

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

_____)	
In the Matter of)	
)	
FRESENIUS MEDICAL CARE AG & CO. KGaA,)	
a partnership limited by shares;)	DECISION AND ORDER
)	[Public Record Version]
and)	
)	DOCKET NO. C-
NXSTAGE MEDICAL, INC.,)	
a corporation.)	
_____)	

DECISION

The Federal Trade Commission (“Commission”) initiated an investigation of the proposed acquisition by Respondent Fresenius Medical Care AG & Co. KGaA (“Fresenius”), of Respondent NxStage Medical, Inc. (“NxStage”) (collectively, “Respondents”). The Commission’s Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint would charge Respondents 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.

Respondents and the Bureau of Competition executed an agreement (“Agreement Containing Consent Order” or “Consent Agreement”) containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint, (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint, or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission’s Rules, and (4) a proposed Decision and Order and Order to Maintain Assets.

The Commission considered the matter and determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect. The Commission accepts the executed Consent Agreement and places it on the public record for a period of 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 issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

1. Respondent Fresenius is a partnership limited by shares, organized, existing, and doing business under and by virtue of the laws of Germany with its principal executive offices located at Else Kroener-Strasse 1, 61352 Bad Homburg, Germany, and its United States address for service of process and the Complaint, the Decision and Order, and the Order to Maintain Assets, as follows: Fresenius Medical Care Holdings, Inc., 920 Winter Street, Waltham, MA 02451-1457.
2. Respondent NxStage is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its corporate office and principal place of business located at 350 Merrimack, Lawrence, MA 01843.
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 HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Fresenius” means Fresenius Medical Care AG & Co. KGaA, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by Fresenius Medical Care AG & Co. KGaA, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Fresenius includes NxStage.
- B. “NxStage” means NxStage Medical, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates in each case controlled by NxStage Medical, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.

- D. “Acquirer” means (i) B. Braun Medical Inc. or (ii) any other Person that acquires the Hemodialysis Bloodline Assets pursuant to this Order.
- E. “Acquisition” means the proposed acquisition described in the Agreement and Plan of Merger by and among Fresenius Medical Care Holdings, Inc., Broadway Renal Services, Inc., and NxStage Medical, Inc., dated August 7, 2017, as amended October 29, 2018, including related ancillary agreements, amendments, schedules, exhibits, and attachments, thereto.
- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “B. Braun Acquisition Agreement” means the securities purchase agreement between B. Braun Medical Inc., and NxStage Medical, Inc., dated July 10, 2018, as amended December 11, 2018, including related ancillary agreements, amendments, schedules, exhibits, and attachments, thereto, including, but not limited to, the Patent And Know-How License Agreement and Production And Supply Agreement, that have been approved by the Commission to accomplish the requirements of this Order.
- H. “B. Braun” means B. Braun Medical Inc., a limited liability company organized, existing, and doing business under, and by virtue of, the laws of Pennsylvania, with its corporate office and principal place of business located at 824 Twelfth Avenue, Bethlehem, PA 18018-3524.
- I. “Business Records” means all information, books and Records, documents, files, correspondence, manuals, computer printouts, databases, and other documents, including all hard copies and electronic records wherever stored, including without limitation, client and customer lists, referral sources, research and development reports, production reports, service and warranty records, maintenance logs, equipment logs, operating guides and manuals, documents relating to policies and procedures, financial and accounting records and documents, creative materials, advertising materials, promotional materials, studies, reports, notices, orders, inquiries, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists and contracts, salaries and benefits information, physician lists and contracts, supplier lists and contracts, and, subject to legal requirements, copies of all personnel files.

- J. “Cartridge” means a cassette, cartridge, tray, or other platform, separate from an extracorporeal blood therapy machine (including but not limited to a hemodialysis machine), that consists of the combination of at least a blood fluid pathway together with a dialysate fluid pathway, which fluid pathways are integrated in an organized fashion to ensure that the blood fluid pathway and dialysate fluid pathway align properly with associated components of the extracorporeal blood therapy machine during use.
- K. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents, that is not in the public domain and that is related to the Hemodialysis Bloodline Assets. For avoidance of doubt, Confidential Business Information does not include any information related to any Excluded Assets.
- L. “Contract” means any agreement, contract, lease, license agreement, consensual obligation, promise or undertaking (whether written or oral and whether express or implied), whether or not legally binding with third parties.
- M. “Contribution Agreement” means the Contribution, Assignment, and Assumption Agreement between NxStage Medical Inc. and B. Medical LLC, and attached as Non-Public Appendix D to this Order.
- N. “Direct Cost” means cost not to exceed the cost of labor, material, travel, and other expenditures to the extent the costs are directly incurred to provide Support Services. “Direct Cost” to an Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the then-current average wage rate for such employee, including benefits.
- O. “Divestiture Agreement” means (i) the B.Braun Acquisition Agreement or (ii) any other agreement between Respondents (or a Divestiture Trustee) and an Acquirer that receives the prior approval of the Commission to divest the Hemodialysis Bloodline Assets, including all related ancillary agreements, schedules, exhibits, and attachments thereto that have received the Commission’s prior approval.
- P. “Divestiture Date” means the date on which Respondents (or the Divestiture Trustee) close the transaction to divest the Hemodialysis Bloodline Assets to an Acquirer.
- Q. “Divestiture Trustee” means the Person appointed by the Commission pursuant to Paragraph VI. of this Order.
- R. “Excluded Assets” means those assets identified in Non-Public Appendix E to this Order.
- S. “Hemodialysis Bloodline Assets” means all of Respondent NxStage’s right, title, and interest in and to all property and assets, wherever located, relating to the Hemodialysis Bloodline Business, including, but not limited to:

1. the Hemodialysis Bloodline Intellectual Property;
2. the NxStage Manufacturing Machinery;
3. all Contracts and all outstanding offers or solicitations to enter into any Contract (and all rights thereunder and related thereto), to the extent transferable, and at the Acquirer's option;
4. all consents, licenses, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, if any, and all pending applications therefor or renewals thereof, to the extent assignable; and
5. Business Records.

Provided, however, that Hemodialysis Bloodline Assets do not include Excluded Assets.

- T. "Hemodialysis Bloodline Business" means the business conducted by Respondent NxStage related to bloodlines used in hemodialysis patient treatment, including but not limited to, pressure pods, clamps, and tubes.

Provided, however, for the purposes of this Order, the Hemodialysis Bloodline Business does not include the Streamline Express product.

Provided, further, however, that Respondent does not retain, or have any license to, any Hemodialysis Bloodline Intellectual Property used to make any Product used in the Streamline Express product.

- U. "Hemodialysis Bloodline Employee" means any individual (i) employed by Respondent NxStage on a full-time, part-time, or contract basis at any time as of, and after, August 7, 2017, the date of the announcement of the Acquisition and, (ii) whose job responsibilities relate in any way to the Hemodialysis Bloodline Business.

- V. "Hemodialysis Bloodline Intellectual Property" means all Intellectual Property related to the Hemodialysis Bloodline Business.

- W. "Intellectual Property" means all intellectual property, including (i) all patents, patent applications and inventions and discoveries that may be patentable; (ii) all registered and unregistered copyrights in both published works and unpublished works; (iii) all know-how, trade secrets, and confidential or proprietary information in customer lists, software,

technical information, data, process technology, plans, drawings, and blue prints; and (iv) all rights in internet web sites and internet domain names.

- X. “Monitor” means the Person appointed by the Commission pursuant to Paragraph V. of this Order.
- Y. “NxStage Manufacturing Machinery” means the equipment and assets listed in Schedule 2 to the Contribution Agreement.
- Z. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- AA. “Peritoneal Dialysis Machines” means machines and disposables primarily used to perform peritoneal dialysis at home.
- BB. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- CC. “Products” means all products used in the Hemodialysis Bloodline Business, including but not limited to, pressure pods, clamps, tubes, and packaging.
- DD. “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium.
- EE. “Support Services” means administrative and technical services and training related to the operation of the Hemodialysis Bloodline Business as of the Divestiture Date, including but not limited to, such services and training relating to integration of billing and collection systems, any integration of Intellectual Property, and mechanical and technical support related to the operation of any equipment.
- FF. “System One Machines” means machines and disposables (including Cartridges) used in Respondent NxStage’s System One portable hemodialysis system.

II.

IT IS FURTHER ORDERED that:

- A. No later than 10 days after the Acquisition Date, Respondents shall divest the Hemodialysis Bloodline Assets, absolutely and in good faith, to B. Braun pursuant to the B. Braun Acquisition Agreement.

- B. If Respondents have divested the Hemodialysis Bloodline Assets to B. Braun prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
1. B. Braun is not acceptable as the acquirer of the Hemodialysis Bloodline Assets, then Respondents shall immediately rescind the B. Braun Acquisition Agreement, and shall divest the Hemodialysis Bloodline Assets no later than 120 days from the date this Order is issued, absolutely and in good faith, at no minimum price, to a Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission; or
 2. The manner in which the divestiture of the Hemodialysis Bloodline Assets to B. Braun was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Hemodialysis Bloodline Assets as the Commission may determine are necessary to satisfy the requirements of this Order.
- C. No later than the Divestiture Date, Respondents shall secure all consents, assignments, and waivers from all Persons that are necessary for the divestiture of the Hemodialysis Bloodline Assets; *provided, however*, that Respondents may satisfy this requirement by certifying that the Acquirer has executed appropriate agreements directly with each of the relevant Persons; and *provided further* that in the event Respondents are unable to obtain any consent, assignment, or waiver required by this Paragraph, Respondents shall (i) provide such assistance as the Acquirer may reasonably request in its efforts to obtain the consent or (ii) with the acceptance of the Acquirer and the prior approval of the Commission, Respondents may substitute equivalent assets or arrangements.
- D. Respondent Fresenius may enter into an agreement with B. Braun or any other Acquirer for a worldwide, royalty-free, non-exclusive, fully paid-up, perpetual, irrevocable, transferable, and sublicensable license of the Hemodialysis Bloodline Intellectual Property, for Respondent's use solely in (i) Cartridges and System One Machines used predominantly in home treatment, with de minimis use permitted for in-center hemodialysis treatments as delineated in the B. Braun Acquisition Agreement, including necessary training, or used in critical care treatment (ii) Peritoneal Dialysis Machines, and (iii) as necessary to comply with Paragraph II.E of this Order.
- E. Respondents shall:
1. At the request of Acquirer and in a manner that receives the prior approval of the Commission, provide Products for a period of up to 36 months from the Divestiture Date; and

2. Provide the Products required by this Order at the price(s) set forth in the B. Braun Acquisition Agreement, and in quality and quantity sufficient to enable Acquirer to operate the Hemodialysis Bloodline Business in substantially the same manner as Respondent NxStage prior to the Acquisition, including the ability to increase sales of current Products.

Provided, however, that after the expiration of 36 months, at the request of any Acquirer, the Acquirer shall have the option to extend the length of time that it receives Products from Respondent pursuant to Paragraph II.E.1 for up to an additional 2, 12-month periods.

F. Respondents shall:

1. At the request of Acquirer and in a manner that receives the prior approval of the Commission, provide Support Services sufficient to enable the Acquirer to operate the Hemodialysis Bloodline Assets in substantially the same manner that Respondents have operated such assets prior to the Acquisition;
2. Provide the Support Services, at the request of Acquirer, for a period of time from the Divestiture Date until 12 months after the NxStage Manufacturing Machinery has been moved to, and successfully installed in, a manufacturing facility owned by, or operated by or on behalf of, Acquirer; and
3. Provide the Support Services required by this Paragraph at substantially the same level and quality as such services were provided by Respondents prior to the Acquisition.

Provided, however, that Respondents shall not require any Acquirer to pay compensation for Support Services that exceeds the Direct Cost of providing such goods and services.

G. Respondents shall permit any trademarks owned by Respondents, any abbreviation thereof, or any name, logo, or lettering which is similar, which are affixed to any Hemodialysis Bloodline Asset on the Divestiture Date, to remain so affixed in the operation of the Hemodialysis Bloodline Assets by the Acquirer for a period of up to 18 months from the Divestiture Date.

H. Respondents shall cooperate with and assist Acquirer to evaluate and retain any and all Hemodialysis Bloodline Employees necessary to operate the Hemodialysis Bloodline Business in substantially the same manner as Respondents prior to the divestiture, including but not limited to:

1. Not later than 20 days after Respondents sign the Consent Agreement, Respondents shall (i) identify all Hemodialysis Bloodline Employees, (ii) allow Acquirer to inspect the personnel files and other documentation of all Hemodialysis Bloodline Employees, to the extent permissible under applicable laws, and (iii) allow Acquirer an opportunity to interview any Hemodialysis Bloodline Employee;
 2. Respondents shall (i) not offer any incentive to any Hemodialysis Bloodline Employee to decline employment with Acquirer, (ii) remove any contractual impediments that may deter any Hemodialysis Bloodline Employee from accepting employment with Acquirer, including but not limited to, any non-compete or confidentiality provision of employment or other contracts with Respondents that would affect the ability of such employee to be employed by Acquirer, and (iii) not otherwise interfere with the recruitment, hiring, or employment of any Hemodialysis Bloodline Employee by Acquirer;
 3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with Acquirer for any Hemodialysis Bloodline Employee who accepts an offer of employment from Acquirer, and (ii) provide each Hemodialysis Bloodline Employee with reasonable financial incentive as necessary to accept offers of employment with Acquirer; and
 4. For a period of 3 years after the Hemodialysis Bloodline Assets are divested, Respondents shall not solicit the employment of any employee that is employed by Acquirer and whose job responsibilities relate in any way to dialysis; *provided, however*, that a violation of this provision will not occur if: (i) the individual's employment has been terminated by Acquirer, (ii) Respondents hire an individual who responds to an advertisement for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (iii) Respondents hire employees who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.
- I. The purpose of the divestiture is to ensure the continuation of the Hemodialysis Bloodline Business as an ongoing viable business engaged in the same business in which the assets were engaged at the time of the announcement of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in this matter.

III.

IT IS FURTHER ORDERED that:

- A. From the date Respondents sign the Consent Agreement until the Respondents divest the Hemodialysis Bloodline Assets to Acquirer, and for the NxStage Manufacturing Machinery, from the date Respondents sign the Consent Agreement until the NxStage Manufacturing Machinery has been moved to, and successfully installed in, a manufacturing facility owned by, or operated by or on behalf of, Acquirer, Respondents shall:
1. Maintain the Hemodialysis Bloodline Assets in substantially the same condition (except for normal wear and tear) as they existed at the time Respondents signed the Consent Agreement;
 2. Take such actions that are consistent with the past practices of Respondent NxStage in connection with the Hemodialysis Bloodline Assets, and that are taken in the ordinary course of business and in the normal day-to-day operations of the Hemodialysis Bloodline Assets;
 3. Keep available the services of the current officers, employees, and agents of Respondent NxStage; and maintain the relations and goodwill with suppliers, payors, physicians, landlords, patients, employees, agents, and others having business relations with the Hemodialysis Bloodline Assets;
 4. Preserve the Hemodialysis Bloodline Assets as ongoing businesses and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Hemodialysis Bloodline Assets would be diminished; and
 5. Not object to sharing with the Acquirer the payor and supplier contract terms relating to the Hemodialysis Bloodline Assets: (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 Respondents not to disclose the information to any third party.
- B. The purposes of this Paragraph III is to: (1) preserve the Hemodialysis Bloodline Assets as a viable, competitive, and ongoing business until the assets are transferred to Acquirer, (2) prevent interim harm to competition pending the relevant divestitures and other relief, and (3) help remedy any anticompetitive effects of the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall (i) keep confidential (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Business Information received or maintained by Respondents relating to the Hemodialysis Bloodline Assets; and Respondents' employees shall not use or share, directly or indirectly, any Confidential Business Information with any of Respondents' employees who operate, manage, or market, Respondents' Hemodialysis Bloodline Business that competes with the divested assets and business, *provided, however*, that Respondents may disclose or use such Confidential Business Information in the course of:
 - 1. Performing its obligations or as permitted under this Order, or the Divestiture Agreement; or
 - 2. Complying with financial reporting requirements, obtaining legal advice, prosecuting or defending legal claims, investigations, or enforcing actions threatened or brought against the Hemodialysis Bloodline Business, or as required by law.
- B. If disclosure or use of any Confidential Business Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.

V.

IT IS FURTHER ORDERED that:

- A. Richard Shermer of R. Shermer & Co. shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents and attached as Appendix B ("Monitor Agreement") and Non-Public Appendix C ("Monitor Compensation"). The Monitor is appointed to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.

- B. No later than one day after the Acquisition Date, Respondents shall transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Order and consistent with the purposes of the Order.
- C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order and (ii) act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission.
 2. Respondents shall (i) ensure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order;
 3. The Monitor (i) shall serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
 4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, 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 losses, claims, damages, liabilities, or expenses result from the Monitor's gross negligence or willful misconduct; and
 5. Respondents 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*, that such agreement shall not restrict the Monitor from providing any information to the Commission.

- D. The Monitor shall report in writing to the Commission (i) every 30 days after the Acquisition Date for a period of one year, (ii) every 90 days thereafter until Respondents have completed all obligations required by Paragraph II. of this Order (including a final report when Respondents have completed all such obligations), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order.
- E. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:
1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within 5 days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 2. Respondents shall, no later than 5 days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order on the same terms and conditions as provided in this Paragraph V.
- 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 Order.

VI.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the divestiture and other obligations as required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Hemodialysis Bloodline Assets and perform Respondents' other obligations in a manner that satisfies the requirements of this Order.

- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture Trustee, pursuant to § 5(l) 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.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within 10 days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Within 10 days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or other action required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and to take such other action as may be required to divest the Divestiture Assets.
 2. The Divestiture Trustee shall have 12 months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the 12 month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the 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 Divestiture Trustee, by the court.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph VI in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable 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 expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however,* if the Divestiture 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 Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however,* that Respondents shall select such entity within 5 days of receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture 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 necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture 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 Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part

on a Commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, 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 losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order.
 7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every 60 days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- H. The Divestiture Trustee appointed pursuant to this Order may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order.

- I. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures and other obligations or action required by this Order.

VII.

IT IS FURTHER ORDERED that:

- A. The Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof, and any failure by Respondents to comply with the terms of the Divestiture Agreement shall constitute a violation of this Order; provided, however, that the Divestiture Agreement shall not limit, or be construed to limit, the terms of this Order. To the extent any provision in the Divestiture Agreement varies from or conflicts with any provision in the Order such that Respondents cannot fully comply with both, Respondents shall comply with the Order.
- B. Respondents shall not modify, replace, or extend the terms of the Divestiture Agreement after the Commission issues the Order without the prior approval of the Commission, except as otherwise provided in Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).

VIII.

IT IS FURTHER ORDERED that:

- A. Respondents shall:
1. notify Commission staff via email at bccompliance@ftc.gov of the Acquisition Date no later than 5 days after the Acquisition Date, and;
 2. submit the complete Divestiture Agreement to the Commission at ElectronicFilings@ftc.gov and bccompliance@ftc.gov no later than 30 days after the Divestiture Date.
- B. Respondents shall submit verified written reports (“compliance reports”) in accordance with the following:
1. An interim compliance report 30 days after the Order is issued, and every 60 days thereafter until Respondents have fully complied with the provisions of Paragraph II of this Order;

2. An annual compliance report one year after the date this Order is issued, and annually for the next 9 years on the anniversary of that date; and
 3. Additional compliance reports as the Commission or its staff may request.
- C. Each compliance report shall set forth in detail the manner and form in which Respondents intend to comply, are complying, and have complied with this Order. Each compliance report shall contain sufficient information and documentation to enable the Commission to determine independently whether Respondents are in compliance with the Order. Conclusory statements that Respondents have complied with their obligations under the Order are insufficient. Respondents shall include in their reports, among other information or documentation that may be necessary to demonstrate compliance, a full description of the measures Respondents have implemented or plan to implement to ensure that they have complied or will comply with each paragraph of the Order, a description of all substantive contacts or negotiations for the divestitures and the identities of all parties contacted, and information necessary to demonstrate, including a certification that, the number of in-center hemodialysis treatments performed using Respondents' System One falls within the de minimis exception contained in the B. Braun Acquisition Agreement. Respondents shall retain copies of all material written communications to and from such parties, as well as all non-privileged internal memoranda, reports, and recommendations concerning completing their obligations under the Order for a period of 3 years, and shall provide copies of those records to Commission staff upon request.
- D. Each compliance report shall be verified in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or another officer or employee specifically authorized to perform this function. Respondents shall submit an original and 2 copies of each compliance report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each compliance report to the Monitor if the Commission has appointed one in this matter.

IX.

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

- A. Any proposed dissolution of Respondent Fresenius Medical Care AG & Co. KGaA;
- B. Any proposed acquisition, merger, or consolidation of Respondent Fresenius Medical Care AG & Co. KGaA; or

- C. Any other change in Respondent Fresenius, including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and five days' notice to the relevant Respondent, made to its principal place of business as identified in this Order, registered office of its United States subsidiary, or its headquarters office, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of Respondents related to compliance with this Order, which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate 10 years from the date it is issued.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED:

**Non-Public Appendix A
Divestiture Agreement**

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

Appendix B

Monitor Agreement

Non-Public Appendix C
Monitor Compensation Agreement

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

Non-Public Appendix D

**Contribution, Assignment, and Assumption
Agreement between NxStage Medical Inc., and B.
Medical LLC.**

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

Non-Public Appendix E Excluded Assets

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