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#### UNITE D STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Jon Leibowitz, Chairman J. Thomas Rosb Edith Ramirez Julie Brill

In the Matter of

Docket No. C-4348

FRESENIUS MEDICAL CAR E AG & CO. KGaA, a partnership limited by shares.

#### 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 ecept and consideration of public comments, now in furtheonformity with the procedure described in Commission Re 2.34, 16 C.F.R. § 2.34, the Commissionereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Hold Separate and Mantain Assets ("Hold SeparateOrder"):

1. Respondent Fesenius Mediad CareAG & Co. KGaA is a pranership limited by shares organized, exiting 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 Acquire the Pager and Supplier on tract terms Relating To the Clinics To BeDivested: (i) if the Pager or Supplier onsents in writing to such disclosure upon æquest by the Acquier, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent Fresenius not to disclose the information to anythird 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 Aquirer duing the Hold Separtae Period oncall the approvals for divestiture pursuant to the Consentrelegement have been satisfied.

- B. At any time after the Effective Date, the Commission may point a Hold Sepate Tustee to assure that Liberty is held separate from Respondent Fresenius.
  - 1. The Commissionhall select the Hold Sepate Trusteesubject to the constof Respondent Fesenius which onsent shall not be unarconably withheld. If Respondent Fresenius has not opposed, initiang, including the reasons for opposing the selection of a poposed Hold Sepate Trustee within five (5) business dayafternotice by the staff of the Commission to Respondent Fresenius of the identity of any proposed Hold Separte Trustee Respondent Fesenius shall be dened to have onsented to the selection of the proposed to the Separte Trustee
  - 2. Not later that five (5) business dayafterappointment of the Hold Sepade Trustee Respondent Tesenius shall execute agreement that, subject to the priopparoval of the Commission, confers on the Hold Separate Trustee bit the rights and power 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 that ten (10) business days afterappointment of the Hold Separate Trustee Respondent Fesenius shall, pursuato the Hold Separate Trustee Agreement, transfe to the Hold Separate Trustee all rights, powers, rad 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 Obseton and Orde
  - 4. Respondent lesenius shall consteto the following terms and conditions reguling the powers, duties, authorities, and speonsibilities of the Hold Separe Trustee:
    - a. The Hold Septate Trusteeshall have the esponsibility consistent with the terms of this Hold Septate Oder and the Deission and Orderfor monitoring the organization of liberty, for managing Liberty through the Manager, for maintaining the independence of Liberty, and formonitoring Responder Fresenius's compliance with its obligations pursuant to the Orders.
    - b. Subject to all applicable was and regulations, the Hold Sepatea Trusteeshall have full and completeaccess to all person hebooks, records, documents and dilities of Liberty or to anyother reevant information as the Hold Sepatea Trusteemay reasonably request including, but not limited to, all documents and records kept by Respondent Fesenius in the ording accurse of business that hate to liberty. Respondent Fresenius shall develop such financial or other information as the Hold Sepatea Trusteemay reasonably request and shall cooperte with the Hold Sepatea Trusteemay respondent Fresenius shall take no action to interfere with or impede the Hold

Separte Trustetes ability to monitor Respondent Formenius's compliance/ith the Orders or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separte Oder.

- c. The Hold Septrate Trusteeshall have the authority to employ at the costrad expense of Respondentes features, such consultants, accontants, attorney and other representatives and sestistants as areasonally necessary to cary out the Hold Separate Trustee's duties and responsibilities.
- d. The Commission may require the Hold Separate Tustee, ad Persons hired by 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 Fersenius mary equire the Hold Separte Trustee, ad Persons hired by the Hold Separte Trustee, to sig a confidentiality agreement prohibiting the disclosure of any Confidential Business formation gained as a result of his or her role as Hold Separtae Trusteeto anyone other than the Commissin.
- f. Thirty (30) days after the appointment of the Hold Separate Trustee pursuant to this Paragaph II.B., and every thirty (30) days therefter until the Hold Separte Oder terminates, the bild Separte Trusteeshall report in writing to the Commission concerning the eforts to a complish the purposes of this Hold SepterOder. Included within that report shall be the Hold Separte Trustees assessment offic extent to which the businesses comprising Liberty are meeting (or exceeding) their projected goals as ar reflected in operating plans, budgets, projections or anyother regularly prepared financial statements.
- g. If the Hold SeptateTrusteeceases to act offails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Septate Trustee onsistent with the terms of this parageh, subjetc to the consent of Respondent Fresenius, which consent shall a 240 Tibea (shabrlyd) Tj ET 1t bth

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- 1. Respondent Fresenius shall transfer all rights, powers, and authorities necessary to manage and mantain Liberty, to the Manager.
- 2. The Manager shall report directly and exclusively to the Hold Separate Trustee, if one is appointed, or othrevise to Commissin staff, and shall manage Liberty independently of the management of Responde Fresenius. The Manger shall not be involved, in any way, in the operations of the other businesses Roaspondent resenius 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 Peiod unless and until a Hold Septera rustee 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 Maager for managing Liberty mayinclude economic incentives of the Manager to operate Liberty at no less than curent rates of operation (including but not limited to, current rates of production and ses) and to chieve the objectives of this Hold Separate Oder.
- 5. The Manager shall make no material changes in the present operation of Liberty except with the approvator the Hold Separate Tustee or Monitor, in consultation with the Commission staff, or Commissionastf.
- 6. The Manager shall have the athority, with the approvator the Hold Separte Tustee or Commission staff, to removemployees ad replace them with others of similar experienceor skills. If any person ease to act or atils to act diligetly and consistent with the purposes of this Hold Separer Oder, the Manager, in consultation with the Hold Separate Trusteeor Commission staff, may request Respondent Freenius to, and Respondent Fresenius shall, appoint a substitute person, which person the Manager shall have the right to approve.
- 7. In addition to those employes within Liberty, the Manger may employsuch Persons as are reasonably necessary to assist the Manager in managing Liberty.
- 8. The Commissiontaff or the Hold Separte Tustee, in consultation with the Commission staff, shall be preditted, to remove the Mharger 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 providen Paragaph II.C. of this Hold Separate Oder.
- 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 rocessary to permit the substituetManager(s) to perform his/her/their duties andesponsibilities, pursuat to thisHold Separtae Order.

- D. No laterthan five (5) days afterthis Hold Separate Oder 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 Communisision's press he aseand analysis to aid public comment.
- E. The purpose of this Paragaph II areto: (1) preserveLiberty as a vible, competitive, and ongoing busines independent Respondent Resenus until the divestitures requires the Decision and Order is achieved; (2) assure that no Corfidential Business hformation is exchanged between Respondentresenius and liberty, except in accordance with the provisions of this Hold Reparte Oder; (3) prevent interim harm to competitive effects of the proposed Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

IV. (Acquisition Requirements)

IT I S FURTHER ORDERED that:

- A. Respondent Fresenius shall not acquire Liberty until it has obtained for all the Appendix A Clinics:
  - 1. all approvas for the assignment of the Clinic's Physician Contrats, as require by the Decision and Order
  - 2. all approvas by joint venture patners neessary for the Acquirer to acquire the Appendix A Clnics that areowned by a joint venture, rad shall assing all such approvas to the Acquirer and
  - 3. all approvas by joint venture patners neessary for the Acquirer of Appendix A Joint VentureEquity Interests to jointly own and opreate the Appendix A Chics that are owned by the joint venture, rad shall assing all such approvals to the Acquire
- B. Respondent Fresenius shall hold separate the entirety of Libera t e.00000r() The Destruction of the Destr

V. (Divestiture Requirements)

IT I S FURTHER ORDERED that at the Time Of Divesture of eachClinic To Be Divested Respondent shall:

A. assign to the Acquireall rights, title, and integest to leasesof the RehPropertyOf The Clinic, and shall obtain all approvals necessary for such assignments, *PROVIDED*, *HOWEVER*, that (1) if theAcquirer obtains all rights, title, and integest to a lease forReal PropertyOf A Clinic To Be Divestel before the Asstes To BeDivested as divested pursuant to Paragraph II.A. of the Decision and Order, and (2) the Acquirer certifies its receipt of such lease and taches it as praof 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 formation Relate to Liberty is not provided to, or obtained by, Respondent Esenius's enployees, othethan those reployees opeating Liberty pursuant to this Hold Separative der;
- b. Respondent Fesenius employes with access to Confidential Businessformation Relating To Liberty do not provide, disdose or otherwise make available, directly or indirectly, any Confidential Business hformation in contravention of this Hold Separte Order; and
- c. Respondent Fresenius's employees, other than those employees operating Liberty pursuant to this Hold Separated er, do not solicit, access or use an Confidential Business information that the pareprohibited under this Hold Separate Oder from receiving for any reason or purpose.
- B. During the Hold Separate Period, Respondent Fresenius shall require any Persons with access to Confidential Business formation Relating To Liberty not to disclose any uch Confidential Business formation to Respondent esenius or to anythird party except as otherwise permitted by this Hold Separate Oder.
- C. Respondent Fresenius shall:
  - 1. not disclose Confidential Businessdormation reating exclusively to anyof the Clinics To BeDivested to any Person other that he Acquier of such Clinic;
  - 2. after the Time OfDivestiture of sub Clinic:
    - a. not use Confidential Busise hformation relating exclusively to anyof the Clinics To BeDivested for any purpose othethan compling with the terms of this Order or with anylaw; and
    - b. destroyall records of Confidential Bisiness Information relating exclusively to any of the Clinics To BeDivested, recept to the retent that: (1) Respondente Senius is required by law to retain such information, and (2) Responde Fresenius's inside or outside attorness maykeep on ecopy solely for archival purposes, but manyot disclose such copy to the rest of Respondent Fresenius.
- D. The purpose of this Paragaph VI areto: (1) preserveLiberty as a viale, competitive, and ongoing busines independent Respondent Resenus until the divestitures require the Decision and Order are achieved; (2) assure that no Corfidential Business hformation is exchanged between Respondent resenus and liberty, except in acordance with the provisions of this Hold Reparte Oder; (3) prevent interim harm to competition penditoge relevant divestitures and otherief; and (4) help remedyanyanticompetitive effects of the proposed Fresenius-Liberty Acquisition as alleged in the Commission's Complaint.

### VIII. (Monitor)

### IT I S FURTHER ORDERED that:

A. Richard Sherner of R. Sherme& Co. shall be appointed Monitor to assthrat Respondent Fresenius expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Hold Separate Or

- c. Assuring that Confidential Busines aformation is not received orused by Respondent Fresenius or the Acquirer, except as allowed in this Hold Separate Order and in the Decision and Oder, in this matter.
- 2. The Monitor shall atcin a fiduciary capacity for the benefit of the Commission.
- 3. The Monitor shall serve such time as is necessary to monitor Respondent Frenius's compliance with the provisions of this Hold parte Oder, the Decision and Order and the Divestiture Agreements.
- 4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and completencess to Respondente Senius's pesonnel, books, documes, records kept in the Ordinay Course Of Basiness, faititi es and tehnical information, and such other reevant information as the Monitor manageasonably request, related to Responde Fresenius's ompliance with its oblightions under this Hold Separatberder, 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 baility to monitor Respondent Freenius's compliance with this Hold Separate Oder, the Decision and Order and the Divestiture Agreements.
- 5. The Monitor shall serve without bond or other serity, at the expense of Recondent Fresenius on sucleasonale and astomaryterms and and itions as the Comission mayset. The Monitor shall have uthority to employ at the expense of Recondent Fresenius, such a such as a
- 6. Respondent Fresenius shall indemnify the Monitor and hold the Monitor harmless against any losses, daims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including ll reasonable fes of counse and other easonable expenses incuerd in connection with the prepraations for, or defense of, any claim, whetheor not resulting in anyliability, except to the extent that such losses, claims, daesadjabilities, or expenses result from misfarace gross neigence, willful or wanton acts, or bad fath by the Monitor.
- 7. Respondent Resentus shall prove to the Monitor in accordance with the requirements of this Hold Separate Oder a

- 8. Within one (1) month form the date the Monitor is appointed source to this parageph, every sixty (60) days therefter, and otherwise sarequeted by the Commission, the Monitor shall report in writing the Commission concerning performance by Respondent Resenius of its obligions under this Hold Separater der, the Decision and Order, and the Divestiture Agreements
- 9. Respondent Fresenius may require the Monitor and each of the Monitor's consultants, accountants, attornesy and otherepresentatives and saistants toign a customary confidentiality agreement; *PROVIDED*, *HOWEVER*, such agee

X. (Change in Fresenius)

# APPENDIX A

## MONITOR AGREEMENT

### NON-PUBLIC APPENDIX A-1

## MONITOR COMPENSATION

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