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LOCAL 5 HAWAII

Eric Gill, Financial Secretary-Treasurer Hernando Ramos Tan, President Godfrey Maeshiro, Senior Vice-President

December 3, 2009

Mr. Ronald Terry
Administrator
State Of Hawaii, State Health Planning and Development Agency
1177 Alakea Street, Room 402
Honolulu, HI 96813

Dear Mr. Terry:

I write to you today as a representative of Unite Here, Local 5 to oppose the granting of Certificate of Need application #09-13 by Kaiser Foundation Health Plan's ("Kaiser") subsidiary Rainbow Dialysis, LLC ("Rainbow") in its current form. Local 5 does not wish to oppose the establishment of new dialysis services on Maui to the extent there is a need for such services in the community. However, this application makes that question and a number of others unclear:

1. It is not clear from Kaiser's statements that additional dialysis services on Maui are necessary or prudent.
2. To the extent additional services may be necessary, it is important that the services added are calculated to match (and not exceed) the projected needs of the community. It is not clear that this proposal achieves that.
3. It is not clear why the company plans to bring in DaVita, Inc. to operate the facilities.

For these reasons, explained in further detail below, Unite Here Local 5 opposes the granting of CON application #09-13 in its current form, and instead recommends the following:

- SHPDA should deny the application - Kaiser has not shown or suggested that the current facilities are inadequate, only that they cost more than Kaiser wants to spend, and that they meet the HSFP capacity threshold, according to Kaiser. If the facilities are allowed, Kaiser should operate the facilities itself and utilize its own employees for that purpose rather than working with DaVita, an outside, for-profit company which is currently subject to three federal inquiries.
- If the application is not denied outright, SHPDA should only give approval to build one facility and reconsider the second after the effects of the first one on the overall system are known.
- If one or both of the new facilities are allowed, SHPDA should take steps to protect against any situation in which Liberty might stop doing business on Maui, which could lead to another monopoly if it occurred.
- If Kaiser feels Liberty has created an illegal monopoly, it should take steps to enforce state and federal antitrust laws.

We believe Maui residents need and deserve access to top quality health care. It is our sincere hope that the decisions that the members of SHPDA make regarding this application are truly in the best interests of the community.

Does Maui need additional dialysis services?

HRS §323D-43 calls on the applicant to explain the public need for additional facilities. However, while Kaiser details the current patient census at existing Liberty-run facilities,[1] the company does not make clear what the capacity of the current facilities is, or when the company expects that the facilities will reach capacity given its projected rate of increase in the patient population.

Kaiser does not suggest that the current facilities are inadequate, merely that they cost Kaiser too much money. Kaiser points to the argument that the company's dialysis expenditures have increased 3.5 times on Maui since Liberty assumed operation of the dialysis facilities from St. Francis Healthcare. Kaiser also argues that its current average cost for dialysis service on Maui is 2.5 times its cost on Oahu. However, the company does not provide

[1] CON Application #09-13 Rainbow Dialysis LLC, July 2009, pg. 8.

any information with which to examine the validity of this claim. Kaiser does provide a chart (entitled "Chart 1: Monthly Maui Dialysis Spending by Kaiser Permanente (2003-2008)" and reproduced on the next page) about the company's dialysis spending on Maui. Kaiser currently only claims to provide healthcare to 40% of Maui's residents,[2] so any changes in cost to non-Kaiser members are not addressed at all with this information. Further, the caption in the center of the chart appears to be incorrect – the caption appears to be pointing to September 2005, but the caption itself is labeled "December 2005." Given that this is the only information Kaiser gives to support its claims of cost increases for dialysis, this error is potentially significant. If, in fact, the date Liberty took over from St. Francis was December 2005, then cost increases for the period from January 2006 to September 2008 are not proportionately greater than the cost increases for a similar time period from March 2003 to December 2005 (see charts on the following page).

Kaiser states, "The Rainbow Dialysis project will bring new competition to Maui as Kaiser will retain DaVita Inc to manage the dialysis facilities."[3] It is not at all clear that this is the case, since Kaiser does not discuss whether it will allow its members to continue using Liberty's services once Rainbow's facilities are in place.

While the company provides charts illustrating its estimates that it will achieve $4.5 million in cost savings in Rainbow's first full year of operations (and even more the second and third years),[4] along with projected statements of revenue and expenses,[5] Kaiser does not explain what, if any, effects this will have on health care premiums for its members.

Does this proposal match the community's needs?

The CON application addresses potential alternatives to Kaiser's proposal. The company mentions a few alternatives, but states that its proposal is the most cost-effective and will have the best outcomes. However, the company does not offer any proposal or analysis of starting services with one facility rather than two. Liberty previously expressed concern about the viability of its own operations if the two proposed facilities begin operations on Maui, and the applicant addresses this by providing projections indicating that both companies will exceed the minimum threshold number of treatments after three or four years. The state has the power to test this assertion by conditionally approving one facility and denying the other until a more appropriate time, rather than approving both now.

The company has not proven beyond its projections and assertions that it can save money by using DaVita as a dialysis operator rather than sending patients to Liberty. Kaiser has not disclosed how much of the revenues from operations will be paid to DaVita for managing the facility. It has included no analysis of DaVita's operations elsewhere. Kaiser does not discuss whether it has had similar dealings with DaVita in the past, let alone any dealings with the company at all, or what the outcome of any such dealings might have been. Given that DaVita owns over 25% of all dialysis facilities nationwide and was based out of California up until mid-2009,[6] it would be surprising if Kaiser had never dealt with the company in any capacity.

[2] CON Application #09-13 Rainbow Dialysis LLC, July 2009, pg. 11.
[3] CON Application #09-13 Rainbow Dialysis LLC, July 2009, pg. 7.
[4] CON Application #09-13 Rainbow Dialysis LLC, July 2009, Table D2, pg. D-6.
[5] CON Application #09-13 Rainbow Dialysis LLC, July 2009, Exhibits D-2 and D-3.
[6] "Ailing state too much for medical clinic operator: Fortune 500 company DaVita jumps to Denver," *Los Angeles Business Journal*, 6/1/09.

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Chart 1: The following is the chart Kaiser includes in the CON application illustrating cost increases for dialysis services on Maui before and after Liberty's acquisition of St. Francis' dialysis facilities:

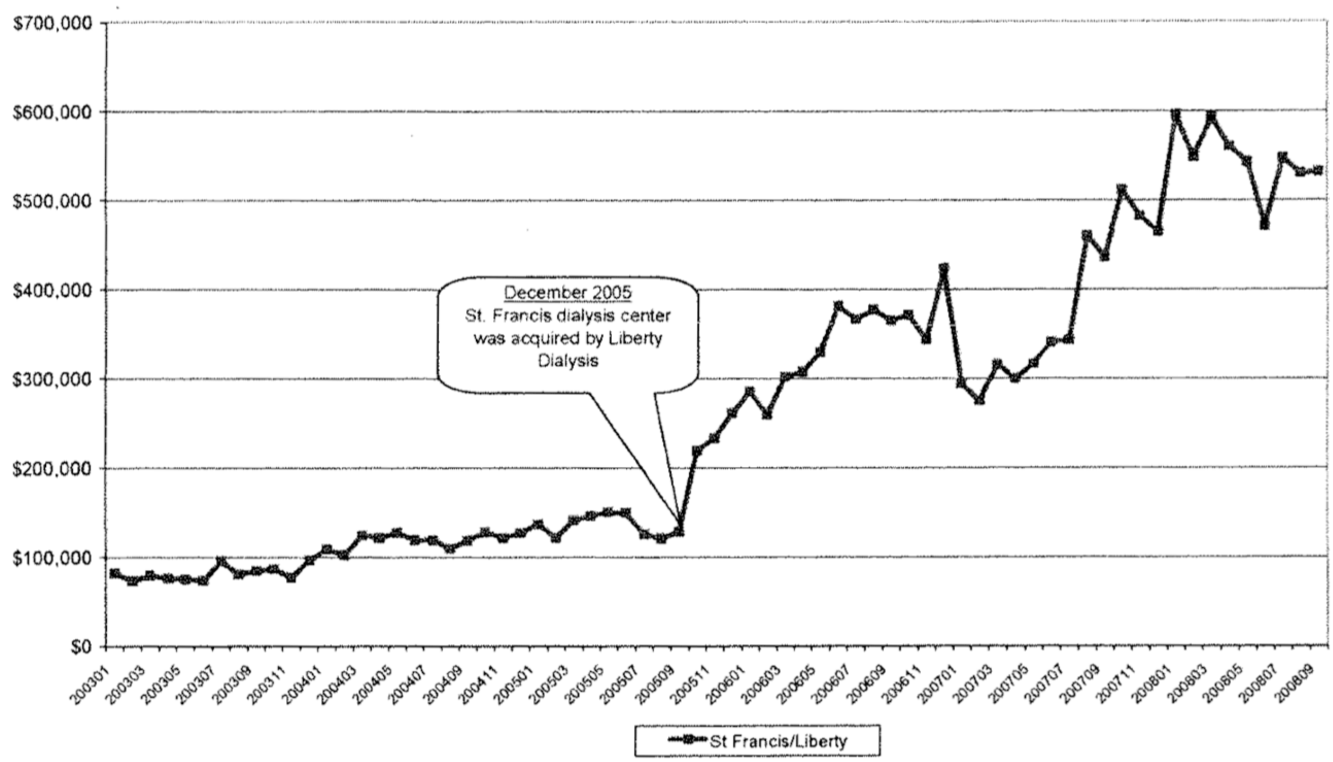
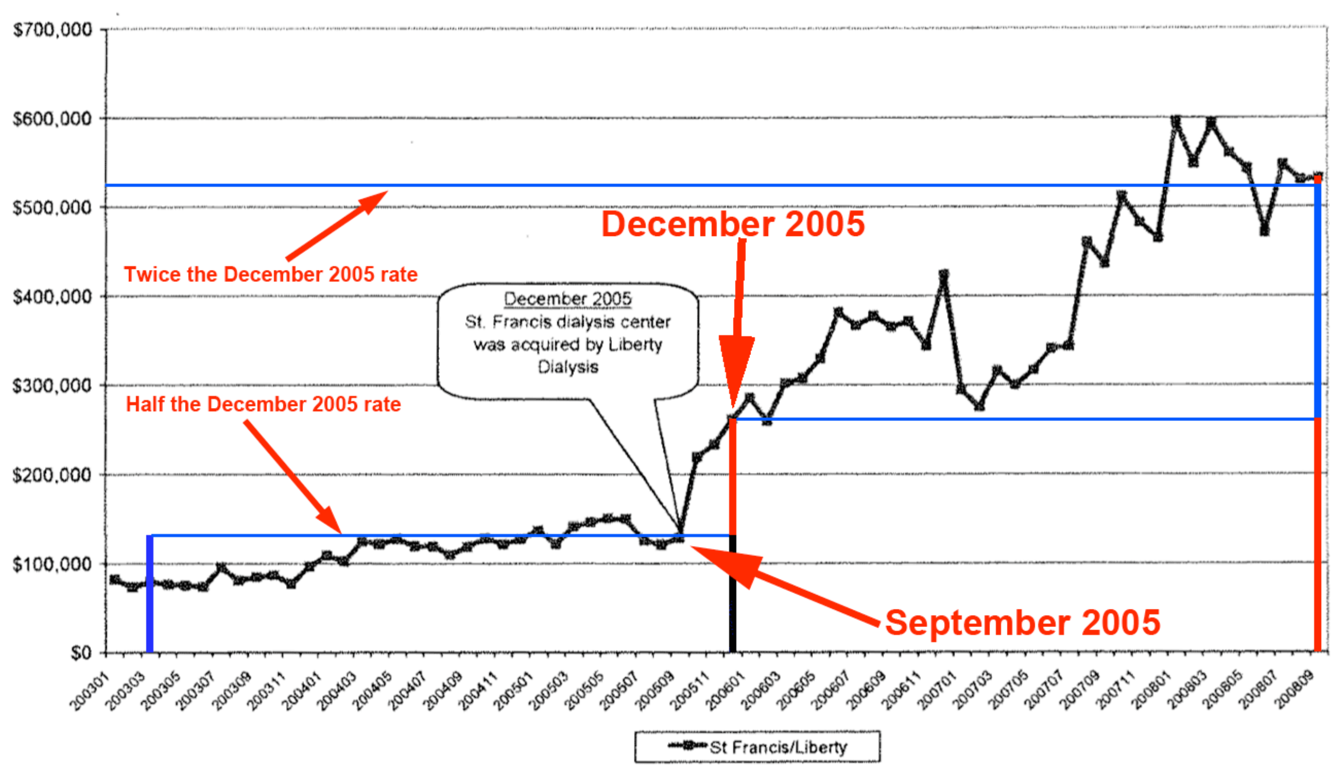


Chart 2: The chart above contains an error, which is illustrated below. Further lines are added to show the implications this error has in the company's analysis of cost increases before and after Liberty took over dialysis services on Maui (assuming Liberty did take over services in December 2005 as Kaiser claims, and not September 2005):



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A subcontractor with profit motives

Kaiser states, "The bulk of Kaiser Permanente's revenues are derived from premiums and other capitated payments. Under this arrangement, Kaiser Permanente is required to provide needed services within a "fixed" budget, which serves as an incentive to contain costs."[7] In this case, it is unclear why Kaiser would choose to use DaVita, a for-profit company, to operate the proposed facilities rather than internalizing operations itself.

Since DaVita is a for-profit company, some portion of the money it earns is returned to its shareholders. To put it another way, DaVita, unlike Kaiser, is incentivized to act in the interests of its shareholders, not just in the interests of the patients it serves.

The cost of dialysis treatment is increased by the cost of drugs administered to patients. The United States Renal Data System's 2009 Annual Report on the state of dialysis in America, in its discussion on providers, compared the per-person-per-month costs of major dialysis providers and provider groups, including DaVita, Fresenius, Dialysis Clinic Inc., small dialysis organizations (as a group), independent units (as a group), and hospital-based units (as a group).[8]. **The report found that DaVita had the highest per-person-per-month costs for IV iron, IV vitamin D hormones and erythropoiesis stimulating agents ("ESAs"). DaVita also had above-average per-person-per-month costs for dialysis (second only to small dialysis organizations).**

The only explanation Kaiser offers as to why it does not intend to operate the facilities itself is in its discussion of potential alternatives: "Kaiser has exhausted other options for dialysis and determined that Rainbow Dialysis is both the most cost-effective option and the best for improving health outcomes for the patients served on Maui. Other options pursued were more costly, not less costly, and included joint ventures, purchasing financial interests in outside dialysis centers, and internalizing dialysis without a management agreement."[9] Kaiser never includes any financial analysis or other details of the alternatives it claims to have considered.

According to Kaiser's application, "The single most important feature that improves with the internalization of dialysis patients is the increased ability for physicians to monitor patients across multiple locations by accessing a patient's medical information electronically. Diabetes and ESRD patients are managed through a registry in the physician panel support tool in Kaiser Permanente HealthConnect, the electronic medical record system."[10] Kaiser does not explain why Liberty did not have or did not use access to this data, or why appropriate changes cannot be made to correct this issue with Liberty now. In light of the fact that Kaiser defines "internalization" of patients as, among other things, subcontracting services to DaVita to operate the facilities, it is unclear why providing an outside company with access to patient data was not done with Liberty but will be done with DaVita. It also seems that the maximum benefit from this factor would be achieved through true “internalization”: Kaiser performing these services itself with its own employees. Having complete control of who has access to patients' protected health information also would minimize the risk of violations of patients' privacy rights under HIPAA.

DaVita, Inc.: Big Profits, Big Federal Inquiries

DaVita is one of the two largest providers of dialysis service nationwide (the other being Fresenius Medical Care North America), serving roughly 99,000 patients (27% of the U.S. total) as of 2007.[11] It is also a very profitable company: despite the fact that 80% of DaVita's patients are under Medicare and Medicare-assigned HMO plans,[12] the company managed a net income of over $374 million in 2008, almost as much as its record 2007 profits of over $381 million. DaVita is on track for another profitable year, having recently reported well over $300 million in net income in the first nine months of 2009.[13] In its financial statements, the company explained that nearly all of its profit is derived from commercial payors.[14]

There are several other issues regarding DaVita which are of concern:

- In mid-2008, a former nurse at a DaVita dialysis center in Lufkin, Texas, was charged with the murders of five dialysis patients and aggravated assault against five others. Prosecutors allege the nurse injected the

[7] CON Application #09-13 Rainbow Dialysis LLC, July 2009, pg. D-5.
[8] United States Renal Data System, 2009 Annual Report, Volume 2, page 330. Table 10.23.ii
[9] CON Application #09-13 Rainbow Dialysis LLC, July 2009, pg. D-7.
[10] CON Application #09-13 Rainbow Dialysis LLC, July 2009, pg. C-2.
[11] United States Renal Data System, 2009 Annual Report, Volume 2, page 325. Table 10.1.ii
[12] DaVita Inc. SEC Form 10-K for the fiscal year ended December 31, 2008, page 2.
[13] DaVita Inc. SEC Form 10-Q for the quarterly period ended September 30, 2009, page 1.
[14] DaVita Inc. SEC Form 10-Q for the quarterly period ended September 30, 2009, page 37.

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patients with bleach.[15] In July 2009, prosecutors announced they would seek the death penalty in the case. CBS reported that some victims' families criticized DaVita for not acting sooner to remove the nurse from the facility – she was fired on April 28, a day after the clinic closed, although two of the deaths occurred on April 1. The company responded that the nurse would not have been caught if the clinic had closed sooner. According to attorney Mark Melton, who represented Lufkin-area patients and their families, "It is our belief that the upper management of Davita has placed profit over quality healthcare and human life." "And as a result of that, people have suffered, and people have died."[16] On April 28, 2008, the Centers for Medicare and Medicaid Services conducted an on-site, unannounced complaint investigation at the Lufkin clinic and found several systemic problems at the clinic. Investigators reported, among other things:

- "According to the 2007 Dialysis Facility Report provided to the facility in September 2007, the facility had a 27% mortality rate which was greater than the State Average of 19.9%. There was no evidence that 2007 Dialysis Facility Report had been reviewed and analyzed by facility management including the Medical Director to improve patient outcomes or that any plan had been developed, adopted, and implemented to correct poor outcomes."[17]
- "A review of the facility's Adverse Occurrence Reports (AOR) on May 5, 2008 for the period of September 1, 2007 through April 28, 2008 found a total of 114 recorded. On interview 5/6/08 in the treatment room at 4:30 p.m. employees # 2,1 and 4 of the facility stated all of the AOR's for the period of September 1, 2007 through April 28, 2008 were provided to the surveyors. Review of the emergency transfer logs obtained from the two ambulance services available found 68 emergency transports from the facility which were not reported as AOR's as required by facility policy."[18]
- "A total of 24 facility records were reviewed during this survey. Of the 24 patients, 17 were on the facility's dialyzer reuse program. Seventeen of seventeen records of patients on the reuse program did not include accurate documentation of treatments with a reused dialyzer. The daily treatment sheets of patients treated prior to April 17, 2008 did not contain the documentation that the staff had tested the dialyzer to verify that the germicide used in the disinfection process was removed from the dialyzer by running normal saline through the dialyzer. The space on the daily treatment records that is used by the facility for recording that two staff persons had verified that there was no residual germicide present in the dialyzer, was completed with the words "non-reuse." Interview with employee # 1 in the conference room of the facility on May 1, 2008 confirmed that these 17 patients were treated with reuse dialyzers prior to April 17, 2008."[19]

- By its own admission,[20] DaVita was subject to three inquiries by the federal government as of September 30, 2009, one of which is connected with a joint criminal and civil investigation, and the other two are connected with civil investigations. No proceedings had been initiated against the company by the federal government as of September 30, 2009.
  - One civil inquiry, brought by the U.S. Attorney's Office for the Northern District of Georgia and the U.S. Department of Justice in Washington DC, relates to prescription drugs (including Zemplar, Hectorol, Venofer, Ferrlicit and Epogen). Although no charges had been brought against the company as of the end of September 2009, DaVita reported that the allegations were part of a civil qui tam complaint filed by individuals and brought pursuant to the Federal False Claims Act.[21] DaVita claimed of the filings, "Any negative findings could result in substantial financial penalties against us and exclusion from future participation in the Medicare and Medicaid programs."[22]
    - Dialysis companies have been suspected of over-prescribing the anti-anemia drug Epogen over the past several years. Medicare spent almost $2 billion per year on Epogen alone as of 2002, according to the *Boston Globe*. Studies have shown that although 95% of the dialysis clinics in the country administer the drug intravenously, they could use as much as 21% to 30% less of the drug if it were

[15] "Nightmare Nurse: Poisonous Injections Could Net Death Penalty," *CBS News*, July 16, 2009. http://www.cbsnews.com/blogs/2009/07/16/crimesider/entry5165446.shtml
[16] " Could Lawsuit Be Coming Against Davita Dialysis Center?" *KTRE News*, June 24, 2008. http://www.ktre.com/Global/story.asp?S=8550495
[17] DHHS, Center for Medicare & Medicaid Services, OMB No. 0938-0391, Lufkin Dialysis Center. Pg. 8.
[18] DHHS, Center for Medicare & Medicaid Services, OMB No. 0938-0391, Lufkin Dialysis Center. Pg. 10.
[19] DHHS, Center for Medicare & Medicaid Services, OMB No. 0938-0391, Lufkin Dialysis Center. Pg. 13.
[20] According to DaVita's 10-Q for 2Q 09, page 41 (PDF page 46), "We are the subject of a number of inquiries by the federal government. We have received subpoenas from the U.S. Attorney's Office for the Northern District of Georgia, the U.S. Attorney's Office for the Eastern District of Missouri and the U.S. Attorney's Office for the Eastern District of Texas. We are cooperating with the U.S. Attorney's Offices with respect to each of the subpoenas and producing the requested records. Any negative findings could result in substantial financial penalties against us, exclusion from the future participation in the Medicare and Medicaid programs and, in certain cases, criminal penalties. To our knowledge, no proceedings have been initiated by the federal government against us at this time."
[21] DaVita 10-Q for 3rd quarter 2009, pg. 10.
[22] DaVita 10-K for 2008, pg. 31.

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administered subcutaneously.[23] **"'The industry is incentivized to use intravenous because they make a profit margin on every unit they administer,' said Dr. Peter Crooks, who oversees dialysis care for 3,000 patients in Southern California for Kaiser Permanente , a large HMO. Most Kaiser Permanente patients on dialysis in Southern California receive Epogen by injection,"** reports the *Boston Globe.*[24] Critic Dr. Noshi A. Ishak, a kidney specialist in New Hampshire, argues of those that choose intravenous administration, "They do it to milk the system."[25]

  - DaVita has been subpoenaed by the OIG offices in Houston and Dallas related to Medicare claims related to the prescription drug EPO (Epogen) related to services provided between 2001 and 2004.[26] While no proceedings had been brought against DaVita as of December 31, 2008, negative findings could result in financial penalties and exclusion from participation in Medicare and Medicaid.
  - The company faces potential litigation from the U.S. Attorney General's Office for the Eastern District of Missouri in St. Louis, regarding DaVita's use of pharmaceuticals, relations to pharmaceutical companies, and financial relationships with physicians and joint ventures from 12/1/96 to present. Specifically, it relates to the administration and billing of EPO.
- The company is currently defending itself from several wage and hour claims (styled as class action claims) in the Superior Court of California alleging that the company failed to provide various employees with rest and meal periods, failed to pay compensation in lieu of providing rest and meal periods, and failed to comply with other California labor code requirements. DaVita stated that it intends to vigorously defend against these claims and to vigorously oppose the certification of these matters as class actions.[27]

Given the many arguments against granting the application in full at this time, we respectfully request that you:
a) Deny this Certificate of Need application pending revision; or
b) Barring that, do not grant it in full; or
c) Barring a) or b) do not grant it all at once.
Please choose to put the needs of Maui's dialysis community above Kaiser's desire to save money and DaVita's desire to make money.

Sincerely,

Benjamin Sadoski, Research Analyst
Unite Here, Local 5

[23] "Some see profiteering in clinics' use of drug," *The Boston Globe*, October 24, 2006. http://www.boston.com/business/healthcare/articles/2006/10/24/some_see_profiteering_in_clinics_use_of_drug/
[24] "Some see profiteering in clinics' use of drug," *The Boston Globe*, October 24, 2006. http://www.boston.com/business/healthcare/articles/2006/10/24/some_see_profiteering_in_clinics_use_of_drug/
[25] "Some see profiteering in clinics' use of drug," *The Boston Globe*, October 24, 2006. http://www.boston.com/business/healthcare/articles/2006/10/24/some_see_profiteering_in_clinics_use_of_drug/
[26] DaVita 10-K for 2008, pg. 31.
[27] DaVita 10-K for 2008, pg. 32.

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