

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

**COMMISSIONERS: Jon Leibowitz, Chairman
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill**

_____)	
In the Matter of)	
)	
Laboratory Corporation of America)	
Holdings,)	
a corporation,)	
)	Docket No. C-
and)	
)	
Orchid Cellmark Inc.)	
a corporation.)	
_____)	

**DECISION AND ORDER
[Public Record Version]**

The Federal Trade Commission (“Commission”), having initiated an investigation of the acquisition of Respondent Orchid Cellmark Inc. (“Orchid”) by Respondent Laboratory Corporation of America Holdings (“LabCorp”), hereinafter referred to as Respondents, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Laboratory Corporation of America Holdings is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 358 South Main Street, Burlington, North Carolina.

2. Respondent Orchid Cellmark Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 4390 US Route One, Princeton, New Jersey.

3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “LabCorp” means Laboratory Corporation of America Holdings, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by LabCorp, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, LabCorp includes Orchid.
- B. “Orchid” means Orchid Cellmark Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Orchid, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Acquisition” means the acquisition of Orchid by LabCorp.
- D. “Actual Costs” means the cost of labor, material, shipping, travel and other expenditures directly incurred to provide the relevant service. As used herein, the cost of labor for the

use of the labor of an employee of Respondents shall not exceed the average hourly wage rate for such employee.

- E. “Alternative Divestiture Assets” means all assets relating to and used in the provision of Paternity Testing Services by Orchid in the United States, its territories and possessions, as those assets existed prior to the Acquisition, and includes but is not limited to the facility located at 5698 Springboro Pike, Dayton, Ohio 45449, all related real and personal property, the Assigned Agreements, and Books and Records.
- F. “Assigned Agreements” means all contracts and agreements between Orchid and Customers, in effect as of November 10, 2011, for the provision of Paternity Testing Services, including those that are listed in Section 2.01(b) of the Disclosure Schedule attached to the Asset Purchase Agreement, between Respondent LabCorp and DDC, dated as of November 10, 2011, and attached hereto in Non-Public Appendix A.
- G. “Books and Records” means all information relating to the Government Paternity Testing Services Business, including but not limited to all originals and all copies of any books, records, documents, data, and files of any kind (regardless whether the information is stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media and regardless of where the information is stored or maintained) containing or pertaining to such information, including but not limited to operating information, technical information, financial information, accounting information, historic and current pricing and bid information, vendor information, collectors’ information, promotional and marketing information including website content and sales and marketing materials, employment information relating to any Orchid Relevant Employees, and statistical and other data bases. For the avoidance of doubt, Books and Records includes but is not limited to Case Specific Information and Customer Information; for the further avoidance of doubt, Books and Records includes all historical information and is not limited to information relating to the Assigned Agreements.
- H. “Case Specific Information” means all information relating to specific cases generated by Orchid under agreements and contracts with Governmental Entities for the provision of Paternity Testing Services, including but not limited to Samples and Results, chain of custody records, client authorization forms, court orders, affidavits, and other case specific correspondence; for the avoidance of doubt, Case Specific Information includes all case information relating to the Assigned Agreements and to all other past agreements and contracts between Orchid and Governmental Entities prior to the Acquisition for the provision of Paternity Testing Services as well as all case information generated by LabCorp as it maintains the Government Paternity Testing Services Business pursuant to the Order to Maintain Assets and the Transition Services Agreement.
- I. “Certifications” means all accreditations related to the collection, processing or analyzing of paternity tests currently held by Orchid that are necessary for the fulfilling of

government paternity testing contracts including, but not limited to AABB (American Association of Blood Banks).

- J. “Commission” means the Federal Trade Commission.
- K. “Commission-approved Acquirer” means the following:
 - 1. DDC, if DDC has been approved by the Commission to acquire the Divestiture Assets pursuant to Paragraph II. of this Order in connection with the Commission’s determination to make this Order final; or
 - 2. a Person that receives the prior approval of the Commission to acquire the Alternative Divestiture Assets pursuant to Paragraph II. or Paragraph VI. of this Order.
- L. “Confidential Business Information” means any non-public, competitively sensitive, or proprietary information that is not independently known to a Person from sources other than the Person to which the information pertains, and includes, but is not limited to, pricing information, historic and current bid information, marketing methods, market intelligence, competitor information, management system information, business processes and practices, customer communications, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices.
- M. “Consent Agreement” means the Agreement Containing Consent Orders executed by Respondents on November 10, 2011.
- N. “Customer” means any Governmental Entity that is or was a purchaser of any Paternity Testing Services in the United States (including all U.S. territories and possessions) from Orchid, or any Governmental Entity to whom Orchid considered providing or sought to provide Paternity Testing Services in the United States regardless of whether that Governmental Entity purchased such services from Orchid or Orchid actually provided such services.
- O. “Customer Information” means all information relating to Customers, including all originals and all copies of any books, records, documents, data, and files of any kind (regardless of whether the information is stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media and regardless of where the information is stored or maintained) containing or pertaining to such information, including but not limited to, customer lists, rolodex, employee files, Requests for Proposals, Invitations to Bid, proposals, and draft and executed contracts; for the avoidance of doubt, Customer Information includes electronic files maintained on the computers of Orchid Relevant

Employees even if the computers are to be retained by Respondents, and includes all historical information.

- P. “DDC” means DNA Diagnostics Center, located at DNA Technology Park, One DDC Way (Formerly 205 Corporate Court) in Fairfield, Ohio.
- Q. “DDC Divestiture Agreement” means the Divestiture Agreement entered into between Respondent LabCorp and DDC.
- R. “Decision and Order” means:
1. the Proposed Decision and Order contained in the Consent Agreement in this matter until issuance and service of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued by the Commission following issuance and service of a final Decision and Order by the Commission.
- S. “Divestiture Agreement” means the following, which with respect to DDC is referenced in and attached to this Order as Non-Public Appendix A:
1. Asset Purchase and Sale Agreement;
 2. Transition Services Agreement; and
 3. all other agreements by the Commission-approved Acquirer and Respondents, including all amendments, exhibits, attachments, agreements and schedules thereto, related to the divestiture of the Divestiture Assets.
- T. “Divestiture Assets” means all right, title, interest of Respondents in and to the following:
1. Equipment;
 2. Books and Records; and
 3. at the option of the Commission-approved Acquirer and with the approval of the Commission, Certifications.
- U. “Equipment” means all laboratory equipment and all other equipment and furniture located at Orchid’s facility relating to the provision of Paternity Testing Services to Governmental Entities as it existed prior to the Acquisition that the Commission-approved Acquirer chooses to acquire and that the Commission approves acquiring; for the avoidance of doubt, the Equipment to be divested to DDC shall not include computers, servers or other hardware, telephones, and phone systems.
- V. “Governmental Entity(ies)” means any federal, state, local, or governmental entity (including Native American tribal authorities) in the United States; any court, legislature,

governmental agency or governmental commission; or any judicial or regulatory authority of any government in the United States, its territories and possessions.

- W. “Government Paternity Testing Services Business” means Orchid’s business of providing Paternity Testing Services to Governmental Entities, as that business existed prior to the Acquisition, and as that business is maintained by LabCorp after the Acquisition pursuant to the Order to Maintain Assets and the Transition Services Agreement. Government Paternity Testing Services Business includes any business that the Commission-approved Acquirer obtains during the term of the Transition Services Agreement. Government Paternity Testing Services Business also includes the formulation of bids and bidding for the business of providing Paternity Testing Services to Governmental Entities regardless of whether the bids are submitted or won.
- X. “Orchid Relevant Employees” means all employees of Orchid prior to the Acquisition who have responsibilities for Paternity Testing Services to Government Entities; for the avoidance of doubt, Orchid Relevant Employees may also have joint responsibilities for other businesses of Orchid, including Paternity Testing Services for private purposes.
- Y. “Order” means this Decision and Order.
- Z. “Paternity Testing Services” means DNA testing that is used to establish that two or more people are genetically related.
- AA. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business entity, and any subsidiaries, divisions, groups or affiliates thereof.
- BB. “Samples and Results” means DNA samples associated with the Government Paternity Testing Services Business and reports in hard copy and electronic form of results of tests conducted using those samples
- CC. “Respondents” means LabCorp and Orchid, individually and collectively.
- DD. “Third Party(ies)” means any Person other than the following: (1) the Respondents, or (2) the Commission-approved Acquirer.
- EE. “Transition Services” means any transitional services related to or necessary for the continuation of the provision of Paternity Testing Services to Governmental Entities by the Commission-approved Acquirer.
- FF. “Transition Services Agreement(s)” means any agreement or arrangement entered into by and between the Respondents and a Commission-approved Acquirer to provide Transition Services that receives the prior approval of the Commission and thereby

becomes a Divestiture Agreement, or that is otherwise approved by the Commission in connection with the Commission's determination to make this Order final.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall:
1. divest the Divestiture Assets no later than ten (10) days after the Acquisition, absolutely and in good faith to DDC, pursuant to and in accordance with the DDC Divestiture Agreement; *provided, however*, that the timing of the delivery of specific Divestiture Assets to DDC shall be determined by DDC; and
 2. sell, assign, transfer, convey, and deliver all right, title and interest in the Assigned Agreements to the Commission-approved Acquirer, consistent with the terms of the Assigned Agreements, at a time determined in the sole discretion of the Commission-approved Acquirer (and, with respect to DDC, pursuant to and in accordance with the DDC Divestiture Agreement); and shall:
 - a. use good faith efforts to secure all necessary consents, orders, authorizations, and approvals in connection with the Assigned Agreements;
 - b. cooperate with the Commission-approved Acquirer's efforts to secure the required consents, orders, authorizations, and approvals;
 - c. not interfere with the efforts of the Commission-approved Acquirer to secure the required consents and approvals; and
 - d. indemnify, defend and hold harmless the Commission-approved Acquirer, its employees, officers, directors, shareholders, partners, members, attorneys, accountants, agents and representatives and their heirs, successors and permitted assigns against, and reimburse any such person for, any and all losses, damages, costs, expenses, liabilities, obligations, and claims of any kind that such person may at any time suffer or incur as a result of or in connection with Respondents' failure to comply with their obligations pursuant to the Assigned Agreements.

provided further that:

3. if Respondents have divested any of the Divestiture Assets or sold, assigned, transferred, conveyed, or delivered and rights, title, or interests in any Assigned Agreements to DDC prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies

Respondents that:

- a. DDC is not an acceptable acquirer of the Divestiture Assets, then Respondents shall immediately rescind the transaction with DDC and shall:
 - (1) divest the Divestiture Assets to a Commission-approved Acquirer no later than sixty (60) days from the date the Commission notifies Respondents that DDC is not an acceptable acquirer, and sell, assign, transfer, convey, and deliver all right, title and interest in the Assigned Agreements to the Commission-approved Acquirer and otherwise comply with the obligations of Paragraph II.A.2.; and
 - (2) if Respondents fail to divest to a Commission-approved Acquirer as required by Paragraph II.A.3.a.(1), then the Commission may appoint a Divestiture Trustee pursuant to Paragraph VI. to divest the Alternative Divestiture Assets, absolutely and in good faith, at no minimum price, and only in a manner that receives the prior approval of the Commission to a Commission-approved Acquirer; or
 - b. the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph VI. of this Order, to effect such modifications to the manner of divesting the Divestiture Assets to DDC (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. Notwithstanding the divestiture obligations in Paragraph II.A above, after the transfer of all Books and Records, LabCorp may retain a copy of Case Specific Information but only under the following conditions:
1. all Case Specific Information retained by LabCorp shall be maintained in a secure location within the legal offices of LabCorp and accessible only through authorized members of the legal staff;
 2. Case Specific Information shall be used for the purpose only of defending lawsuits or responding to investigations, subpoenas or claims brought against LabCorp relating to the provision of Paternity Testing Services as verified by authorized members of the legal staff; for the avoidance of doubt, no Case Specific Information shall be used for bidding on the provision of Paternity Testing Services by LabCorp, for formulating such bids to provide Paternity Testing Services by LabCorp, for the provision of Paternity Testing Services by

LabCorp, or for any other competitive purpose;

3. if Respondents require access to Case Specific Information, Respondents shall provide notice to the Commission at the same time that Respondents request access from the legal staff. Such notice shall identify the specific information being requested and shall include an explanation of Respondents' need for the information. Such notice shall be made to the Commission's Secretary, pursuant to the Commission's Rules of Practice, and a copy of such notice shall be given simultaneously to the Commission's Bureau of Competition, Compliance Division; and
 4. all Case Specific Information shall otherwise be maintained consistent with the document retention policies of LabCorp.
- C. Respondents shall provide Transition Services to the Commission-approved Acquirer, at the option of the Commission-approved Acquirer, and shall enter into an appropriate Transition Services Agreement to provide Transition Services to the Commission-approved Acquirer, subject to the approval of the Commission at no more than Respondent's Actual Cost; *provided, however*, that Respondents and the Commission-approved Acquirer shall not modify or amend such Transition Services Agreement without the prior approval of the Commission.
- D. For two (2) years after the Commission-approved Acquirer assumes the obligations under the Assigned Agreements, Respondents shall not join, file, or prosecute any suit, in law or equity, or initiate any other action (such as an action to protest the award of a bid), against a Governmental Entity with whom the Commission-approved Acquirer has entered into an agreement to provide Paternity Testing Services -- or against the Commission-approved Acquirer -- the subject of which is the legality or validity of such agreement entered into any time after the Respondents execute the Agreement Containing Consent Orders.
- E. The purpose of the divestiture of the Divestiture Assets and the additional requirements in this Order is to ensure the continuation of Orchid's Government Paternity Testing Services Business as a viable, on-going, independent and competitive business, in the same line of commerce in which the business was engaged at the time of the Acquisition, and to ensure that the Commission-approved Acquirer is able to bid effectively in the future to provide Paternity Testing Services to Governmental Entities in order to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondents shall:

- A. Not later than fifteen (15) days after signing the Divestiture Agreement, provide an opportunity for the proposed Commission-approved Acquirer:
 - 1. to meet personally, and outside the presence or hearing of any employee or agent of any Respondents, with any one or more of the Orchid Relevant Employees; and
 - 2. to make offers of employment to any one or more of the Orchid Relevant Employees;
- B. Not interfere, directly or indirectly, with the proposed Commission-approved Acquirer's hiring or employing of the Orchid Relevant Employees;
- C. Remove any impediments or incentives within the control of Respondents that may deter Orchid Relevant Employees from accepting employment with the proposed Commission-approved Acquirer or that may affect the ability of any Orchid Relevant Employee to work for the proposed Commission-approved Acquirer, including but not limited to removing any non-competes relating to Paternity Testing Services; and Respondents shall not make any counteroffer to an Orchid Relevant Employee who receives a written offer of employment from the proposed Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;
- D. Provide all Orchid Relevant Employees with reasonable financial incentives to continue in their positions until those Orchid Relevant Employees that accept offers of employment from the Commission-approved Acquirer become employees of the Commission-approved Acquirer. Such incentives shall include but are not limited to a continuation of all employee benefits (including offering Orchid Relevant Employees the same employee benefits available to LabCorp employees prior to the Acquisition), including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by law and for those Orchid Relevant Employees covered by a pension plan), offered by Respondents; and

- E. Not, for a period of one (1) year following the date that each Orchid Relevant Employee becomes an employee of the Commission-approved Acquirer, directly or indirectly, solicit or otherwise attempt to induce any such Orchid Relevant Employee to terminate his or her employment with the Commission-approved Acquirer; *provided, however*, that Respondents may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Orchid Relevant Employees; or
 2. hire Orchid Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph III.E.; *provided further, however*, that this Paragraph III.E. shall not prohibit Respondents from making offers of employment to or employing any Orchid Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer.
- F. Notwithstanding the above, Respondents shall:
1. provide the proposed Commission-approved Acquirer an opportunity to meet personally, and outside the presence or hearing of any employee or agent of any Respondents, with any person who was an employee of Orchid prior to the Acquisition, whose responsibilities related solely to the provision of Paternity Testing Services to private parties, and who either was not offered employment with Respondents or has declined an offer of employment with Respondents;
 2. provide the proposed Commission-approved Acquirer an opportunity to make offers of employment to such employees;
 3. not interfere, directly or indirectly, with the proposed Commission-approved Acquirer's hiring or employing of such employees; and
 4. remove any impediments or incentives within the control of Respondents that may deter such employees from accepting employment with the proposed Commission-approved Acquirer or may affect the ability of such employee to work for the proposed Commission-approved Acquirer, including but not limited to removing any non-competes relating to Paternity Testing Services.

IV.

IT IS FURTHER ORDERED that:

- A. Except as required by Paragraph II.B., above, and Paragraph IV.B., below, Respondents shall not request, receive, solicit, or access, directly or indirectly, any Confidential Business Information of the Government Paternity Testing Services Business, or Books and Records (or any information contained therein), and shall not use, disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such information, directly or indirectly, to or with any Person other than as necessary to comply with and consistent with the requirements of the Decision and Order, the Order to Maintain Assets, or the Divestiture Agreement.

- B. To the extent any Confidential Business Information of the Government Paternity Testing Services Business or Books and Records (or the information contained therein) are made available to Respondents for the limited purposes identified in Paragraph IV.A. (and except as required by Paragraph II.C, above):
 - 1. such information and Books and Records (or the information contained therein) shall be made available only to Respondents' employees who have direct responsibilities for the Government Paternity Testing Services Business; and
 - 2. no employee of Respondents who is an employee of Respondents after the Acquisition shall use any Confidential Business Information of the Government Paternity Testing Services Business or Books and Records (or the information contained therein) to formulate a bid in connection with the provision of Paternity Testing Services to a Governmental Entity by Respondents, to bid on the provision of such services by Respondents, or to provide such services by Respondents except as is required by the Decision and Order, the Order to Maintain Assets, or the Divestiture Agreement.

- C. Respondents shall:
 - 1. require, as a condition of continued employment post-divestiture, that each of Respondents' employees who had or have access to or possession, custody or control of any Confidential Business Information of the Government Paternity Testing Services Business or Books and Records (or the information contained therein) sign a confidentiality agreement no later than twenty (20) days after the Acquisition that complies with the restrictions, prohibitions and requirements of the Decision and Order and the Order to Maintain Assets and that prohibits Respondents' employees from using or disclosing such information in connection with Respondents' businesses; and

2. no later than ten (10) days after the Acquisition implement procedures and take such actions as are necessary to ensure that Respondents' employees comply with the restrictions, prohibitions and requirements of this Paragraph IV., including all actions that Respondents would take to protect their own confidential information.
- D. Respondents shall provide access to the Commission-approved Acquirer, solely at the option of the Commission-approved Acquirer and in the manner determined by the Commission-approved Acquirer, to employees of Orchid as it existed prior to the Acquisition who have or had access to Confidential Business Information of the Government Paternity Testing Services Business or to Books and Records (or the information contained therein), who become employees of Respondents after the Acquisition, to obtain Confidential Business Information of the Government Paternity Testing Services Business or Books and Records (or the information contained therein).

V.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Divestiture Agreement, including but not limited to using good faith efforts to secure all required consents and approvals.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant requirements of this Order and the Divestiture Agreement in a manner consistent with the purpose of this Order.
- D. If a Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 1. The Monitor shall have the power and authority to monitor Respondents' compliance with this Order and the Divestiture Agreement and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission and shall not be considered an employee or agent of Respondents.
3. The Monitor shall serve until the Commission-approved Acquirer has assumed all responsibilities under the Assigned Agreements in a manner that fully satisfies the requirements of this Order and the Divestiture Agreement and notification by the Commission-approved Acquirer to the Monitor that it is fully capable of providing service under those agreements; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purpose of this Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under this Order and the Divestiture Agreement, including but not limited to their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with this Order or the Divestiture Agreement.
5. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
6. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondents shall report to the Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under this Order or

the Divestiture Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order and the Divestiture Agreement.

- E. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph V.
- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- I. The Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order or as a Monitor pursuant to the Order to Maintain Assets.

VI.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations imposed by Paragraph II. of this Order (or if the Commission determines that DDC is not an acceptable purchaser and Respondents have not complied with Paragraph II.A.3.a. of this Order), the Commission may appoint a trustee ("Divestiture Trustee") to divest the Alternative Divestiture Assets absolutely and in good faith, at no minimum price, and to comply with Respondents' other obligations in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant

to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, and have stated in writing their reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraph II. or believes that such can be achieved within a reasonable time, the period may be extended by the Commission; *provided, however,* that the Commission may extend the period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VI.D. in an amount equal to the delay,

as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a Commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
 - F. The Commission may on its own initiative or at the request of the Divestiture Trustee, issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
 - G. The Divestiture Trustee appointed pursuant to this Paragraph VI. may be the same person appointed as Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

VII.

IT IS FURTHER ORDERED that:

- A. The Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order or the Order to Maintain Assets, it being understood that nothing in this Order or the Order to Maintain Assets shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreement.
- B. The Divestiture Agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents' obligations under this Order.

VIII.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the Acquisition, and every thirty (30) days thereafter until Respondents have divested the Divestiture Assets and the Transition Services Agreement has terminated, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order and the Order to Maintain Assets. Respondents shall submit at the same time a copy of their report concerning compliance with this Order and the Order to Maintain Assets to the Monitor, if any Monitor has been appointed under either this Order or the Order to Maintain Assets.
- B. Respondents shall include in their reports, among other things that are required from time to time:
 - 1. a full description of the efforts being made to comply with this Order and the Order to Maintain Assets;
 - 2. if DDC is not approved by the Commission pursuant to Paragraph II.A., a description of all substantive contacts or negotiations related to the divestiture of the Divestiture Assets and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing their obligations pursuant to Paragraph II. of this Order.

IX.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger or consolidation of Respondents, or (3) any other change in the Respondents that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or

under the control of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date on which this Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED:

**Non-Public Appendix A
Divestiture Agreement**

[Incorporated By Reference, But Redacted From Public Record Version]