Senator Deb Patterson
900 Court St. NE, S-411
Salem, Oregon 97301

Dear Chair Patterson and members of the Senate Health Care Committee,

I write to encourage the adoption of a ban on non-competition agreements for medical practitioners, as part of House Bill 4130. I believe this ban would save many patient lives, improve workplace experiences for workers and nephrologists, and save countless taxpayer dollars.

I recently published a book on the dialysis industry, *How to Make a Killing: Blood, Death and Dollars in American Medicine* (W W Norton, August 2023). I am a journalist, not an MD or an authority on healthcare policy, but during the six years of research and reporting that went into this book, I spoke with many such experts, as well as with attorneys, medical device entrepreneurs, lawmakers and other authorities in the dialysis space.

Among my conclusions, as set forth in my book with extensive reference notes, are the following:

1) Two dominant firms, Fresenius and DaVita, run some 75% of clinics and treat about 80% of patients in America. According to several economists I consulted and quote in my book, these two firms enjoy duopoly or monopoly positions in many local markets.[1] (Because dialysis patients require frequent and lengthy treatments, most patients need to have a clinic within easy reach of their homes: dialysis patients cannot "shop around" like most consumers. Hence a dialysis firm's dominance in local markets can represent a de facto monopoly in these markets.)

2) US law requires having a medical director in order to operate a dialysis facility.

3) When signing doctors to medical directorships, the two dominant firms routinely include restrictive non-compete agreements. These agreements can block rival clinics from opening – clinics which might provide better, more innovative care (see more on quality of care below). For this reason, the National Kidney Foundation and Home Dialyzors United have both petitioned the FTC to eliminate non-competes.[2]

4) Lack of market competition in US dialysis, enabled in part by the existence of non-compete agreements, harms patients, workers, nephrologists and taxpayers.

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[1] *How to Make a Killing*, pp. 117-120, and related reference notes.
[2] https://www.regulations.gov/comment/FTC-2023-0007-20299 and https://www.regulations.gov/comment/FTC-2023-0007-19265

The remainder of this letter provides background information to support my contention in point 4 above.

Dialysis outcomes in the United States are worse than in other developed nations, not only for patients, but also for workers, nephrologists and taxpayers. It is my belief, based on six years of research for my book, and it is furthermore the belief of many experts whom I consulted and cite in my book, that a central reason for these poor outcomes is the highly consolidated market structure of dialysis in America, which puts 80% of patients in the hands of two large, publicly traded, highly profit-oriented firms.

Dialysis outcomes are far **worse for patients**, who die sooner and suffer more negative outcomes than in other countries.[3] Within the U.S., those who receive care through non-profit facilities survive substantially longer than those who dialyze in for-profit facilities.[4] Likewise, patients who dialyze at government-run Veterans Administration clinics enjoy higher survival rates than those who obtain treatment at for-profit contractors working for the VA.[5]

Dialysis is **worse for many workers**, who must contend with extremely difficult work conditions and limited options for employment.[6] They are likewise **worse for many nephrologists**, who have fewer choices available for their work, and whose practice of medicine may be constrained by profit-driven corporate protocols. Comments made by nephrologists to the FTC suggest the nature and extent the problem. One nephrologist noted that a noncompete agreement "prevented me from opening a dialysis clinic in the inner city area of Harrisburg, where it was needed very badly."[7] Another nephrologist wrote that "As a dialysis physician," elimination of non-competes would help him and fellow MDs "innovate treatment options that we can administer ourselves without being threatened by the big dialysis companies that hire us as their medical directors who would then control what we can do or not."[8] Yet another physician referenced the threat of non-compete related litigation impeding his career growth and patient care alike: "The implied and often written threat of costly litigation directed towards physicians who wish to pursue other career opportunities while continuing to provide care for patients…"[9]

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[3] *How to Make a Killing*, pp. 11-12 and passim, and related reference notes. See also, for example, Robert Foley and Raymond Hakim, "Why is the Mortality of Dialysis Patients in the United States Much Higher than the Rest of the World?" JASN 1 June 2009.

[4] See for example Samuel Dickman, Reza Mirza et al, "Mortality at For-Profit Versus Not-For-Profit Hemodialysis Centers: A Systematic Review and Meta-analysis," International Journal of Health Services (2020); Manjula Kurella Tamura, I.-Chun Tho et al, "Dialysis Initiation and Mortality Among Older Veterans with Kidney Failure Treated in Medicare vs the Department of Veterans Affairs," JAMA Internal Medicine (2018); and Yi Zhang, Dennis J. Cotter et al, "The Effect of Dialysis Chains on Mortality among Patients Receiving Hemodialysis," Health Services Research (2011)

[5] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6317601/

[6] *How to Make a Killing*, pp. 25ff and passim, and related reference notes.

[7] https://www.regulations.gov/comment/FTC-2023-0007-17458

[8] https://www.regulations.gov/comment/FTC-2023-0007-20366

[9] https://www.regulations.gov/comment/FTC-2023-0007-4863

Dialysis in America is a **greater burden for taxpayers** than in other countries. Medicare alone spends well over $50 billion a year on dialysis: that's 7% of the Medicare budget, used to treat a mere 1% of the Medicare patient population.

After years of scrutinizing this industry as a journalist, I have concluded that non-competes in the dialysis business help to create excess expenditure of taxpayer funds, excess patient harm and death, and harm to dialysis professionals at all levels, whose employment opportunities are severely curtailed by these agreements.

Sincerely,

Tom Mueller PhD
www.tommueller.co
Author of How to Make a Killing: Blood, Death and Dollars in American Medicine (W W Norton, 1 August 2023)