

1 Laurence M. Rosen, Esq. (SBN 219683)
2 **THE ROSEN LAW FIRM, P.A.**
3 355 South Grand Avenue, Suite 2450
4 Los Angeles, CA 90071
5 Telephone: (213) 785-2610
6 Facsimile: (213) 226-4684
7 Email: lrosen@rosenlegal.com

8 Counsel for Plaintiff

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 _____, Individually and on behalf of all
12 others similarly situated,

13 Plaintiff,

14 v.

15 FRESENIUS MEDICAL CARE AG &
16 CO. KGAA, FRESENIUS MEDICAL
17 CARE MANAGEMENT AG, RICE
18 POWELL, and, MICHAEL BROSANAN,

19 Defendants.

Case No:

**CLASS ACTION COMPLAINT FOR
VIOLATION OF THE FEDERAL
SECURITIES LAWS**

JURY TRIAL DEMANDED

20
21 Plaintiff _____, (“Plaintiff”), individually and on behalf of all other persons
22 similarly situated, by Plaintiff’s undersigned attorneys, for Plaintiff’s complaint
23 against Defendants (defined below), alleges the following based upon personal
24 knowledge as to Plaintiff and Plaintiff’s own acts, and information and belief as to
25 all other matters, based upon, inter alia, the investigation conducted by and through
26 Plaintiff’s attorneys, which included, among other things, a review of the
27 Defendants’ public documents, conference calls and announcements made by
28 Defendants, United States Securities and Exchange Commission (“SEC”) filings,

1 wire and press releases published by and regarding Fresenius Medical Care AG &
2 Co. KGaA (“Fresenius” or the “Company”), analysts’ reports and advisories about
3 the Company, and information readily obtainable on the Internet. Plaintiff believes
4 that substantial evidentiary support will exist for the allegations set forth herein after
5 a reasonable opportunity for discovery.

6 **NATURE OF THE ACTION**

7 1. This is a federal securities class action on behalf of a class consisting of
8 all persons and entities other than Defendants who purchased or otherwise acquired
9 the publicly traded securities of Fresenius between February 24, 2016 and January 6,
10 2017, both dates inclusive (the “Class Period”). Plaintiff seeks to recover
11 compensable damages caused by Defendants’ violations of the federal securities laws
12 and to pursue remedies under Sections 10(b) and 20(a) of the Securities Exchange
13 Act of 1934 (the “Exchange Act”) and Rule 10b-5 promulgated thereunder.

14 **JURISDICTION AND VENUE**

15 2. The claims asserted herein arise under and pursuant to §§10(b) and 20(a)
16 of the Exchange Act (15 U.S.C. §§78j(b) and §78t(a)) and Rule 10b-5 promulgated
17 thereunder by the SEC (17 C.F.R. §240.10b-5).

18 3. This Court has jurisdiction over the subject matter of this action under
19 28 U.S.C. §1331 and §27 of the Exchange Act.

20 4. Venue is proper in this District pursuant to §27 of the Exchange Act (15
21 U.S.C. §78aa) and 28 U.S.C. §1391(b) as Defendants conducts business in this
22 district, and a significant portion of the Defendants’ actions, and the subsequent
23 damages, took place within this District.

24 5. In connection with the acts, conduct and other wrongs alleged in this
25 Complaint, Defendants, directly or indirectly, used the means and instrumentalities of
26 interstate commerce, including but not limited to, the United States mail, interstate
27 telephone communications and the facilities of the national securities exchange.

28

PARTIES

1
2 6. Plaintiff, as set forth in the accompanying Certification, purchased
3 Fresenius securities at artificially inflated prices during the Class Period and was
4 damaged upon the revelation of the alleged corrective disclosure.

5 7. Defendant Fresenius is a kidney dialysis company, which provides
6 dialysis treatment and related dialysis care services, and other health care
7 services. The Company is a German partnership limited by shares and operates two
8 dialysis centers in Los Angeles, California. Fresenius securities are traded on the New
9 York Stock Exchange (“NYSE”) under the ticker symbol “FMS.”

10 8. Defendant Fresenius Medical Care Management AG (“General Partner”)
11 is the Company’s sole general partner, conducts the business of the Company, and
12 represents the Company in external relations.

13 9. Defendant Rice Powell (“Powell”) has been the Chief Executive Officer
14 and Chairman of the Management Board of the General Partner throughout the Class
15 Period.

16 10. Defendant Michael Brosnan (“Brosnan”) has been the Chief Financial
17 Officer and member of the Management Board of the General Partner throughout the
18 Class Period.

19 11. Defendants Powell and Brosnan are sometimes referred to herein as the
20 “Individual Defendants.”

21 12. Each of the Individual Defendants:

- 22 (a) directly participated in the management of the Company;
 - 23 (b) was directly involved in the day-to-day operations of the Company at the
24 highest levels;
 - 25 (c) was privy to confidential proprietary information concerning the
26 Company and its business and operations;
- 27
28

- 1 (d) was directly or indirectly involved in drafting, producing, reviewing
2 and/or disseminating the false and misleading statements and
3 information alleged herein;
- 4 (e) was directly or indirectly involved in the oversight or implementation of
5 the Company's internal controls;
- 6 (f) was aware of or recklessly disregarded the fact that the false and
7 misleading statements were being issued concerning the Company;
8 and/or
- 9 (g) approved or ratified these statements in violation of the federal securities
10 laws.

11 13. The Company is liable for the acts of the Individual Defendants and its
12 employees under the doctrine of *respondeat superior* and common law principles of
13 agency because all of the wrongful acts complained of herein were carried out within
14 the scope of their employment.

15 14. The scienter of the Individual Defendants and other employees and
16 agents of the Company is similarly imputed to the Company under *respondeat*
17 *superior* and agency principles.

18 15. The Company and the Individual Defendants are referred to herein,
19 collectively, as the "Defendants."

20 SUBSTANTIVE ALLEGATIONS

21 Background

22 16. The Company offers dialysis treatment, and related laboratory and
23 diagnostic services through a network of 3,418 outpatient dialysis clinics in
24 approximately 45 countries worldwide.

25 Materially False and Misleading Statements

26 17. On February 24, 2016, the Company filed a Form 20-F for the fiscal year
27 ended December 31, 2015 (the "2015 20-F") with the SEC, which provided the
28 Company's quarterly and year-end financial results and position and stated that the

1 Company's disclosure controls were effective as of December 31, 2015. The 2015
2 20-F was signed by Defendants Powell and Brosnan. The 2015 20-F contained signed
3 certifications pursuant to the Sarbanes-Oxley Act of 2002 ("SOX") by Defendants
4 Powell and Brosnan attesting to the accuracy of financial reporting and the disclosure
5 of all fraud.

6 18. In the 2015 20-F, the Company stated the following with regards to its
7 patients covered by private insurance:

8
9 *A significant portion of our North America Segment profits is*
10 *dependent on the services we provide to a minority of our patients who*
11 *are covered by private insurance.*

12 Government reimbursement programs generally pay less than
13 private insurance. Medicare pays us only 80% of the Medicare allowable
14 amount (the patient, Medicaid or secondary insurance being responsible
15 for the remaining 20%), and Medicaid rates are comparable. As a result,
16 the payments we receive from private payors generate a substantial
17 portion of the profits we report. We derived 32% of our worldwide
18 revenue from Medicare and Medicaid. *In 2015, approximately 35% of*
19 *our consolidated Health Care revenues were attributable to private*
20 *payors in the North America Segment.* Therefore, if the private payors
21 in the North America Segment reduce their payments for our services, or
22 if we experience a material shift in our revenue mix toward Medicare or
23 Medicaid reimbursement, then our revenue, cash flow and earnings
24 would materially decrease.

25 Over the last few years, we have generally been able to implement
26 modest annual price increases for private insurers and managed care
27 organizations, but government reimbursement has remained flat or has
28 been increased at rates below typical consumer price index ("CPI")
increases. There can be no assurance that we can achieve future price
increases from private insurers and managed care organizations
comparable to those we have historically received. With increased
governmental reform and regulatory activity, reimbursement from
private insurers may be subject to downward pressure in the coming
years. The advent of the federal and state health care exchanges may also
negatively impact reimbursement from private insurance. Any

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

reductions in reimbursement from private insurers and managed care organizations could materially and adversely impact our operating results. Any reduction in our ability to attract private pay patients to utilize our health care services relative to historical levels could adversely impact our operating results. Any of the following events, among others, could have a material adverse effect on our operating results:

- a portion of our business that is currently reimbursed by private insurers or hospitals may become reimbursed by managed care organizations, which generally have lower rates for our services; or
- a portion of our business that is currently reimbursed by private insurers at rates based on our billed charges may become reimbursed under contracts at lower rates.

[Emphasis added].

19. The statements referenced in ¶¶ 18 above were materially false and/or misleading because they misrepresented and failed to disclose the following adverse facts pertaining to the Company’s business, operational and financial results, which were known to Defendants or recklessly disregarded by them. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (1) the Company’s reliance on dialysis patients enrolled in premium assistance programs was unsustainable; (2) the Company’s arrangement of their charitable donations funding a premium assistance program for dialysis patients would result in an U.S. Department of Justice investigation; and (3) as a result, Fresenius’s public statements were materially false and misleading at all relevant times.

The Truth Emerges

20. On January 6, 2017, the Company revealed that it had received a subpoena from the Justice Department for information regarding an arrangement in which its charitable donations fund dialysis treatment for patients.

1 26. Plaintiff will fairly and adequately protect the interests of the members
2 of the Class and has retained counsel competent and experienced in class and
3 securities litigation. Plaintiff has no interests antagonistic to or in conflict with those
4 of the Class.

5 27. Common questions of law and fact exist as to all members of the Class
6 and predominate over any questions solely affecting individual members of the Class.

7 Among the questions of law and fact common to the Class are:

- 8 • whether the federal securities laws were violated by Defendants' acts as
9 alleged herein;
- 10 • whether statements made by Defendants to the investing public during
11 the Class Period misrepresented material facts about the financial
12 condition, business, operations, and management of the Company;
- 13 • whether Defendants' public statements to the investing public during the
14 Class Period omitted material facts necessary to make the statements
15 made, in light of the circumstances under which they were made, not
16 misleading;
- 17 • whether the Individual Defendants caused the Company to issue false
18 and misleading SEC filings and public statements during the Class
19 Period;
- 20 • whether Defendants acted knowingly or recklessly in issuing false and
21 misleading SEC filings and public statements during the Class Period;
- 22 • whether the prices of Fresenius securities during the Class Period were
23 artificially inflated because of the Defendants' conduct complained of
24 herein; and
- 25 • whether the members of the Class have sustained damages and, if so,
26 what is the proper measure of damages.

27 28. A class action is superior to all other available methods for the fair and
28 efficient adjudication of this controversy since joinder of all members is

1 impracticable. Furthermore, as the damages suffered by individual Class members
2 may be relatively small, the expense and burden of individual litigation make it
3 impossible for members of the Class to individually redress the wrongs done to them.
4 There will be no difficulty in the management of this action as a class action.

5 29. Plaintiff will rely, in part, upon the presumption of reliance established
6 by the fraud-on-the-market doctrine in that:

- 7 • Defendants made public misrepresentations or failed to disclose material
8 facts during the Class Period;
- 9 • the omissions and misrepresentations were material;
- 10 • Fresenius securities are traded in efficient markets;
- 11 • the Company's securities were liquid and traded with moderate to heavy
12 volume during the Class Period;
- 13 • the Company traded on the NYSE, and was covered by multiple
14 analysts;
- 15 • the misrepresentations and omissions alleged would tend to induce a
16 reasonable investor to misjudge the value of the Company's securities;
17 and
- 18 • Plaintiff and members of the Class purchased and/or sold Fresenius
19 securities between the time the Defendants failed to disclose or
20 misrepresented material facts and the time the true facts were disclosed,
21 without knowledge of the omitted or misrepresented facts.

22 30. Based upon the foregoing, Plaintiff and the members of the Class are
23 entitled to a presumption of reliance upon the integrity of the market.

24 31. Alternatively, Plaintiff and the members of the Class are entitled to the
25 presumption of reliance established by the Supreme Court in *Affiliated Ute Citizens of*
26 *the State of Utah v. United States*, 406 U.S. 128, 92 S. Ct. 2430 (1972), as Defendants
27 omitted material information in their Class Period statements in violation of a duty to
28 disclose such information, as detailed above.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

COUNT I

**Violation of Section 10(b) of The Exchange Act and Rule 10b-5
Against All Defendants**

32. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

33. This Count is asserted against the Company and the Individual Defendants and is based upon Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the SEC.

34. During the Class Period, the Company and the Individual Defendants, individually and in concert, directly or indirectly, disseminated or approved the false statements specified above, which they knew or deliberately disregarded were misleading in that they contained misrepresentations and failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

35. The Company and the Individual Defendants violated §10(b) of the 1934 Act and Rule 10b-5 in that they:

- employed devices, schemes and artifices to defraud;
- made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
- engaged in acts, practices and a course of business that operated as a fraud or deceit upon plaintiff and others similarly situated in connection with their purchases of Fresenius securities during the Class Period.

36. The Company and the Individual Defendants acted with scienter in that they knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated, or acquiesced in the issuance or

1 dissemination of such statements or documents as primary violations of the securities
2 laws. These defendants by virtue of their receipt of information reflecting the true
3 facts of the Company, their control over, and/or receipt and/or modification of the
4 Company's allegedly materially misleading statements, and/or their associations with
5 the Company which made them privy to confidential proprietary information
6 concerning the Company, participated in the fraudulent scheme alleged herein.

7 37. Individual Defendants, who are the senior officers and/or directors of
8 the Company, had actual knowledge of the material omissions and/or the falsity of
9 the material statements set forth above, and intended to deceive Plaintiff and the other
10 members of the Class, or, in the alternative, acted with reckless disregard for the truth
11 when they failed to ascertain and disclose the true facts in the statements made by
12 them or other personnel of the Company to members of the investing public,
13 including Plaintiff and the Class.

14 38. As a result of the foregoing, the market price of Fresenius securities was
15 artificially inflated during the Class Period. In ignorance of the falsity of the
16 Company's and the Individual Defendants' statements, Plaintiff and the other
17 members of the Class relied on the statements described above and/or the integrity of
18 the market price of Fresenius securities during the Class Period in purchasing
19 Fresenius securities at prices that were artificially inflated as a result of the
20 Company's and the Individual Defendants' false and misleading statements.

21 39. Had Plaintiff and the other members of the Class been aware that the
22 market price of Fresenius securities had been artificially and falsely inflated by the
23 Company's and the Individual Defendants' misleading statements and by the material
24 adverse information which the Company's and the Individual Defendants did not
25 disclose, they would not have purchased Fresenius securities at the artificially inflated
26 prices that they did, or at all.

27 40. As a result of the wrongful conduct alleged herein, Plaintiff and other
28 members of the Class have suffered damages in an amount to be established at trial.

1 participated in the unlawful conduct alleged which artificially inflated the market
2 price of Fresenius securities.

3 46. Each of the Individual Defendants and the General Partner, therefore,
4 acted as a controlling person of the Company. By reason of their senior management
5 positions and/or being directors of the Company, each of the Individual Defendants
6 had the power to direct the actions of, and exercised the same to cause, the Company
7 to engage in the unlawful acts and conduct complained of herein. Each of the
8 Individual Defendants and the General Partner exercised control over the general
9 operations of the Company and possessed the power to control the specific activities
10 which comprise the primary violations about which Plaintiff and the other members
11 of the Class complain.

12 47. By reason of the above conduct, the Individual Defendants and the
13 General Partner are liable pursuant to Section 20(a) of the Exchange Act for the
14 violations committed by the Company.

15 **PRAYER FOR RELIEF**

16 WHEREFORE, Plaintiff demands judgment against Defendants as follows:

17 A. Determining that the instant action may be maintained as a class action
18 under Rule 23 of the Federal Rules of Civil Procedure, and certifying Plaintiff as the
19 Class representative;

20 B. Requiring Defendants to pay damages sustained by Plaintiff and the
21 Class by reason of the acts and transactions alleged herein;

22 C. Awarding Plaintiff and the other members of the Class prejudgment and
23 post-judgment interest, as well as their reasonable attorneys' fees, expert fees and
24 other costs; and

25 D. Awarding such other and further relief as this Court may deem just and
26 proper.

27 **DEMAND FOR TRIAL BY JURY**

28 Plaintiff hereby demands a trial by jury.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated:

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

By: _____
Laurence M. Rosen, Esq. (SBN 219683)
355 S. Grand Avenue, Suite 2450
Los Angeles, CA 90071
Telephone: (213) 785-2610
Facsimile: (213) 226-4684
Email: lrosen@rosenlegal.com

Counsel for Plaintiff