

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

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

In the Matter of

**DAVITA INC.,
a corporation.**

Docket No. C-4334

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by DaVita Inc. of CDSI I Holding Company, Inc. (“DSI”), and DaVita Inc. (hereafter referred to as “Respondent DaVita”) 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 Respondent DaVita 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

Respondent DaVita, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent DaVita 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 Respondent DaVita 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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, 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 issues its Complaint, makes the following jurisdictional findings, and issues the following Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent DaVita Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1551 Wewatta St. Denver, Colorado 80202.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent DaVita, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that all capitalized terms used in this Hold Separate Order, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders, the following definitions shall apply:

- A. “DaVita Clinics” means the DaVita-owned Clinics listed in Appendix A to the Decision and Order and the DaVita Clinics in Non-Public Appendix F to the Decision and Order.
- B. “Decision and Order” means:
 1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- C. “Divestiture Date” means the earliest date on which all of the of the divestitures required by the Decision and Order have been completed.
- D. “Hold Separate Period” means the time from the Effective Date until one day after the Divestiture Date.
- E. “Hold Separate Trustee” ”i2800 0.0000 TD5e Per

II. (Asset Maintenance)

IT IS FURTHER ORDERED that:

- A. From the date Respondent DaVita signs the Consent Agreement until the Divestiture Date, Respondent DaVita shall:
1. Maintain each of the DaVita Clinics and all Assets Associated with such Clinics in substantially the same condition (except for normal wear and tear) existing at the time Respondent DaVita signs the Consent Agreement;
 2. Take such actions that are consistent with the past practices of Respondent DaVita in connection with each of the DaVita Clinics and the Assets Associated with each and that are taken in the Ordinary Course Of Business and in the normal day-to-day operations of Respondent DaVita;
 3. Keep available the services of the current officers, employees, and agents of Respondent DaVita; and maintain the relations and good will with Suppliers, Payors, Physicians, landlords, patients, employees, agents, and others having business relations with the DaVita Clinics and the Assets Associated with them in the Ordinary Course Of Business;
 4. Preserve the DaVita Clinics and all Assets Associated with them as an ongoing businesses and not take any affirmative action, or fail to take any action within Respondent DaVita's control, as a result of which the viability, competitiveness, and marketability of the DaVita's Clinics or the Assets Associated with them would be diminished;
- B. From the date Respondent DaVita signs the Consent Agreement until the Divestiture Date, Respondent DaVita shall:
1. Not object to the sharing with the Acquirer the Payor and Supplier contract terms Relating To the Clinics To Be Divested: (i) if the Payor or Supplier consents in writing to such disclosure upon a request by the Acquirer, and (ii) if the Acquirer enters into a confidentiality agreement with Respondent DaVita not to disclose the information to any third party; and
 2. Cooperate with the Acquirer and assist the Acquirer, at no cost to the Acquirer, in obtaining all Third Party Approvals and Government Approvals For Divestiture, and all Government Approvals For Continued Operation, for each Clinic To Be Divested.
- C. The purposes of this Paragraph II are to: (1) preserve the DaVita Clinics as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the relevant

divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed DaVita-DSI Acquisition as alleged in the Commission's Complaint.

III. (DSI Hold Separate)

IT IS FURTHER ORDERED that:

A. From the Effective Date until the until the Divestiture Date, Respondent DaVita shall hold the entirety of DSI separate, apart, and independent of Respondent DaVita. To hold DSI separate, Respondent DaVita shall, among other things:

1. Not offer DSI employees positions with Respondent DaVita, other than continuing the positions they have within DSI; and
2. Do nothing to prevent or discourage suppliers that, prior to the Effective Date, supplied goods and services to DSI from continuing to supply goods and services to DSI.

PROVIDED, HOWEVER, that Respondent DaVita may divest any of the Appendix A Clinics to the Acquirer during the Hold Separate Period once all the approvals for divestiture pursuant to the Consent Agreement have been satisfied.

B. At any time after the Effective Date, the Commission may appoint a Hold Separate Trustee to assure that DSI is held separate from Respondent DaVita.

1. The Commission shall select the Hold Separate Trustee, subject to the consent of Respondent DaVita which consent shall not be unreasonably withheld. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of a proposed Hold Separate Trustee within five (5) business days after 0(s)Tj4.680840ye0000FD DaVi

4. Respondent DaVita shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Hold Separate Trustee:
 - a. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate Order and the Decision and Order, for monitoring the organization of DSI, for managing DSI through the Manager; for maintaining the independence of DSI; and for monitoring Respondent DaVita's compliance with its obligations pursuant to the Orders.
 - b. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of DSI or to any other relevant information as the Hold Separate Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent DaVita in the ordinary course of business that relate to DSI. Respondent DaVita shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent DaVita shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent DaVita's compliance with the Orders or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.
 - c. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent DaVita, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
 - d. The Commission may require the Hold Separate Trustee, and Persons hired by the Hold Separate Trustee, to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
 - e. Respondent DaVita may require the Hold Separate Trustee, and Persons hired by the Hold Separate Trustee, to sign a confidentiality agreement prohibiting the disclosure of any Confidential Business Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
 - f. Thirty (30) days after the appointment of the Hold Separate Trustee pursuant to this Paragraph III.B., and every thirty (30) days thereafter until the Hold Separate Order terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate Order. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses comprising DSI are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly pr

- g. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Hold Separate Trustee consistent with the terms of this paragraph, subject to the consent of Respondent DaVita, which consent shall not be unreasonably withheld. If Respondent DaVita has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent DaVita of the identity of any substitute Hold Separate Trustee, Respondent DaVita shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent DaVita and the substitute Hold Separate Trustee shall execute a new Hold Separate Trustee Agreement, subject to the approval of the Commission, consistent with this Pre

Hold Separate Trustee or Commission staff, may request Respondent DaVita to, and Respondent DaVita shall, appoint a substitute person, which person the Manager shall have the right to approve.

7. In addition to those employees within DSI, the Manager may employ such Persons as are reasonably necessary to assist the Manager in managing DSI.
8. The Commission staff or the Hold Separate Trustee, in consultation with the Commission staff, shall be permitted, to remove the Manager for cause. Within fifteen (15) da

2. all approvals by joint venture partners necessary for the Acquirer to acquire the Appendix A Clinics that are

VI. (Facilitate Hiring)

IT IS FURTHER ORDERED that From the time Respondent DaVita signs the Agreement Containing Consent Order until sixty (60) days after the Time Of Divestiture of each Clinic To Be Divested or until January 3, 2012, whichever is later,:

- A. Respondent DaVita (which includes the Hold Separate Manager where applicable during the Hold Separate Period) shall:
1. if requested by the Acquirer, facilitate interviews between each Designated DaVita Employee and the Acquirer, and shall not discourage such employee from participating in such interviews;
 2. not interfere in employment negotiations between each Designated DaVita Employee and the Acquirer;
 3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict the Designated DaVita Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated DaVita Employee to decline employment with the Acquirer;
 4. cooperate with the Acquirer of the Clinic in effecting transfer of the Designated DaVita Employee to the employ of the Acquirer, if the Designated DaVita Employee accepts such offer of employment from the Acquirer;
 5. eliminate any contractual provisions or other restrictions that would otherwise prevent the Designated DaVita Employee from being employed by the Acquirer;
 6. eliminate any confidentiality restrictions that would prevent the Designated DaVita Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information Relating To the Operation Of The Clinic; and
 7. pay, for the benefit of any Designated DaVita Employee who accepts employment with the Acquirer, all accrued bonuses, vested pensions and other accrued benefits.

PROVIDED, HOWEVER, that if, at any time after the Time of Divestiture, the Acquirer gives Respondent DaVita an unsolicited list of employees from the Non-Public Appendix G of the Decision and Order to whom the Acquirer does not intend to offer employment, then such employees may be hired by Respondent DaVita as full time employees without violating this Paragraph VI. *PROVIDED, FURTHER, HOWEVER*, that no earlier than fifteen (15) days after the Time of Divestiture, Respondent DaVita may submit a written request to the Acquirer identifying those persons from the Non-Public Appendix G of the Decision and Order to whom Respondent DaVita wishes to offer full time employment; and if the Acquirer within fifteen (15) days of receipt of such request grants, in writing, such request, then Respondent DaVita may offer employment to such employees; but if the Acquirer within fifteen (15) days of receipt of such request either: (i) chooses to hire

such employees, or (ii) chooses to defer a hiring decision and keep the requested employees on the Non-Public Appendix G, then Respondent DaVita shall continue to comply with the terms of this Paragraph VI. with regard to such employees..

- B. With respect to each Physician who has provided services to a Clinic To Be Divested pursuant to any of the Clinic's Physician Contracts in effect at any time during the four (4) months preceding the Time Of Divestiture of the Clinic ("Contract Physician"), DaVita shall not offer any incentive to the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group to decline to provide services to the Clinic To Be Divested, and shall eliminate any confidentiality restrictions that would prevent the Contract Physician, the Contract Physician's practice group, or other members of the Contract Physician's practice group from using or transferring to the Acquirer of the Clinic To Be Divested any information Relating To the Operation Of The Clinic.

VII. (Confidentiality)

IT IS FURTHER ORDERED that:

- A. From the Effective Date until the Divestiture Date:
 - 1. Respondent DaVita shall not permit any of its employ

to Respondent DaVita’s employees, other than those employees operating DSI pursuant to this Hold Separate Order.

5. Respondent DaVita shall institute procedures and requirements to ensure that:

- a. Confidential Business Information Related to DSI is not provided to, or obtained by, Respondent DaVita’s employees, other than those employees operating DSI pursuant to this Hold Separate Order;
- b. Respondent DaVita employees with access to Confidential Business Information Relating To DSI do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Hold Separate Order; and
- c. Respondent DaVita’s employees, other than those employees operating DSI pursuant to this Hold Separate Order, do not solicit, access or use any Confidential Business Information that they are prohibited under this Hold Separate Order from receiving for any reason or purpose.

B. From the Effective Date until the Divestiture Date, Respondent DaVita shall require any Persons with access to Confidential Business Information Relating To the DSI to not to disclose any Confidential Business Information Relating To DSI to Respondent DaVita or to any third party except as otherwise permitted by this Hold Separate Order.

C. DaVita shall:

- 1. not disclose Confidential Business Information relating exclusively To Be Divested to any Person other than the Acquirer of such Clinic;
- 2. after the Time Of Divestiture of such Clini
 - a. D l n l x of the Clinics To Be Divested for any purpose other than complying with the terms of this Order or with any law; and
 - b. DaVita shall destroy all records of Confidential Business Information relating exclusively to any of the Clinics To Be Divested , exTD0.0600 TFD0.0600 TFD0.0600 TFD0.0600 the extent that: (1) DaVita is required by law to retain such information, and (2) DaVita’s inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of DaVita.

D. The purposes of this Paragraph IV are to: (1) preserve DSI as a viable, competitive, and ongoing business independent of Respondent DaVita until the divestit q t u b h Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondent DaVita and DSI, except in accordance with the provisions

of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed DaVita-DSI Acquisition as alleged in the Commission's Complaint.

VIII. (Monitor)

IT IS FURTHER ORDERED that:

- A. Richard Shermer of R. Shermer & Co. shall be appointed Monitor to assure that Respondent DaVita expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Hold Separate Order and the Decision and Order.
- B. No later than one (1) day after the Effective Date, Respondent DaVita shall, pursuant to the Monitor Agreement, attached as Appendix A and Confidential Appendix A-1, and to this Hold Separate Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform their duties and responsibilities in a manner consistent with the purposes of this Hold Separate Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent DaVita, which consent shall not be unreasonably withheld. If Respondent DaVita has 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 Respondent DaVita of the identity of any proposed Monitor, Respondent DaVita shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent DaVita shall execute an agreement that, subject to the prior a

- b. Monitoring any transition services agreements;
 - c. Assuring that Confidential Business Information is not received or used by Respondent DaVita or the Acquirer, except as allowed in this Hold Separate Order and in the Decision and Order, in this matter.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve for such time as is necessary

8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent DaVita of its obligations under this Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
 9. Respondent DaVita 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*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. 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 Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
 - F. 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 VIII.
 - G. 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 Hold Separate Order, the Decision and Order, and the Divestiture Agreements.
 - H. The Monitor appointed pursuant to this Order may be the same Person appointed as a Hold Separate Trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Monitor or Divestiture Trustee under the Decision and Order.

IX. (Compliance Reports)

IT IS FURTHER ORDERED that within thirty (30) days after the date this Hold Separate Order becomes final, and every sixty (60) days thereafter until the Hold Separate Order terminates, Respondent DaVita shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Hold Separate Order and the related Decision and Order; *PROVIDED, HOWEVER*, that, after the Decision and Order in this matter becomes final, the reports due under this Hold Separate Order shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent DaVita pursuant to the Decision and Order.

X. (Change in DaVita)

IT IS FURTHER ORDERED that Respondent DaVita shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of DaVita,
- B. Any proposed acquisition, merger or consolidation of DaVita, or
- C. Any other change in DaVita 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 DaVita.

XI. (Access)

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent DaVita, DaVita shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of DaVita 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. DaVita shall permit any

APPENDIX A
MONITOR AGREEMENT

NON-PUBLIC APPENDIX A-1

MONITOR COMPENSATION

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