

**Statement of
Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips,
and Commissioner Christine S. Wilson
Concerning the Proposed Acquisition of NxStage Medical, Inc. by
Fresenius Medical Care AG & Co. KGaA
FTC File No. 171-0227
February 19, 2019**

Fresenius Medical Care Holdings, Inc. (“Fresenius”), a subsidiary of Fresenius Medical Care AG & Co. KGaA, proposes to acquire NxStage Medical, Inc. (“NxStage”). Following a thorough and lengthy staff investigation, the Commission has voted to issue a complaint and accept a settlement requiring the parties to divest a business in the one relevant product market where the evidence suggested competitive harm otherwise was likely to occur.

Specifically, the Commission believes the proposed transaction would, as initially proposed, substantially reduce competition in the market for hemodialysis bloodlines, a product that both firms manufacture and sell. To resolve this competitive concern, the parties will divest, subject to the Commission’s prior approval, all of NxStage’s hemodialysis bloodlines business to B. Braun Medical Inc.

The proposed transaction also vertically integrates NxStage, the largest supplier of in-home hemodialysis machines, and Fresenius, one of the two largest providers of in-clinic outpatient dialysis treatments. These two types of treatment are vertically related because in-clinic providers purchase the in-home machines for provision to patients who can be migrated from in-clinic to in-home dialysis. In-clinic and in-home hemodialysis possess different attributes. Patients with end-stage renal disease (“ESRD”) may seek in-clinic or in-home dialysis. But only a subset of such patients qualifies for in-home treatment, which, as studies confirm, has advantages including better health outcomes, convenience, and quality of life. Unfortunately, only a small fraction of the eligible population of ESRD patients currently uses in-home treatments.

When the Commission is presented with vertical mergers in industries with highly concentrated market structures, we scrutinize those mergers thoroughly and extensively. Here, following such an investigation, the evidence did not support a theory of harm other than the one remedied in our Order. To the contrary, the investigation—including information gathered from a number of current and potential market participants—showed that the transaction would likely increase the sale of NxStage’s in-home machines and thereby improve health outcomes by making in-home hemodialysis available to more qualifying ESRD patients.

We considered two primary concerns relating to the vertical aspects of the transaction: (1) input foreclosure/raising rivals’ costs, and (2) customer foreclosure. With respect to the first, the totality of the evidence did not support a finding that Fresenius would employ either a foreclosure or a raising rivals’ cost strategy. Rather, it showed that Fresenius likely would continue to sell the System One in-home machines to competitors, and potentially would increase the use of in-home machines dramatically—that is, profit by expanding the business it proposes to purchase, supporting NxStage’s superior in-home machines with Fresenius’ superior

scale and service. In fact, many market participants—including some of Fresenius’s direct competitors—agreed with this conclusion. The totality of the evidence also shows that Fresenius has a strong record of supplying other clinics with dialysis products. Moreover, the Commission heard from a variety of stakeholders that this deal has the potential to improve health outcomes for thousands of dialysis patients by expanding access to in-home hemodialysis treatment.

Staff also evaluated whether the Fresenius/NxStage acquisition was likely to make entry more difficult for potential in-home hemodialysis machine manufacturers. The concern here is that, after the acquisition, Fresenius would purchase in-home hemodialysis machines exclusively from itself—thereby reducing the total potential sales to new entrants and making entry more difficult. But the evidence does not support a finding of harm under this theory. In fact, CVS Health announced its intention to enter the in-home hemodialysis machine market *well after* Fresenius said publicly that it intended to acquire NxStage, and the evidence showed that at least one other firm is likely to enter in the relatively short term. In addition, some potential entrants and other market participants have explained that the acquisition potentially would expand the in-home hemodialysis market in a way that would lead to more sales opportunities.

Commissioner Chopra believes that this merger will diminish incentives for other new entrants who might be relying on venture capital. But, as discussed above, the investigation found that the acquisition may open new doors for potential entrants. Moreover, it uncovered no evidence that a possible tightening of one source of funding used by some potential entrants would undermine competition and reduce innovation.

Second, Commissioner Chopra claims that the efficiencies in this merger are not merger-specific because they can be achieved by contract. To be clear, the evidence did not support a finding of harm from the vertical theories in this transaction; consequently, we do not rest our decision on the presence of efficiencies. But, in any event, present-day realities show that the parties have not achieved the same result via contract. Today, Fresenius has a contract to purchase and deploy the NxStage System One machine to the subset of patients currently eligible for in-home hemodialysis. But sales and distribution of the machine—despite its superior technology—remain anemic because of low in-home hemodialysis adoption. This merger aligns the combined firm’s incentives in ways that a contract does not—notably by better incentivizing Fresenius to increase the distribution of these life-saving machines. As the new owner of NxStage’s System One machines, Fresenius is likely to make more money expanding sales of those machines than it would if NxStage were supplying the machines to Fresenius.

Staff also evaluated a potential horizontal overlap between NxStage’s System One machine and Fresenius’s 2008k@home machine (hereinafter the “Baby K Machine”), but it did not pose a competitive issue or raise antitrust concerns. The Baby K Machine is an older model that is large, heavy, and difficult to move. It also requires an expensive investment to reconfigure the plumbing and electrical systems of the patient’s home. NxStage’s machine is smaller, lighter, portable, and does not require the same infrastructure upgrades. Customers do not regard the two machines as substitutes. Nor has the Baby K Machine played any meaningful role in disciplining pricing of NxStage’s machine. In short, all evidence showed that the Baby K Machine was not a competitive alternative to the System One.

The Commission investigates mergers to obtain the economic and market evidence required to inform its enforcement decisions. The evidence here showed that the transaction is likely to reduce competition in the bloodlines market, a violation that, consistent with Commission practice, required a divestiture remediating the risk. The evidence did not support theories of input or customer foreclosure, and was not sufficient to support a challenge to the merger in court. It did, however, suggest that the transaction will likely yield meaningful procompetitive benefits. These benefits are not limited to the standard cost reductions expected from vertical integration, but, as noted above, include expectations that the merger will facilitate an expansion of in-home hemodialysis, which studies indicate may have health benefits for dialysis patients.