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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **FRESENIUS AG** a corporation; and **FRESENIUS USA, INC.** a corporation.	DOCKET NO. C-3689

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fresenius AG, the parent company of Fresenius USA, Inc. (collectively "Fresenius"), has entered into an Agreement and Plan of Reorganization with W.R. Grace & Co. ("Grace") whereby Fresenius will acquire from Grace the businesses comprising National Medical Care, Inc. ("NMC"), and that such acquisition, if consummated, would violate 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, and having reason to believe that Fresenius has entered into such agreement in restraint of trade in violation of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENTS

1. Respondent Fresenius AG is a corporation organized, existing and doing business under and by virtue of the laws of Germany with its office and principal place of business located at Borkenberg 14, 61440 Oberursel/Ts, Bad Homburg, Germany.

2. Respondent Fresenius USA, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Massachusetts with its principal place of business located at 2637 Shadelands Drive, Walnut Creek, California 94598.

3. At all times relevant herein, the Respondents (collectively "Fresenius") have been, and are now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. § 44) and Section 1 of the Clayton Act (15 U.S.C. § 12), and are corporations whose business is in or affecting commerce as defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. § 44).

II. THE PROPOSED ACQUISITION

4. On or about February 24, 1996, Fresenius and Grace executed an Agreement and Plan of Reorganization in which Fresenius would acquire the assets and businesses comprising Grace's NMC subsidiary.

5. Fresenius and NMC are substantial direct competitors in the United States market for hemodialysis concentrate.

III. THE RELEVANT LINE OF COMMERCE

6. One relevant line of commerce within which to analyze the effects of the acquisition is the United States market for hemodialysis concentrate. Hemodialysis concentrate is a bicarbonate solution used in hemodialysis treatment of End Stage Renal Disease to carry waste materials from the patient's blood during the treatment.

7. Hemodialysis concentrate is a necessary product for hemodialysis treatment with no available substitute. The cost of the hemodialysis concentrate accounts for a small portion of the cost of hemodialysis treatment.

8. Imports of hemodialysis concentrate into the United States are rare. The potential for significant imports is constrained by the fact that most concentrate is shipped in an aqueous solution, making shipping costs very high relative to the value of the product.

9. Total sales of hemodialysis concentrate in the United States are approximately $50 million.

IV. MARKET CONCENTRATION

10. Fresenius and NMC are two of a small number of producers of hemodialysis concentrate in the United States. NMC is the leading producer. The other producers include CGH Medical, Minn-Tech Corporation, Rockwell Medical and Dana Laboratories. After the acquisition, Fresenius would have a market share of hemodialysis concentrate sales of over 50 percent in the United States.

11. The United States market for hemodialysis concentrate is highly concentrated as measured by the Herfindahl-Hirschman Index (HHI). On the basis of capacity, the proposed acquisition would increase concentration, as measured by the HHI, by over 1250 points, to over 3100. On the basis of sales, the proposed acquisition would increase concentration, as measured by the HHI, by over 950 points, to over 3000.

V. CONDITIONS OF ENTRY

12. Entry into the hemodialysis concentrate market would not be likely to deter or offset reductions in competition resulting from the acquisition.

13. In addition to obtaining FDA approval, a new entrant would need to obtain a relatively high volume of sales in order to have cost-competitive production, and to support the costs of product testing. The need to capture a large market share makes the success of new entry less likely, and acts as a deterrent to entry. Most of the investment in production would likely be sunk in the event that entry were unsuccessful.

14. The likelihood of new entry is also reduced by the fact that a significant proportion of the dialysis clinics that use hemodialysis concentrate, including NMC, also produce the concentrate, and therefore are unlikely to purchase from a new entrant. Vertically integrated firms account for approximately a third of patients receiving hemodialysis treatment.

15. Moreover, a new entrant into hemodialysis concentrate would need to have an effective distribution system. However, there are only a few large full-line distributors of hemodialysis products, the largest of which (Fresenius, NMC, and CGH Medical) already produce hemodialysis concentrate.

VI. EFFECTS OF THE ACQUISITION

16. The acquisition of NMC by Fresenius may substantially lessen competition in the United States market for hemodialysis concentrate because, among other things:

a. it will eliminate substantial head-to-head competition between NMC and Fresenius;

b. it will increase concentration substantially in a highly concentrated market;

c. it will increase the likelihood of coordinated interaction among producers of hemodialysis concentrate;

d. company documents project that the increased "consolidation" of suppliers will likely lead to "price stabilization;" and

e. it will likely result in increased prices for hemodialysis concentrate.

VII. VIOLATIONS CHARGED

17. The acquisition agreement between Fresenius and NMC described in paragraph 4 violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

18. The proposed acquisition of NMC by Fresenius would, if consummated, violate 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of October, 1996, issues its complaint against said respondents.

By the Commission, Commissioner Starek dissenting.

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Donald S. Clark
Secretary