

1 J. Thomas Greene (Cal. Bar No. 57159)
tgreene2@ftc.gov
2 Federal Trade Commission
600 Pennsylvania Ave., NW
3 Washington, DC 20580
Tel: (202) 326-2531
4 Fax: (202) 326-2624

5 Stephen A. Mohr (Cal. Bar No. 246340)
smohr@ftc.gov
6 Federal Trade Commission
600 Pennsylvania Ave., N.W.
7 Washington, DC 20580
Tel: (202) 326-2850
8 Fax: (202) 326-2624

9 Counsels for Plaintiff

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13 **IN THE UNITED STATES DISTRICT COURT**
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
SOUTHERN DIVISION

15 FEDERAL TRADE COMMISSION)

16 Plaintiff,)

17 v.)

18 LABORATORY CORPORATION OF)
19 AMERICA, et al,)

20 Defendant.)

No. SACV-10-1873-AG (MLGx)

**PLAINTIFF FEDERAL TRADE
COMMISSION'S OPPOSITION
TO NONPARTY SUN
CLINICAL LABORATORIES'
MOTION FOR AN
ADDITIONAL BROADER
PROTECTIVE ORDER**

Date: January 28, 2011

Judge: Hon. Andrew J. Guilford

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25 Plaintiff Federal Trade Commission (the "Commission") respectfully
26 requests that the Court deny nonparty Sun Clinical Laboratories' ("Sun") Motion
27 for an Additional Broader Protective Order. Sun has asked this court to prohibit

1 the Federal Trade Commission from “disclos[ing], disseminat[ing], release[ing],
2 exchang[ing] to or with any party in this proceeding or us[ing], referenc[ing],
3 quot[ing], or lodg[ing] as evidence for any purpose” the materials Sun provided to
4 the FTC during its investigation of Defendants’ Laboratory Corporation of
5 America and Laboratory Corporation of America Holdings (collectively,
6 “LabCorp”) purchase of Westcliff Medical Laboratories, Inc (“Westcliff”). This
7 Court entered a Protective Order Governing Confidential Material (“Protective
8 Order”) on January 4, 2010 that prevents the disclosure of Sun’s confidential or
9 proprietary information to anyone beyond LabCorp’s outside counsel, thus
10 protecting the interests that Sun has identified in its Motion. The materials at issue
11 are an important component of the record, which will be less complete without
12 their inclusion, particularly with respect to market share calculations for LabCorp
13 and Westcliff, which will be inaccurate if the parties are unable to rely on the
14 market share data submitted by Sun. Therefore, this Court should deny Sun’s
15 Motion.

16 ARGUMENT

17 The provisions in the Protective Order are consistent with the standard
18 provisions used in litigation before the FTC. *See* 16 C.F.R. § 3.31, Appendix A.
19 Pursuant to the Protective Order, all the material that Sun desires to protect will be
20 designated “Highly Confidential – Outside Counsel Only” and may only be
21 disclosed to LabCorp’s outside counsel. Protective Order ¶¶ 1, 2, 3, 7. Outside
22 counsel may only use this information “for the purposes of the preparation and
23 hearing of this proceeding, or any appeal therefrom, or for the purpose of the
24 preparation and hearing in the FTC administrative proceeding directly related to
25 this proceeding, and for no other purpose whatsoever.” *Id.* ¶ 11. Based on these
26 provisions, LabCorp cannot use Sun’s documents or information to gain any
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1 competitive advantage over Sun and therefore Sun's concerns about LabCorp's
2 potential misuse of Sun's information are unfounded.¹

3 It is critical that the FTC be permitted to rely on and lodge into evidence the
4 information submitted by Sun.² In order to most accurately calculate market shares
5 of LabCorp and Westcliff in the relevant product market, it is necessary to
6 aggregate sales data and other market share metrics from the competitors in the
7 relevant market, even small fringe competitors like Sun. Further, the FTC has
8 relied on the documents and data it received from Sun to refute LabCorp's claim
9 that irrelevant fringe players like Sun are poised to replicate the competition that is
10 lost with the acquisition of Westcliff. Evidence from Sun also supports the FTC's
11 analysis of market definition, the likelihood and sufficiency of entry into the
12 relevant market, and potential anti-competitive effects of the acquisition in the

13
14 ¹ Despite Sun's assertion to the contrary, LabCorp served Defendants' First
15 Request for Documents to Plaintiff on December 17, 2010, which seeks, among
16 other things, information and materials received from and communications with
17 third parties during the FTC's investigation.

18 ² Sun's assertion that it did not have a legal obligation to cooperate with the
19 FTC and that it provided information to the FTC voluntarily is incorrect. Pursuant
20 to its investigative authority under 15 U.S.C. § 57b-1 and 16 C.F.R. § 2.7, the FTC
21 issued a Civil Investigative Demand ("CID") to Sun on July 29, 2010. *See*
22 *CID Issued to Sun Clinical Laboratories, July 29, 2010*. Sun provided the
23 documents for which it now seeks protection pursuant to this CID. *See* *CID*
24 *Response from Sun Clinical Laboratories, Aug. 23, 2010*. Similarly, 15 U.S.C.
25 § 49 provides the FTC with the authority to "require by subpoena the attendance
26 and testimony of witnesses and the production of all such documentary evidence
27 relating to any matter under investigation." The FTC permitted Sun to submit a
28 declaration in lieu of testifying pursuant to an investigative subpoena in order to
minimize the burden on Sun. *See* *Declaration of Francis Sun (Oct. 29, 2010)*. The
FTC will submit the *CID Issued to Sun Clinical Laboratories on July 29, 2010*, the
CID Response from Sun Clinical Laboratories on Aug. 23, 2010, and the
Declaration of Francis Sun in camera upon request of the Court.

1 relevant market and the FTC should be able, with appropriate protections, to use
2 that information as evidence in this matter. Finally, the FTC's economic expert,
3 Dr. Frederick Flyer, has used information gained from Sun to calculate market
4 shares.

5 **CONCLUSION**

6 Because the existing Protective Order is sufficient to protect Sun's interests
7 and because the Sun information is a necessary component of the evidence in this
8 matter (and the underlying administrative trial), Plaintiff respectfully requests that
9 the Court deny Nonparty Sun's Motion for an Additional Broader Protective
10 Order.

11 A proposed order is attached.

12 Dated: January 18, 2011

13 Respectfully submitted,

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15 By: /s/ Stephen A. Mohr

16 Stephen A. Mohr (Cal. Bar No. 246340)

17 Federal Trade Commission
18 600 Pennsylvania Ave., N.W.
19 Washington, DC 20580
20 Tel: (202) 326-2850
21 Fax: (202) 326-2624
22 smohr@ftc.gov
23
24
25
26
27
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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 Pennsylvania Avenue N.W. Washington, D.C. 20001.
2. That on January 18, 2011, declarant served the PLAINTIFF'S OPPOSITION TO NONPARTY SUN CLINICAL LABORATORIES' MOTION FOR AN ADDITIONAL BROADER PROTECTIVE ORDER by emailing a true and correct PDF to J. Robert Robertson at robby.robertson@hoganlovells.com, Corey Roush at corey.roush@hoganlovells.com, and to R. W. Chong at reobertchong@doochonglaw.com.

_____/s/ Stephen A. Mohr_____

Stephen A. Mohr
Counsel for Plaintiff
Federal Trade Commission