

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
J. Thomas Rosb
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 Fre

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

E. "Hold Separate Trustee" means the person appointed pursuant to Parag

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 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 c

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 anytime 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 Trustees 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

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 II.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,

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 Acquiree all rights, title, and interest to leases of the Real Property Of The Clinic, and shall obtain all approvals necessary for such assignments; *PROVIDED, HOWEVER*, that (1) if the Acquiree 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 proof of the Divestiture Agreement, then Fr

practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To B

- a. Confidential Business Information Relating 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 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 purpose of this Paragraph VI 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 Shemer of R. Shemer & Co. shall be appointed Monitor to assist Respondent Fresenius in expeditiously complying with all of its obligations and performing all of its responsibilities as required by this Hold Separate Order.

- 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 mistake or 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 a

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 Separation 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

X. (Change in Fresenius)

APPENDIX A
MONITOR AGREEMENT

NON-PUBLIC APPENDIX A-1

MONITOR COMPENSATION

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