ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDERS TO AID PUBLIC COMMENT
In the Matter of DaVita, Inc. and Total Renal Care, Inc.
File No. 2110013

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") with DaVita, Inc., through its wholly-owned subsidiary, Total Renal Care, Inc. ("DaVita"). The proposed Consent Agreement is intended to remedy the anticompetitive effects that would likely result from DaVita's proposed acquisition ("Proposed Acquisition") of all dialysis clinics owed by the University of Utah ("University").

Pursuant to an Asset Purchase Agreement dated September 22, 2021, DaVita proposes to acquire all 18 dialysis clinics from the University in a non-HSR-reportable transaction. DaVita is the largest provider of dialysis services in the United States and the University is an academic and public research institution in the State of Utah. The 18 dialysis clinics extend from the southeast corner of Nevada to the southern part of Idaho. The Commission alleges in its Complaint that the Proposed Acquisition if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by reducing competition and increasing concentration in outpatient dialysis services provided in the Provo, Utah market.

The proposed Consent Agreement will remedy the alleged violations by preserving competition that would otherwise be eliminated by the Proposed Acquisition. Under the terms of the Consent Agreement, DaVita is required to divest three dialysis clinics to Sanderling Renal Services, Inc., ("SRS") and must provide SRS with transition services for one year. In addition, DaVita cannot: (1) enter into, or enforce, any non-compete agreements with physicians employed by the University that would restrict their ability to work at a clinic operated by a competitor of DaVita (except to prevent a medical director under a contract with DaVita from simultaneously serving as a medical director at a clinic operated by a competitor); (2) enter into any agreement that restricts SRS from soliciting DaVita's employees for hire; or (3) directly solicit patients who receive services from the divested clinics for two years. Finally, DaVita is required to receive prior approval from the Commission before acquiring any new ownership interest in a dialysis clinic in Utah.

II. The Relevant Market and Competitive Effects

The Commission's Complaint alleges that the relevant line of commerce is the provision of outpatient dialysis services. Patients receiving dialysis services have end stage renal disease ("ESRD"), a chronic disease characterized by a near total loss of function of the kidneys and fatal if not treated. Many ESRD patients have no alternative to outpatient dialysis treatment because they are not viable home dialysis or transplant candidates (or they are waiting for a transplant for multiple years, during which time they must still receive dialysis treatment). Treatments are usually performed three times per week for sessions lasting between three and four hours. According to the United States Renal Data System, there were over 555,000 ESRD dialysis patients in the United States in 2018.

The Commission's Complaint also alleges that the relevant geographic market in which to assess the competitive effects of the Proposed Acquisition is the greater Provo, Utah area. Specifically, the market is centered on Provo, Utah and extends north to Orem, Utah and south to Payson, Utah. The market is defined by the distance ESRD patients will travel to receive reoccurring treatments. Because ESRD patients are often suffering from multiple health problems and may require assistance traveling to and from the dialysis clinic, patients cannot travel long distances to receive treatment. Accordingly, most patients are unwilling or unable to travel more than 30 minutes or 30 miles for treatment, although travel times and distances may vary by location.

Dialysis providers seek to attract patients by competing on quality of services. To some extent, the providers also compete on price. Although Medicare eventually will cover all ESRD patients' dialysis costs, there is a 30-month transition period where commercially insured patients' costs are covered by their insurers, which compensate the providers at competitively negotiated rates.

In the greater Provo market, there are only three providers: The University (which has three clinics), DaVita (four clinics) and Fresenius Medical Care (one clinic). Therefore, the University and DaVita directly and substantially compete in the relevant market as the two largest providers, and DaVita would own seven of the eight clinics in the region. The Proposed Acquisition would eliminate competition between DaVita and The University in the relevant market for outpatient dialysis services, increasing the ability to unilaterally raise prices to third-party payers and decreasing the incentive to improve the quality of services provided to patients.

III. Entry

Entry into the outpatient dialysis services market in the greater Provo, Utah area would not be likely, timely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Proposed Acquisition. The most significant barrier to entry is contracting a nephrologist with an established referral base to serve as the clinic's medical director. The Department of Health and Human Services requires that each dialysis clinic must have a nephrologist as a medical director. Locating a nephrologist is difficult because clinics typically enter into exclusive contractual arrangements with a nephrologist who is paid a medical director fee. Finding patients may also be difficult if the nephrologist does not have local ties, as most nephrologists typically refer their patients to the clinic where they serve as medical director. Moreover, the area itself must have a low penetration of dialysis clinics and a high ratio of commercial to Medicare patients to attract entry.

IV. The Agreement Containing Consent Order

Section II of the Proposed Order requires that DaVita divest the three University clinics in the greater Provo market to SRS, including all of the assets necessary for SRS to independently and successfully operate the clinics, which include, among other things, all leases for real property, all medical director contracts, and a license for each clinics' policies and procedures.

Section IV of the Proposed Order requires that DaVita provide transition services to SRS for up to one year, and Section V requires DaVita to provide assistance to SRS in hiring the employees at the divested clinics and to refrain from soliciting those employees for 180 days. In addition, Section V prohibits DaVita from entering into or enforcing non-compete agreements with any University nephrologist, except to prevent a medical director under a contract with DaVita from simultaneously serving as a medical director at a clinic operated by a competitor. Section V also prohibits DaVita from entering into any non-solicitation agreement with SRS that would prevent SRS from soliciting DaVita's employees for hire.

Section VI of the Proposed Order, along with the Order to Maintain Assets, requires that DaVita take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the divested clinics and their assets. Section VIII provides for the appointment of a Monitor to oversee the divestiture.

Section X of the Proposed Order requires DaVita to obtain prior approval from the Commission for any future acquisition of any ownership interests in any dialysis clinic in Utah. With regard to transactions involving clinics in multiple states, such prior approval only applies to the clinics in Utah.

The Commission does not intend this analysis to constitute an official interpretation of the proposed Order or to modify its terms in any way.