

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

In the Matter of

**FRESENIUS MEDICAL CARE AG &
CO. KGaA,**
 a partnership limited by shares.

Docket No. C-4348

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Fresenius Medical Care AG & Co. KGaA of Liberty Dialysis Holdings, Inc. (“Liberty”), and Fresenius Medical Care AG & Co. KGaA (hereafter referred to as “Respondent Fresenius”) having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Fresenius 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; and

Respondent Fresenius, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Fresenius of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent Fresenius that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondent Fresenius has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed 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 the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Fresenius Medical Care AG & Co. KGaA is a partnership limited by shares organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its office and principal place of business located at Else-Kröner-Straße 1, 61352 Bad Homburg, Germany. Fresenius Medical Care AG & Co. KGaA is the parent of Fresenius Medical Care Holdings, Inc., a New York corporation, d/b/a Fresenius Medical Care North America (“FMCNA”) with its office and principal place of business located at 920 Winter St., Waltham, MA 02451-1457.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Fresenius, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that all capitalized terms used in this Hold Separate Order, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders, the following definitions shall apply:

- A. “Fresenius Clinics” means the Fresenius-owned Clinics listed in Appendix A to the Decision and Order and the Fresenius Clinics in Non-Public Appendix F to the Decision and Order.
- B. “Decision and Order” means:
 1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- C. “Divestiture Date” means the earliest date on which all of the divestitures of the Appendix A Clinic Assets, except for the Secondary Divestiture Assets, as required by the Decision and Order have been completed.
- D. “Hold Separate Period” means the time from the Effective Date until one day after the Divestiture Date, or the divestiture of the Dallas Joint Venture Equity Interests, whichever is later.

- E. "Hold Separate Trustee" means the person appointed pursuant to Paragraph III of this Hold Separate Order.
- F. "Monitor" means any monitor appointed pursuant to Paragraph VII of this Hold Separate Order.
- G. "Orders" means the Decision and Order and this Hold Separate Order.
- H. "Secondary Divestiture Assets" means the Hawaii Clinic Assets, Connecticut Clinic Assets, the New York Clinic Assets, and the Florida Viera Clinic Assets.
- I. "Secondary Divestiture Date" means each of the dates on which Secondary Divestiture Assets are divested to DSI, or the Acquirer pursuant to Paragraph II or Paragraph V of the Order.

II. (Asset Maintenance)

IT IS FURTHER ORDERED that:

- A. From the date Respondent Fresenius signs the Consent Agreement until the Divestiture Date and Secondary Divestiture Dates, Respondent Fresenius shall:
 - 1. Maintain each of the Fresenius Clinics and all Assets Associated with such Clinics in substantially the same condition (except for normal wear and tear) existing at the time Respondent Fresenius signs the Consent Agreement;
 - 2. Take such actions that are consistent with the past practices of Respondent Fresenius in connection with each of the Fresenius Clinics and the Assets Associated with each and that are taken in the Ordinary Course Of Business and in the normal day-to-day operations of Respondent Fresenius;
 - 3. Keep available the services of the current officers, employees, and agents of Respondent Fresenius; and maintain the relations and good will with Suppliers, Payors, Physicians, landlords, patients, employees, agents, and others having business relations with the Fresenius Clinics and the Assets Associated with them in the Ordinary Course Of Business;
 - 4. Preserve the Fresenius Clinics and all Assets Associated with them as ongoing businesses and not take any affirmative action, or fail to take any action within Respondent Fresenius's control, as a result of which the viability, competitiveness, and marketability of the Fresenius's Clinics or the Assets Associated with them would be diminished;

5. Not object to sharing with the Acquirer the Payor and Supplier contract terms Relating To the Clinics To Be Divested: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent Fresenius not to disclose the information to any third party; and
 6. Cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, in obtaining all Third Party Approvals and Government Approvals For Divestiture, and all Government Approvals For Continued Operation, for each Clinic To Be Divested.
- B. From the date Respondent Fresenius signs the Consent Agreement until the Secondary Divestiture Dates, Respondent Fresenius shall:
1. appoint an executive responsible for overseeing and maintaining such Secondary Divestiture Assets to be the primary contact between Respondent Fresenius and Commission staff and the Monitor.
 2. maintain such assets until each of the Secondary Divestiture Dates in a business-as-usual manner and/or in accordance with the applicable business plan. The appointed executive shall compare past business plans, operating and capital budgets to current metrics to assure that the clinics are maintained appropriately.
- C. The purposes of this Paragraph II are to: (1) preserve the Fresenius Clinics as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

III. (Liberty Hold Separate)

IT IS FURTHER ORDERED that:

- A. For the Hold Separate Period, Respondent Fresenius shall hold the entirety of Liberty separate, apart, and independent of Respondent Fresenius. To hold Liberty separate, Respondent Fresenius shall, among other things:
1. Not offer Liberty employees positions with Respondent Fresenius, other than continuing the positions they have within Liberty; and
 2. Do nothing to prevent or discourage suppliers that, prior to the Effective Date, supplied goods and services to Liberty from continuing to supply goods and services to Liberty.

PROVIDED, HOWEVER, that Respondent Fresenius may divest any of the Appendix A Clinics to the Acquirer during the Hold Separate Period once all the approvals for divestiture pursuant to the Consent Agreement have been satisfied.

B. At any time after the Effective Date, the Commission may appoint a Hold Separate Trustee to assure that Liberty is held separate from Respondent Fresenius.

1. The Commission shall select the Hold Separate Trustee, subject to the consent of Respondent Fresenius which consent shall not be unreasonably withheld. If Respondent Fresenius has not opposed, in writing, including the reasons for opposing, the selection of a proposed Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent Fresenius of the identity of any proposed Hold Separate Trustee, Respondent Fresenius shall be deemed to have consented to the selection of the proposed Hold Separate Trustee.
2. Not later than five (5) business days after appointment of the Hold Separate Trustee, Respondent Fresenius shall execute an agreement that, subject to the prior approval of the Commission, confers on the Hold Separate Trustee all the rights and powers necessary to permit the Hold Separate Trustee to perform his duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of this Hold Separate Order.
3. Not later than ten (10) business days after appointment of the Hold Separate Trustee, Respondent Fresenius shall, pursuant to the Hold Separate Trustee Agreement, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Decision and Order.
4. Respondent Fresenius shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Hold Separate Trustee:
 - a. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of Liberty, for managing Liberty through the Manager, for maintaining the independence of Liberty, and for monitoring Respondent Fresenius's compliance with its obligations pursuant to the Orders.
 - b. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of Liberty or to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent Fresenius in the ordinary course of business that relate to Liberty. Respondent Fresenius shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent Fresenius shall take no action to interfere with or impede the Hold

Separate Trustee's ability to monitor Respondent Fresenius's compliance with the Orders or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.

- c. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent Fresenius, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
 - d. The Commission may require the Hold Separate Trustee, and Persons hired by the Hold Separate Trustee, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
 - e. Respondent Fresenius may require the Hold Separate Trustee, and Persons hired by the Hold Separate Trustee, to sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
 - f. Thirty (30) days after the appointment of the Hold Separate Trustee pursuant to this Paragraph III.B., and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising Liberty are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
 - g. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent Fresenius, which consent shall not be unreasonably withheld. If Respondent Fresenius has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent Fresenius of the identity of any substitute Hold Separate Trustee, Respondent Fresenius shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent Fresenius and the substitute Hold Separate Trustee shall execute a new Hold Separate Trustee Agreement, subject to the approval of the Commission, consistent with this Paragraph III.B.
- C. Respondent Fresenius shall designate Mr. Mark Caputo, Chief Executive Officer of Liberty, to be Manager of Liberty for the duration of the Hold Separate Period.

1. Respondent Fresenius shall transfer all rights, powers, and authorities necessary to manage and maintain Liberty, to the Manager.
2. The Manager shall report directly and exclusively to the Hold Separate Trustee, if one is appointed, or otherwise to Commission staff, and shall manage Liberty independently of the management of Respondent Fresenius. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondent Fresenius during the term of this Hold Separate Order.
3. The Monitor will monitor the activities of the Manager and the operations of Liberty during the Hold Separate Period unless and until a Hold Separate Trustee is appointed.
4. The Manager shall have no financial interests (other than existing options and interests in securities of Respondent Fresenius) affected by Respondent Fresenius's revenues, profits or profit margins, except that the compensation of the Manager for managing Liberty may include economic incentives dependent on the financial performance of Liberty if there are also sufficient incentives for the Manager to operate Liberty at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives of this Hold Separate Order.
5. The Manager shall make no material changes in the present operation of Liberty except with the approval of the Hold Separate Trustee or Monitor, in consultation with the Commission staff, or Commission staff.
6. The Manager shall have the authority, with the approval of the Hold Separate Trustee or Commission staff, to remove employees and replace them with others of similar experience or skills. If any person ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Manager, in consultation with the Hold Separate Trustee or Commission staff, may request Respondent Fresenius to, and Respondent Fresenius shall, appoint a substitute person, which person the Manager shall have the right to approve.
7. In addition to those employees within Liberty, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing Liberty.
8. The Commission staff or the Hold Separate Trustee, in consultation with the Commission staff, shall be permitted, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent Fresenius shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph III.C. of this Hold Separate Order.
9. In the event that the Manager ceases to act as Manager, then Respondent Fresenius shall select substitute Manager(s), subject to the approval of the Hold Separate Trustee, if appointed, and Commission staff, and transfer to the substitute Manager(s) all rights,

powers and authorities necessary to permit the substitute Manager(s) to perform his/her/their duties and responsibilities, pursuant to this Hold Separate Order.

- D. No later than five (5) days after this Hold Separate Order becomes final, Respondent Fresenius shall circulate to the Liberty management and Regional Managers a copy of this Hold Separate Order and the Consent Agreement with the Commission's press release and analysis to aid public comment.
- E. The purposes of this Paragraph III are to: (1) preserve Liberty as a viable, competitive, and ongoing business independent of Respondent Fresenius until the divestitures required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Fresenius and Liberty, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

IV. (Acquisition Requirements)

IT IS FURTHER ORDERED that:

- A. Respondent Fresenius shall not acquire Liberty until it has obtained for all the Appendix A Clinics:
 - 1. all approvals for the assignment of the Clinic's Physician Contracts, as required by the Decision and Order;
 - 2. all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are owned by a joint venture, and shall assign all such approvals to the Acquirer; and
 - 3. all approvals by joint venture partners necessary for the Acquirer of Appendix A Joint Venture Equity Interests to jointly own and operate the Appendix A Clinics that are owned by the joint venture, and shall assign all such approvals to the Acquirer.
- B. Respondent Fresenius shall hold separate the entirety of Liberty, pursuant to Paragraph III of this Hold Separate Order, and not take control over or possession of Liberty, until it has obtained for all the Appendix A Clinics, except for the Secondary Divestiture Assets, all approvals for the assignment of the rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested to the Acquirer, and divested pursuant to Paragraph II of the Order and Paragraph V of this Hold Separate Order.

Copies of all approvals required by this Paragraph IV shall be incorporated into the Divestiture Agreements as appendices.

V. (Divestiture Requirements)

IT IS FURTHER ORDERED that at the Time Of Divestiture of each Clinic To Be Divested Respondent shall:

- A. assign to the Acquirer all rights, title, and interest to leases for the Real Property Of The Clinic, and shall obtain all approvals necessary for such assignments; *PROVIDED, HOWEVER*, that (1) if the Acquirer obtains all rights, title, and interest to a lease for Real Property Of A Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of the Decision and Order, and (2) the Acquirer certifies its receipt of such lease and attaches it as part of the Divestiture Agreement, then Fresenius shall not be required to make the assignments for such Clinic To Be Divested as required by this Paragraph; and
- B. assign to the Acquirer all of the Clinic's Physician Contracts, and shall obtain all approvals necessary for such assignment; *PROVIDED, HOWEVER*, that (1) if the Acquirer enters into a Clinic's Physician Contract for a Clinic To Be Divested before the Assets To Be Divested are divested pursuant to Paragraph II.A. of the Decision and Order, and (2) the Acquirer certifies its receipt of such contract and attaches it as part of the Divestiture Agreement, then Respondent Fresenius shall not be required to make the assignment for such Clinic To Be Divested as required by this Paragraph.

VI. (Facilitate Hiring)

IT IS FURTHER ORDERED that:

- A. Respondent Fresenius shall:
 - 1. if requested by an Acquirer, facilitate interviews between each Designated Fresenius Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;
 - 2. not interfere in employment negotiations between each Designated Fresenius Employee and an Acquirer.
 - 3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated Fresenius Employee from being employed by an Acquirer, and shall not offer any incentive to the Designated Fresenius Employee to decline employment with an Acquirer;
 - 4. cooperate with an Acquirer of a Clinic in effecting transfer of the Designated Fresenius Employee to the employ of the Acquirer, if the Designated Fresenius Employee accepts such offer of employment from an Acquirer;

5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated Fresenius Employee from being employed by an Acquirer;
6. eliminate any confidentiality restrictions that would prevent the Designated Fresenius Employee who accepts employment with the Acquirer from using or transferring to an Acquirer any information Relating To the Operation Of The Clinic; and
7. pay, for the benefit of any Designated Fresenius Employee who accepts employment with an Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

Respondent Fresenius shall comply with the terms of this Paragraph IV.A from the time Respondent Fresenius signs the Consent Agreement until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested for the employees who are Designated Fresenius Employees described in Paragraph I.Y.1.

Respondent Fresenius shall comply with the terms of this Paragraph IV.A. from the time Respondent Fresenius signs the Agreement Containing Consent Order until one-hundred twenty (120) days after the divestiture required pursuant to Paragraph II.A.1. of the Decision and Order is completed for the employees who are Designated Fresenius Employees described in Paragraph I.Y.2.

PROVIDED, HOWEVER, that the terms of this Paragraph IV.A. as it relates to the interviewing and hiring of Regional Managers shall not apply after the Acquirer has hired five (5) Regional Managers.

PROVIDED, HOWEVER, that if, at any time after the Time of Divestiture, DSI or the Acquirer of the Appendix A Clinic Assets gives Respondent Fresenius an unsolicited list of employees from the Non-Public Appendix G to whom the Acquirer does not intend to offer employment, then such employees may be hired by Respondent Fresenius as full time employees without violating this Paragraph IV.A. *PROVIDED, FURTHER, HOWEVER*, that no earlier than fifteen (15) days after the Time of Divestiture, Respondent Fresenius may submit a written request to the Acquirer identifying those persons from the Non-Public Appendix G to whom Respondent Fresenius wishes to offer full time employment; and if the Acquirer within fifteen (15) days of receipt of such request grants, in writing, such request, then Respondent Fresenius may offer employment to such employees; but if the Acquirer within fifteen (15) days of receipt of such request either: (i) chooses to hire such employees, or (ii) chooses to defer a hiring decision and keep the requested employees on the Non-Public Appendix G to the Decision and Order, then Respondent Fresenius shall continue to comply with the terms of this Paragraph IV.A. with regard to such employees.

- B. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"), Respondent Fresenius shall not 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 the Clinic To Be Divested, 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 of the Clinic To Be Divested any information Relating To the Operation Of The Clinic.

VII. (Confidentiality)

IT IS FURTHER ORDERED that:

A. During the Hold Separate Period:

1. Respondent Fresenius shall not permit any of its employees, officers, or directors to be involved in the operations of Liberty, unless otherwise authorized by this Hold Separate Order.
2. Respondent Fresenius, and Respondent Fresenius's or Liberty's personnel operating Liberty, shall retain and maintain all Confidential Business Information of Liberty on a confidential basis, separate and apart from Respondent Fresenius and, except as is requested by Respondent Fresenius for purposes of the divestiture of the Appendix A Clinics as required by the Decision and Order, in this matter, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to Respondent Fresenius or with Respondent Fresenius's personnel.
3. Respondent Fresenius shall not, directly or indirectly, receive, disclose, or use any Confidential Business Information Related To Liberty to any Person except the Appendix A Clinics Acquirer or other persons specifically authorized by the Appendix A Clinics Acquirer to receive such information, or than as necessary to comply with the following:
 - a. the requirements of the Orders
 - b. applicable laws and regulations.
4. Respondent Fresenius shall not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the operation of Liberty to Respondent Fresenius's employees, other than those employees operating Liberty pursuant to this Hold Separate Order.
5. Respondent Fresenius shall institute procedures and requirements to ensure that:

- a. Confidential Business Information Related to Liberty is not provided to, or obtained by, Respondent Fresenius's employees, other than those employees operating Liberty pursuant to this Hold Separate Order;
 - b. Respondent Fresenius employees with access to Confidential Business Information Relating To Liberty do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Hold Separate Order; and
 - c. Respondent Fresenius's employees, other than those employees operating Liberty pursuant to this Hold Separate Order, do not solicit, access or use any Confidential Business Information that they are prohibited under this Hold Separate Order from receiving for any reason or purpose.
- B. During the Hold Separate Period, Respondent Fresenius shall require any Persons with access to Confidential Business Information Relating To Liberty not to disclose any such Confidential Business Information to Respondent Fresenius or to any third party except as otherwise permitted by this Hold Separate Order.
- C. Respondent Fresenius shall:
1. not disclose Confidential Business Information relating exclusively to any of the Clinics To Be Divested to any Person other than the Acquirer of such Clinic;
 2. after the Time Of Divestiture of such Clinic:
 - a. not use Confidential Business Information relating exclusively to any of the Clinics To Be Divested for any purpose other than complying with the terms of this Order or with any law; and
 - b. destroy all records of Confidential Business Information relating exclusively to any of the Clinics To Be Divested , except to the extent that: (1) Respondent Fresenius is required by law to retain such information, and (2) Respondent Fresenius's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Respondent Fresenius.
- D. The purposes of this Paragraph VII are to: (1) preserve Liberty as a viable, competitive, and ongoing business independent of Respondent Fresenius until the divestitures required by the Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Fresenius and Liberty, except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

VIII. (Monitor)

IT IS FURTHER ORDERED that:

- A. Richard Shermer of R. Shermer & Co. shall be appointed Monitor to assure that Respondent Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Hold Separate Order and the Decision and Order.
- B. No later than one (1) day after the Effective Date, Respondent Fresenius shall, pursuant to the Monitor Agreement, attached as Appendix A and Confidential Appendix A-1, and to this Hold Separate Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Hold Separate Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Fresenius, which consent shall not be unreasonably withheld. If Respondent Fresenius has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Fresenius of the identity of any proposed Monitor, Respondent Fresenius shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent Fresenius shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Fresenius's compliance with the terms of this Hold Separate Order, the Decision and Order, and the Divestiture Agreements in a manner consistent with the purposes of this Order.
- D. Respondent Fresenius shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 1. The Monitor shall have the power and authority to monitor Respondent Fresenius's compliance with the terms of this Hold Separate Order, the Decision and Order, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
 - a. Assuring that Respondent Fresenius expeditiously complies with all of its obligations and perform all of its responsibilities as required by the this Hold Separate Order, the Decision and Order, and the Divestiture Agreements;
 - b. Monitoring any transition services agreements;

- c. Assuring that Confidential Business Information is not received or used by Respondent Fresenius or the Acquirer, except as allowed in this Hold Separate Order and in the Decision and Order, in this matter.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve for such time as is necessary to monitor Respondent Fresenius's compliance with the provisions of this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Fresenius's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Fresenius's compliance with its obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements. Respondent Fresenius shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Fresenius's compliance with this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
5. The Monitor shall serve, without bond or other security, at the expense of Respondent Fresenius on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Fresenius, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondent Fresenius shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondent Fresenius shall report to the Monitor in accordance with the requirements of this Hold Separate Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Fresenius, and any reports submitted by the Acquirer with respect to the performance of Respondent Fresenius's obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent Fresenius of its obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
 9. Respondent Fresenius 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*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
 - F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VIII.
 - 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 this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
 - H. The Monitor appointed pursuant to this Order may be the same Person appointed as a Hold Separate Trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Monitor or Divestiture Trustee under the Decision and Order.

IX. (Compliance Reports)

IT IS FURTHER ORDERED that within thirty (30) days after the date this Hold Separate Order becomes final, and every sixty (60) days thereafter until the Hold Separate Order terminates, Respondent Fresenius shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Hold Separate Order and the related Decision and Order; *PROVIDED, HOWEVER*, that, after the Decision and Order in this matter becomes final, the reports due under this Hold Separate Order shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent Fresenius pursuant to the Decision and Order.

X. (Change in Fresenius)

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

- A. Any proposed dissolution of Fresenius,
- B. Any proposed acquisition, merger or consolidation of Fresenius, or
- C. Any other change in Fresenius that may affect compliance obligations arising out of this Order, including but not limited to assignment, the creation or dissolution of subsidiaries, or any other change in Fresenius.

XI. (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 with reasonable notice to Respondent Fresenius, Fresenius shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Fresenius 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 Fresenius related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. Upon five (5) days' notice to Fresenius and without restraint or interference from Fresenius, to interview officers, directors, or employees of Fresenius, who may have counsel present, regarding such matters.

XII. (Termination)

IT IS FURTHER ORDERED that this Hold Separate Order 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 latter of:
 - 1. the end of the Hold Separate Period, or
 - 2. the day after the Commission otherwise directs that this Hold Separate Order is terminated.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: February 28, 2012

APPENDIX A
MONITOR AGREEMENT

NON-PUBLIC APPENDIX A-1

MONITOR COMPENSATION

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