

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman  
Mary L. Azcuenaga  
Janet D. Steiger  
Roscoe B. Starek, III  
Christine A. Varney

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In the Matter of )  
 )  
**FRESENIUS AG** ) DOCKET NO. C-3689  
 )  
a corporation; and ) DECISION AND ORDER  
 )  
**FRESENIUS USA, INC.** )  
 )  
a corporation. )

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The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by Fresenius AG, the parent company of Fresenius USA, Inc. (collectively "Fresenius" or "respondents"), of National Medical Care, Inc. from W.R. Grace & Co., which acquisition is more fully described at paragraph I.D. below, and Fresenius having been

thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, makes the following jurisdictional findings and enters the following order:

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Borckenberg 14, 61440 Oberursel/Ts, Bad Homburg, Germany.

2. Respondent Fresenius USA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Massachusetts with its principal place of business located at 2637 Shadelands Drive, Walnut Creek, California 94598.

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

#### **ORDER**

#### **I**

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

A. "Respondents" or "Fresenius" means Fresenius AG and Fresenius USA, Inc., their directors, officers, employees, agents and representatives, their predecessors, successors, and assigns; their subsidiaries, divisions, and groups and affiliates controlled by Fresenius, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; their domestic and foreign parents, and the subsidiaries, divisions, and groups and affiliates controlled by any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "NMC" means National Medical Care, Inc., its directors, officers, employees, agents and representatives, its predecessors, successors, and assigns; its subsidiaries, divisions, and groups and affiliates controlled by NMC, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; its domestic and

foreign parents, including W.R. Grace & Co., and the subsidiaries, divisions, and groups and affiliates controlled by any other domestic or foreign parent, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

C. "Commission" means the Federal Trade Commission.

D. "NMC Acquisition" means the acquisition by Fresenius AG of NMC that is the subject of an Agreement and Plan of Reorganization entered into on or about February 4, 1996.

E. "Hemodialysis Concentrate" means the acid portion of the dialysate solution used in hemodialysis treatment of End Stage Renal Disease to carry waste materials from the patient's blood during the treatment.

F. "Assets and Businesses" means assets, properties, businesses, and goodwill, tangible and intangible, including, without limitation, the following:

1. All plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property;

2. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, trademarks, patents and patent rights, inventions, trade secrets, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

3. Raw material and finished product inventories and goods in process;

4. All right, title and interest in and to real property, together with appurtenances, licenses, and permits;

5. All right, title, and interest in and to the contracts entered into in the ordinary course of business with customers (other than contracts in which Hemodialysis Concentrate is sold as part of a package of products), suppliers, sales representatives, distributors, agents,

personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

6. All rights under warranties and guarantees, express or implied;

7. All separately maintained, as well as relevant portions of not separately maintained, books, records and files; and

8. All items of prepaid expense.

G. "Hemodialysis Business to Be Divested" means the Fresenius Lewisberry, Pennsylvania Hemodialysis Manufacturing Facility, and any additional Fresenius Hemodialysis Concentrate Assets and Businesses (as defined) as are necessary to assure the Viability and Competitiveness of the Hemodialysis Business to Be Divested in the manufacture, marketing or distribution of Hemodialysis Concentrate.

H. "Viability and Competitiveness" means that the Hemodialysis Concentrate Business to Be Divested is capable of functioning independently and competitively in the Hemodialysis Concentrate business in substantially the same manner achieved by

Competitiveness of the Hemodialysis Business to Be Divested. Respondents shall divest the Hemodialysis Business to Be Divested to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The purpose of the divestiture is to enable the acquirer to compete in the manufacture and sale of Hemodialysis Concentrate in the United States and to remedy the lessening of competition resulting from the NMC Acquisition as alleged in the Commission's Complaint.

B. Pending divestiture of the Hemodialysis Business to Be Divested, Respondents shall take such actions as are necessary to maintain the marketability, viability and competitiveness of the Hemodialysis Business to Be Divested, including, but not limited to, taking necessary steps to ensure that the Lewisberry plant is capable of, and has been approved for, commercial production, and to prevent destruction, removal, wasting, deterioration or impairment of the Hemodialysis Business to Be Divested, other than ordinary wear and tear.

### III

#### **IT IS FURTHER ORDERED** that:

A. If Respondents have not divested the Hemodialysis Business to Be Divested within four (4) months of either (i) the date this Order becomes final, or (ii) the closing of the NMC Acquisition, whichever is later, the Commission may appoint a trustee to divest the Hemodialysis Business to Be Divested pursuant to Paragraph II of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(1) 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. The Commission shall select the trustee under this Paragraph, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions, divestitures, and licensing. If Respondents have not opposed, in

writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission and consistent with the provisions of Paragraph II of this Order, the trustee shall have the exclusive power and authority to divest the Hemodialysis Business to Be Divested.

2. Within ten (10) days after the appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, and in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.

3. The trustee shall have twelve (12) months from the date the trust agreement described in this Paragraph III.B is approved by the Commission to accomplish the divestiture of the Hemodialysis Business to Be Divested, which shall be subject to the prior approval of the Commission. If, however, at the end of this twelve (12) month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.

4. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Hemodialysis Business to Be Divested and to any other relevant information as the trustee may reasonably request. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

5. The trustee shall use his or her 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 at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph II of this Order; provided however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission.

6. The trustee shall serve without bond or other security at the cost and expense of Respondents, and on such reasonable and customary terms and conditions as the Commission or a court may set. The 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 reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Hemodialysis Business to Be Divested.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the duties of the trustee, 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A of this Order.

9. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

10. The trustee shall have no obligation or authority to operate or maintain the Hemodialysis Business to Be Divested.

11. The trustee shall report in writing to Respondents and the Commission every thirty (30) days concerning efforts to accomplish the divestiture.

#### IV

IT IS FURTHER ORDERED that:

A. Within twenty (20) days after the date this Order becomes final and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II and III of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

#### V

**IT IS FURTHER ORDERED** that, for a period of ten (10) years from the date this Order becomes final, Respondents shall cease and desist from acquiring, without Prior Notification to the



firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a Hemodialysis Concentrate manufacturing facility in the United States. Provided, however, that this Paragraph V shall not be deemed to require Prior Notification to the Commission for (i) the construction of new facilities by Fresenius, (ii) the acquisition of new or used equipment in the ordinary course of business from a person other than the acquirer of the Hemodialysis Business to Be Divested, or any other present producer of Hemodialysis Concentrate; or (iii) the purchase or lease by Fresenius of a facility that has not been operated as a Hemodialysis Concentrate manufacturing facility at any time during the year immediately prior to the purchase or lease by Fresenius.

"Prior Notification to the Commission" required by Paragraph V shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification Form"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Fresenius and not of any other party to the transaction. Fresenius shall provide the Notification Form to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Fresenius shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, Fresenius shall not be required to provide Prior Notification to the Commission pursuant to this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

**VI**

**IT IS FURTHER ORDERED** that until the obligations set forth in Paragraphs II, III and V are met, Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of the Order.

**VII**

**IT IS FURTHER ORDERED** that Respondents, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and on five days notice to Respondents, shall permit any duly authorized representative(s) of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Without restraint or interference from Respondents, to interview Respondents' officers, directors, or employees, who may have counsel present, regarding such matters.

By the Commission, Commissioner Starek dissenting.

Seal

Donald S. Clark  
Secretary

ISSUED: October 15, 1996

ATTACHMENT: Dissenting Statement of Commissioner Starek

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

In the Matter of  
*Fresenius AG, et al.*,  
Docket No. C-3689

There were no public comments on the consent agreement in this matter, and I am not aware of any other information that has come to the Commission's attention since its acceptance of that agreement that would persuade me to join in its decision to issue the complaint and final order in this matter. The evidence accumulated in the investigation was not sufficient to give rise to reason to believe that respondents' acquisition of National Medical Care, Inc. ("NMC") from W.R. Grace & Co. is likely to lessen competition substantially in a United States market for hemodialysis concentrate ("HD concentrate").

HD concentrate consists of various salts (sodium chloride, magnesium chloride, calcium chloride, and potassium chloride) and dextrose in purified water, with sodium bicarbonate (*i.e.*, baking soda) added at a later stage. Because this easily formulated mixture does not enter the body and therefore is not a "drug" for purposes of Food and Drug Administration ("FDA") regulation, the FDA applies to HD concentrate the somewhat more lenient regulations applicable to medical devices. Regulatory delay thus does not significantly constrain entry by new firms or expansion by incumbents.

The investigation revealed that various producers of HD concentrate -- including Fresenius itself -- entered quickly and easily into the manufacture of the product, and some stated that they could inexpensively increase their capacity to make HD concentrate by as much as 60 percent within 30 days, without substantial investment or the need for additional FDA approval.<sup>1</sup> These indicia of cheap and simple entry and expansion may explain why the delivered price of HD concentrate has fallen continuously since the product first became available.<sup>2</sup>

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<sup>1</sup> Given the contrast between the time required for entry in the United States and that required in Germany, it is perhaps unsurprising that the latter nation's Bundeskartellamt concluded that Fresenius' acquisition of a competitor in HD concentrate would have anticompetitive effects. Entry into the German HD concentrate business apparently takes three to five years. In the United States, entry requires around nine months.

<sup>2</sup> It is difficult to accept the proposition that "[m]ost of the investment in production would likely be sunk in the event  
(continued...)

Thus, any assessment of this acquisition's potential to increase concentration in the market for HD concentrate -- and in turn make likelier an exercise of market power -- must take into account several strongly mitigating factors, including approximately 40 percent current excess capacity, the aforementioned ability of manufacturers to expand capacity speedily and at minimal cost, and the evident ability of customers (hemodialysis clinics) to integrate into the manufacture of HD concentrate in the event concentrate producers behave anticompetitively. Certain customers that speculated that the acquisition might lead to higher prices for HD concentrate appear to have been unaware of current plans for significant entry or capacity expansion by firms other than Fresenius and NMC. Moreover, other customer complaints seem to have been motivated by a fear that the vertical integration of Fresenius (a manufacturer of kidney dialysis products) and NMC (an operator of hemodialysis treatment centers, among its other businesses) could make the merged firm a stronger competitor in dialysis treatment.

As I said several months ago, it is always tempting to accept the "bird in the hand" represented by a consent agreement proffered in the early stages of an investigation, such as the one entered into (apparently without significant resistance) by Fresenius. Nevertheless, when the evidence on entry, expansion, and the absence of anticompetitive effects is as clear as in this case, the issuance of a consent order is unwarranted.

I therefore dissent.

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<sup>2</sup>(...continued)  
that entry were unsuccessful" (complaint, ¶ 13). The equipment used in the manufacture of HD concentrate appears to be adaptable to alternate uses, and indeed the investigation in this case turned up evidence of firms planning to convert some HD concentrate facilities to other purposes.