

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.)	
)	
_____)	

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

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

- 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 Re

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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

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 simultaneous f Commission s RTJ164.83 0 TD.000 Tc-.0002 Tw(LBureauof sCm)8.38p

III.

- 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 ^{with} 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

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

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 interf

the Divestiture Agreement. Within thirty (30) days from the date the Monitor

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.

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

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60)

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.

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 on January 30, 2022.

By the Commission.

Donald S. Clark
Secretary

SEAL

ISSUED: January 30, 2012

**Non-Public Appendix A
Divestiture Agreement**

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