

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

In the Matter of  
BASF SE,  
a corporation.

Docket No. C-4253

PUBLIC VERSION

**PETITION OF BASF SE**  
**FOR APPROVAL OF PROPOSED DIVESTITURE**

Pursuant to Section 2.41(f) of the Federal Trade Commission (*Commission*) Rules of Practice and Procedure, 16 C.F.R. § 2.41(f) (2002) and Paragraphs II.A and III.A. of the Decision and Order (the *D&O*) issued in this matter and served on June 4, 2009, BASF SE (*BASF*) hereby petitions the Commission to approve: (1) the divestiture of the Ciba IB Business and the Ciba BV Business (together, the *Businesses*) to Dominion Colour Corporation (*DCC*); and (2) the agreements related to such divestiture (the *Petition*).

This Petition incorporates the Definitions set out in the Agreement Containing Consent Orders (the *ACCO*), the *D&O* and the Order to Maintain Assets (the *OMA*) (together, the *Orders*). Except where the context otherwise requires, the defined terms shall have the same meanings where used in this Petition.

**BACKGROUND**

On March 27, 2009, BASF and the Commission entered into the ACCO to settle the Commission's allegations that the proposed acquisition by BASF of Ciba Holding Inc. (*Ciba*) (the *Acquisition*) would have violated federal antitrust laws. The ACCO expressly provides that it does not constitute an admission by BASF that any law has been violated or that the facts (other than jurisdictional facts) as alleged by the Commission in its Complaint are true. On April 2, 2009, the Commission accepted the Orders for public comment. The OMA became effective on April 8, 2009 by service on BASF, as provided for under Paragraph 10 of the ACCO, and the Acquisition was consummated on April 9, 2009. After expiration of the 30-day public comment period,

the Commission on June 4, 2009 finalized the D&O by service on BASF, as provided for under Paragraph 10 of the ACCO.

The Commission's Complaint had alleged that the effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the worldwide markets for the research, development, manufacture and sale of indanthrone blue pigments (*IB Pigments*) and bismuth vanadate pigments (*BV Pigments*), respectively.

Paragraph II.A. of the D&O requires BASF to divest the Ciba IB Business, to assign the Ciba IB Intermediate Supply Contract and Ciba IB Contracts, and to enter into a fully paid-up irrevocable, royalty-free, non-exclusive license for the BASF Blue RS-OPT Intellectual Property, absolutely and in good faith, at no minimum price, by December 4, 2009 (the *IB Divestiture*).

Paragraph III.A. of the D&O requires BASF to divest the Ciba BV Business, by way of divestiture or lease of the Maastricht Plant BV Leased Area or entry into a BV Tolling Agreement, and to assign the Ciba BV Contracts, absolutely and in good faith, at no minimum price, by December 4, 2009 (the *BV Divestiture*).

Paragraphs II.A. and III.A. of the D&O further provide that both the manner of the IB Divestiture and the BV Divestiture (together, the *Divestitures*), and the identity of the IB Acquirer and the BV Acquirer (together, the *Acquirer*), are subject to Commission approval.

BASF desires to complete the Divestitures as soon as possible following Commission approval of such Divestitures and of DCC as the Acquirer, and the satisfaction (or waiver with Commission approval) of the closing conditions set forth in the related agreements. Prompt consummation of the Divestitures will further the purposes of the D&O and is in the interests of the Commission, the public, DCC and BASF, because it will allow DCC to move forward with its business plans for the competitive operation of the Businesses. It will also allow BASF to fulfill expeditiously its obligations under the D&O, and thereby promote the public good.

BASF accordingly respectfully requests that the Commission promptly commence the period of public comment pursuant to Section 2.41(f) of the Commission Rules of Practice and Procedure, 16 C.F.R. § 2.41(f), limit the public comment period to the customary 30-day period, and grant this Petition by approving the Divestitures to DCC, and the related agreements, as soon as practicable after the close of the public comment period.

This Petition explains how the Divestitures satisfy the terms of the D&O.

**THE TERMS OF THE AGREEMENTS ACCOMPLISH FULL DIVESTITURE  
OF THE BUSINESSES**

As indicated above, Paragraphs II.A. and III.A. of the D&O require BASF to divest the Businesses in good faith and at no minimum price on or before December 4, 2009. BASF has agreed to sell to DCC, and DCC has agreed to purchase from BASF, the Ciba IB Business and the Ciba BV Business as reflected in several agreements (the *Agreements*), the closing of which is expressly conditioned upon the Commission's approval. The terms of the Agreements comply with the provisions of the D&O, and the Agreements fully accomplish the Divestitures and divest all assets and assign all rights as required by the D&O.

Subject in each case to adjustments, DCC has agreed to pay BASF [REDACTED] in consideration for the transfer of the Ciba IB Business, and [REDACTED] in consideration for the transfer of the Ciba BV Business.

In respect of the Ciba IB Business, and as contemplated under paragraphs I.MM. and II.C. of the D&O, BASF will continue to manufacture at the Huningue Plant under a tolling arrangement the Ciba IB Pigments for an initial period of [REDACTED], which may be extended at DCC's option (subject to the Commission's prior approval) by up to [REDACTED]. For the duration of the tolling arrangement (and for an additional [REDACTED] at DCC's option), BASF will train DCC employees, and provide to DCC reasonable technical assistance, to manufacture and finish Ciba IB Pigments. BASF agrees to supply to DCC Blue RS-OPT, and agrees to disclose to DCC, and to enter into a fully paid-up irrevocable, royalty-free, non-exclusive license for, the intellectual property to enable DCC to manufacture and produce Blue RS-OPT. BASF receives a license back of the transferred Ciba Intellectual Property in respect only of non-IB Pigments.

The Agreements transferring the Ciba IB Business (*see* confidential Exhibit 1) are:

- the IB Purchase Agreement (carrying out paragraph II.A. and the second proviso of paragraph II.A. of the D&O);
- the IB Intermediate Supply Contract (carrying out in part paragraph II.A. of the D&O);
- the IB Technology License Agreement (carrying out in part paragraph II.A. of the D&O);
- the IB Trademark License Agreement (carrying out the third proviso to paragraph II.A. of the D&O);
- the IB License Back Agreement (carrying out the fourth proviso to paragraph II.A. of the D&O);

- the IB Toll Manufacturing Agreement (carrying out paragraphs II.C., II.D. and II.F.1.b. of the D&O);
- the IB Technical Service Assistance Agreement (carrying out paragraphs II.F.1.a. and II.F.2. of the D&O); and
- the IB Purchase Commitment Agreement.

BASF will also sell to DCC the Ciba BV Business, including the production facilities and assets, technical and laboratory equipment, manufacturing equipment, machinery and other equipment, the inventory (excluding aged inventory) of finished goods, raw materials and work-in-progress, and will transfer to DCC the Maastricht Plant BV Leased Area and buildings under a 99 year lease, together with access to the Maastricht Plant BV Operational Areas for the duration of the lease. Because of its 99-year term, the lease is the functional equivalent of an outright purchase by DCC; moreover, DCC has the right of pre-emption (i.e., the right to purchase the Maastricht Plant BV Leased Area in the event that BASF should seek its sale to a third party) under the BV Maastricht Lease Agreement. Shared services at the site will be provided by BASF, including maintenance and utilities and energy.

For a six-month period after Closing, BASF will provide DCC with certain transition services, including financial and accounting services. BASF receives a license back of the Ciba Intellectual Property in respect only of non-BV Pigments.

The Agreements transferring the Ciba BV Business (*see* confidential Exhibit 2) are:

- the BV Purchase Agreement (carrying out in part paragraph III.A. and paragraph III.B.5. of the D&O);
- the BV Trademark License Agreement (carrying out the second proviso to paragraph III.A. of the D&O);
- the BV License Back Agreement (carrying out the third proviso to paragraph III.A. of the D&O);
- the BV Maastricht Lease Agreement (carrying out paragraphs III.A.2., III.B.1. and in part II.B.2. of the D&O);
- the BV Shared Service Agreement (carrying out paragraphs III.B.6. and II.B.7. of the D&O);
- the BV Transition Service Agreement (carrying out in part paragraph II.B.1.b. and paragraph III.E. of the D&O); and
- the BV Purchase Commitment Agreement.

BASF has diligently pursued and found an Acquirer that it believes should be acceptable to the Commission.

**DCC WILL BE A  
VIABLE, STRONG AND EFFECTIVE COMPETITOR**

The Bureau of Competition's *Study of the Commission's Divestiture Process*<sup>1</sup> (the *Divestiture Study*) and the *Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* (the *Remedies Statement*)<sup>2</sup> each discusses a number of attributes that assist in the identification of a promising divestiture buyer.

As discussed in greater detail below, consideration of all these attributes indicates that DCC is an excellent candidate for ownership of the Businesses. It has: (1) the relevant knowledge and experience; (2) a high degree of commitment to the markets; and (3) the financial and technical resources necessary to successfully run the Businesses.

**DCC Has The Relevant Knowledge And Experience**

According to the Remedies Statement, the requisite attributes of a divestiture buyer can be shown by its "*participation in related product markets or adjacent geographic markets, [or] involvement in up-stream or down-stream markets*".

DCC is a privately held company and was established in 1946; it has been developing, manufacturing, marketing and selling both inorganic and organic color pigments for the last 63 years. From December 1989 to March 2008, DCC was owned by Kikuchi Colour and Chemicals Corporation, a Japanese based pigments and industrial chemicals manufacturer. In March 2008, DCC's four senior managers, led by DCC's President, Mike Klein, purchased DCC. They continue to own 100% of DCC and are engaged full time in management of its operations.

DCC currently has ■■■ employees in Canada and an additional ■■■ employees in the rest of the world. DCC and its personnel have extensive expertise in the research, development, manufacture and production of a full range of inorganic and organic pigments, preparations and dispersions, and anti-corrosive pigments. DCC's current range of products includes organic pigments (high, medium and low performance) and inorganic pigments (DCC has the most extensive line worldwide of chrome yellow and molybdate orange pigments including silica encapsulated, stabilized, pre-darkened, SO2 resistant, and easy dispersing grades).

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<sup>1</sup> A Study of the Commission's Divestiture Process Prepared by the Staff of the Bureau of Competition of the Federal Trade Commission, 1999, *available at*: <http://www.ftc.gov/os/1999/08/divestiture.pdf>.

<sup>2</sup> Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies, 2003, *available at*: <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm#To%20be%20acceptable>.

DCC is a global pigments competitor. It currently markets, distributes and sells organic and inorganic pigments to the coatings, plastics and ink industries in over 75 countries, including the United States and most European countries. DCC's customer base includes both multinational and regional customers. DCC's UK subsidiary, Gemini Dispersions Ltd., sells a wide range of water based pigment dispersions to key coatings and other markets both in Europe and elsewhere. DCC has pigment manufacturing facilities in Ontario (Canada), Valencia (Venezuela), and Xinxiang (China). DCC is known to pigment customers as a reliable global supplier of both inorganic and organic pigments, with a reputation for consistent quality excellence. DCC is certified by QSR to the ISO 9001:2008 standard for its Quality Management System and by SGS to the ISO 14001:2004 standard for its Environmental Management System. These certifications together with DCC's Vision, Purpose and Values are available on DCC's website at [www.domcol.com](http://www.domcol.com).

Since 2000, DCC has completed seven strategic acquisitions of businesses and technologies in the United States, Canada, the UK and Venezuela. The acquired businesses have been successfully integrated into DCC's global operations and attest to DCC's experience in successfully completing and integrating new products and personnel into the DCC group. Since 2000, DCC has also established several strategic alliances in [REDACTED]. These acquisitions and alliances have allowed DCC to grow strategically. In addition, DCC has continued to grow organically through capacity expansion, process and product development, primarily at facilities in Canada.

DCC is particularly strong in the manufacture and sale of lead chromate inorganic pigments (i.e. chrome yellow and molybdate orange). DCC is the largest supplier, and has the most extensive range, of such pigments worldwide, from regular grades, through easy dispersing and stabilized grades, to the leading line of silica encapsulated grades. Given that the market for lead chromate pigments is shrinking due to environmental concerns, BV Pigments are expected to continue to replace certain yellow lead chromate pigments. DCC's experience in the development, manufacture and sale of lead chromate pigments will readily enable it to increase its competitive viability by supplying BV Pigments as substitutes to such lead chromate pigments.

DCC has also developed an extensive range of high performance organic pigments. The IB Pigments are a range of specialty high performance organic pigments, and will complement and expand DCC's existing range of high performance pigments.

DCC has agreed to purchase the assets of the Ciba BV Business, including the manufacturing equipment, systems and other assets, and will continue to operate the Ciba BV Business at the Maastricht Plant, The Netherlands, under a 99 year lease. All [REDACTED] employees of the Ciba BV Business at the Maastricht Plant will transfer to DCC on Closing.

With respect to the Ciba IB Business, BASF will continue to manufacture Ciba IB Pigments at the Huningue Plant, France, under a tolling arrangement. After the

termination of that tolling arrangement, DCC will switch production of the Ciba IB Pigments to [REDACTED].

Through the diligence process and negotiations, DCC has become familiar with both the Businesses, and has the information necessary to assess their respective business potentials and to develop realistic business plans for each of the Businesses. BASF first contacted DCC regarding the Divestitures in February 2009 and has endeavored to provide to DCC all necessary information about the Businesses; DCC first received access to the electronic data room set up for the due diligence on the Businesses in March 2009 and has conducted extensive due diligence of the both the Businesses, including visits to Ciba Basel, Switzerland in June 2009, the Huningue Plant in June 2009, and site visits and inspections in June and August, 2009 of operations and procedures at the Maastricht Plant. Throughout this process, DCC was in frequent contact with BASF's transaction team and received answers to its questions about the Businesses. DCC assessed the Businesses, their geographic reach and their relationship to DCC's strategic plans to expand its inorganic and organic pigment businesses.

DCC sells its pigments to large customers by direct sales and to other customers through its extensive global network of distributors and agents. DCC currently sells pigment products other than BV and IB Pigments to several major customers of the Businesses. DCC's [REDACTED] selling structure [REDACTED] in North America is particularly strong and DCC intends to develop its selling structure [REDACTED] in order to grow in the European market. Earlier in 2009, DCC acquired organic pigment technologies and sales personnel from EC Pigments UK Limited, and prior to Closing DCC will add more marketing, sales and technical support in Europe in order to support the Businesses and to increase further its European presence and commitment.

DCC is experienced in integrating its acquisitions, and is poised to quickly integrate into its operations the Businesses to enable it become a viable competitor in the manufacture and sale of both BV and IB Pigments in North America, Europe and throughout the world.

### **DCC Has A High Degree Of Commitment To The Markets**

The Remedies Statement requires that the buyer has "*the experience, commitment, and incentives necessary*" to achieve the purposes of the Commission's order.

DCC's acquisition of the Businesses is part of its strategic plan to expand its organic and inorganic pigments portfolios and to expand further beyond its North American base. DCC already sells pigments to the coatings market for automotive OEMs, which is one of the principal markets for both IB and BV Pigments, and to suppliers of agriculture and construction equipment; DCC also sells pigments to other markets, which either currently, or could in the future, use IB and BV Pigments.

IB is a specialty high performance organic pigment and has unique color space and light fastness properties. IB Pigments will complement and expand DCC's existing

lines of organic pigments, and will support DCC's long-term strategy of growth and specialization in high performance organics and hybrids, particularly in the automotive coatings market and other important quality-driven markets.

BV is a specialty high performance inorganic pigment and can be used as a substitute for chrome yellow pigments directly and [REDACTED]. The acquisition of the Ciba BV Business is consistent with DCC's long-term strategy to reduce reliance on lead chromate pigments in its product mix. BASF understands that a few years ago DCC developed technology and assessed the feasibility of commencing the production of BV Pigments at its plant in Ajax, Ontario (Canada), but determined that at that time the anticipated rate of return did not warrant investment by DCC. The acquisition of the Ciba BV Business from BASF will enable DCC to enter the BV market and meet its strategic objectives.

DCC has a high degree of commitment to its principal business of the research, development, manufacture and sale of organic and inorganic pigments, and as such also has a high degree of commitment to its acquisition of the Businesses. Moreover, the relative size of the Businesses as compared to DCC's existing businesses indicates that DCC has the opportunity, through the acquisition of the Businesses, to significantly enhance its position in the global color pigment business.

#### **DCC Has The Necessary Financial And Technical Resources**

The Remedies Statement requires that the buyer has the "*financial capability and incentives to acquire and operate the package of assets*".

BASF understands that DCC has submitted its plans for the Businesses and data on its financial resources (including its turnover and the value of its assets) to PricewaterhouseCoopers in Germany and the United States. DCC has not shared such plans and data with BASF.

Nonetheless, DCC has advised BASF that it has increased its lines of credit in Canada in order to finance the future working capital requirements of both Businesses. During the due diligence process, DCC has carefully assessed the operating costs of the Maastricht Plant for the production of BV Pigments, and DCC has also assessed its working capital requirements to support globally sales of the Ciba IB Pigments and the Ciba BV Pigments. BASF understands that DCC will also invest substantial resources to locate sales, marketing and technical-assistance personnel in Europe and elsewhere to support the needs of existing and future customers of the Businesses, as well as investing additional resources in DCC's existing research and development facilities in Ontario (Canada) and laboratories to be located at the Maastricht Plant.

Because of the complex chemistry of the IB Pigments and BV Pigments, and the rigorous quality requirements of customers of both Businesses, the lead time for customers to switch suppliers can be quite long, and in some cases up to 12 months. BASF understands that DCC will use its existing expertise and technical resources,



together with the expertise and technical resources of the Businesses acquired from BASF, to provide continuity of supply and quality IB and BV Pigments to existing customers of the Businesses.

BASF understands that DCC is well financed, and entered the recent economic downturn with minimal borrowings on its operating lines of credit. The economic downturn affected BASF, Ciba, DCC and all other leading pigment manufacturers, particularly those who sell pigments to manufacturers of coatings used by the automotive OEM and industrial markets. With signs that the economic downturn may be ending, DCC remains a strong and viable competitor in the markets for both organic and inorganic pigments.

DCC has the financial resources, proven expertise and incentive to maintain and develop each of the Businesses as a viable and active competitive force in competition with BASF and other competitors.

### **DCC Is Not Currently A Competitor In The Relevant Markets**

The Remedies Statement specifies that the buyer “*should not currently be a significant competitor*” in the relevant market. While DCC has previously engaged in independent research and limited development of IB and BV Pigments and related products, DCC is not currently engaged in the manufacture and/or sale of either IB or BV Pigments. Accordingly, the Divestitures do not create any competition concerns.

### **CONCLUSION**

The divestiture of the Businesses to DCC will accomplish the purposes of the D&O to: (1) ensure the continuation of each of the Businesses as a going concern in the same manner in which it conducted business as of the date of the ACCO, i.e., March 27, 2009; (2) ensure that the Acquirer of the Businesses has the intention and ability to produce (a) the Ciba IB Pigments at a facility independent of BASF, similar to Ciba’s independent production of the IB Pigments, and (b) as an independent producer of the Ciba BV Pigments at the Maastricht Plant; (3) allow the Acquirer, using the IB Toll Manufacturing Agreement, a sufficient amount of time to replicate the certifications and approvals required for the manufacture of the IB Pigments at other manufacturing facilities; and (4) remedy the lessening of competition resulting from the Acquisition alleged in the Commission’s Complaint.

DCC is a global producer and seller of organic and inorganic pigments and possesses the experience and knowledge, commitment and financial and technical resources to be an aggressive, viable and effective competitor as owner of the Businesses. The pre-Acquisition competitive environment will be restored post-Divestiture, because DCC (with the legacy Ciba Businesses) will directly compete with the BASF IB and BV businesses.

Accordingly, BASF hereby respectfully seeks expeditious Commission approval

of the Divestitures to DCC and the Agreements, pursuant to Paragraphs II.A. and III.A. of the D&O.<sup>3</sup>


### REQUEST FOR CONFIDENTIAL TREATMENT

BASF has prepared both a confidential and a non-confidential redacted version of this Petition because the confidential version, together with the attached confidential Exhibits, contains confidential and competitively sensitive business information relating to BASF, DCC, the Businesses and the Divestitures. The disclosure of such information would prejudice BASF and DCC, cause harm to the ongoing competitiveness of the Businesses, and hinder BASF from fulfilling its divestiture obligations under the D&O. BASF has therefore prepared the redacted version of this Petition for public comment.

Pursuant to Sections 2.41(f)(4) and 4.9(c) of the Commission Rules of Practice and Procedure, 16 C.F.R. §§ 2.41(f)(4) and 4.9(c) and the applicable confidentiality provisions of the Hart-Scott-Rodino Antitrust Improvements Act, as amended, 15 U.S.C. § 18a(b), BASF hereby requests, on its own behalf and on the behalf of Ciba and DCC, that the confidential version of this Petition and its Exhibits be afforded confidential treatment. The confidential version of this Petition and its Exhibits also fall within the scope of confidentiality provided by 5 U.S.C. § 552 and Section 4.10(a)(2) of the Commission Rules of Practice and Procedure, 16 C.F.R. § 4.10(a)(2). They are also exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

Dated: October 16, 2009

Respectfully submitted,



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<sup>3</sup> Although the European Commission (EC) must also approve the Divestitures pursuant to Commitments given by BASF to the EC, and merger control notification filings may be required in Brazil and Spain, BASF does not anticipate that the EC approval or such filings will appreciably delay the closing of the acquisition of the Businesses by DCC.

**CONFIDENTIAL EXHIBIT 1**

**IB PURCHASE AGREEMENT**

(Redacted)

**CONFIDENTIAL EXHIBIT 2**

**BV PURCHASE AGREEMENT**

(Redacted)