

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-4341
and)	
)	
Orchid Cellmark Inc.)	
a corporation.)	
)	
_____)	

ORDER TO MAINTAIN ASSETS
[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 Orders (“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 determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order 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 Maintain Assets:

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 to Maintain Assets, all definitions used in the Consent Agreement and the Decision and Order, shall apply.

II.

IT IS FURTHER ORDERED that Respondents shall, from the time Respondents execute the Agreement Containing Consent Orders until the Divestiture Assets are divested, the Assigned Agreements are assigned, and the Commission-approved Acquirer has assumed all responsibilities under the Assigned Agreements:

- A. Take all actions necessary to maintain, and ensure the continued maintenance of, the viability, marketability and competitiveness of the Government Paternity Testing Services Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets or the Government Paternity Testing Services Business, except for ordinary wear and tear, and shall not sell, transfer, encumber or otherwise impair the Government Paternity Testing Services Business (except as required by the Decision and Order);

- B. Perform Paternity Testing Services as required by each Assigned Agreement from the time Respondents execute the Agreement Containing Consent Orders:
1. in the performance of these services:
 - a. Respondents shall perform the services in a professional manner consistent with the terms of each Assigned Agreement, and
 - b. Respondents shall use a degree of care and diligence that is no less than the same degree of care and diligence used by Respondents when engaged in similar activities with respect to the performance of Paternity Testing Services;
 2. Respondents shall provide the services required by the Assigned Agreements at the Orchid facility at 5698 Springboro Pike, Dayton, Ohio 45449, until the earlier of:
 - a. thirty (30) days after the date on which DDC has assumed responsibilities under Assigned Agreements that represent 80% of the total number of tests performed under the Assigned Agreements during the twelve month period ending on September 30, 2011, or
 - b. September 30, 2012;
- C. Maintain relations and good will with all third party contractors, agents, and others having business with Orchid prior to the Acquisition and with Respondents after the Acquisition in connection with the Government Paternity Testing Services Business;
- D. No later than ten (10) days after Respondents execute the Agreement Containing Consent Orders appoint Kathy Leis, Director of Operations, to manage and operate the Government Paternity Testing Services Business in the regular and ordinary course of business and consistent with and in accordance with past practices, and to monitor Respondents' compliance with their obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements:
1. such Manager shall report directly to the Commission staff on a regular basis (timing and method of reporting to be determined in consultation with Commission staff) with no interference from Respondents;
 2. the Manager shall not be involved, in any way, in the operations of the other businesses of Respondents during the term of this Order to Maintain Assets;
 3. the Manager shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives

and assistants as the Manager chooses and are reasonably necessary to carry out the Manager's duties and responsibilities;

4. Respondents shall assure that Commission staff shall have access to and be permitted to communicate with, contact, and be contacted by the Manager without prior notice to Respondents or the presence of Respondents' employees or counsel, except as expressly required by law;
5. No later than three (3) days after appointment of the Manager, Respondents shall enter into a management agreement with that Manager that, in consultation with the Commission staff, transfers all rights, powers, and authority necessary to permit the Manager to perform his or her duties and responsibilities pursuant to this Order to Maintain Assets, in a manner consistent with the purposes of the Order to Maintain Assets and the Decision and Order; and
6. Respondents shall provide the Manager with reasonable financial incentives to undertake this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the Government Paternity Testing Services Business's viability, marketability and competitiveness until the Divestiture Assets are divested, the Assigned Agreements are assigned, and the Commission-approved Acquirer has assumed all responsibilities under the Assigned Agreements, and as may otherwise be necessary to achieve the purposes of the Order to Maintain Assets and the Decision and Order.
7. In the event that the Manager ceases to act as Manager, then Respondents shall select a substitute Manager, in consultation with and subject to the approval of Commission staff, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his or her duties and responsibilities, pursuant to this Order to Maintain Assets.

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 of those 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 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. of the Decision and Order, 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.B. of the Decision and Order):
 - 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 performs all of their responsibilities as required by this Order to Maintain Assets and the Divestiture Agreement.
- 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 to Maintain Assets in a manner consistent with the purpose of this Order to Maintain Assets.
- 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 the Order to Maintain Assets 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 to Maintain Assets 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 to Maintain Assets 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 to Maintain Assets.
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 its obligations under this Order to Maintain Assets and the Divestiture Agreement, including but not limited to its 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 to Maintain Assets 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 to Maintain Assets 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 to Maintain Assets 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 to Maintain Assets 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 to Maintain Assets.
- I. The Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee under the Decision and Order or as a Monitor pursuant to the relevant provisions of the Decision and Order.

VI.

IT IS FURTHER ORDERED that within thirty (30) days after the Acquisition, and every thirty (30) days thereafter until Respondents have complied with the obligations of this Order to Maintain Assets, 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 to Maintain Assets. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to Maintain Assets to the Monitor, if any Monitor has been appointed. Respondents shall include in their reports, among other things that the Commission may require from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of this Order to Maintain Assets;

VII.

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 to Maintain Assets, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

VIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, 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 to Maintain Assets, 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.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: December 6, 2011

**Non-Public Appendix A
Divestiture Agreement**

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