

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

In the Matter of)
)
LABORATORY CORPORATION)
OF AMERICA)
)
and)
)
LABORATORY CORPORATION)
OF AMERICA HOLDINGS,)
Corporations.)

Docket No. 9345
PUBLIC

RESPONDENTS' OPPOSITION TO NONPARTY SUN CLINICAL LABORATORIES'
MOTION FOR AN ADDITIONAL BROADER PROTECTIVE ORDER

Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") respectfully request that the Court deny nonparty Sun Clinical laboratories' ("Sun Clinical") Motion for an Additional Broader Protective Order, which requests that *no one* other than the Federal Trade Commission ("FTC") be permitted to review materials Sun Clinical provided to the FTC. On December 1, 2010, this Court entered a Protective Order Governing Discovery Material ("Protective Order") that prevents the disclosure of any confidential and proprietary information of Sun Clinical to anyone other than LabCorp's outside counsel. There is no need for an even more protective protective order in this case as the interests asserted by Sun Clinical in its Motion are already protected by the current Protective Order, and preventing LabCorp's outside counsel from accessing relevant documents and information on which the FTC has relied in bringing its enforcement action would prejudice LabCorp. Sun Clinical's Motion should be denied.

ARGUMENT

In its Motion, Sun Clinical seeks to bar the FTC from disclosing to LabCorp any documents or information Sun Clinical provided to the FTC as part of the FTC's investigation of LabCorp's acquisition of Westcliff Medical Laboratories, Inc. That investigation culminated in the FTC bringing an enforcement action to prevent completion of the acquisition. LabCorp has requested the documents and information provided by third-parties to the FTC in the course of the investigation because those materials apparently form the basis of the FTC's claims in this proceeding and the related administrative litigation. Indeed, as Sun Clinical correctly notes, the FTC has filed a declaration of Sun Clinical's owner in support of the FTC's motion for a preliminary injunction in the related federal case pending in the Central District of California. The Protective Order already entered by this Court allows the FTC to disclose confidential third-party documents and information only to LabCorp's outside counsel consistent with both the FTC's legal obligations and Sun Clinical's confidentiality interests. As a result, Sun Clinical has no basis for arguing that the existing Protective Order does not protect its interests or that LabCorp's outside counsel is not entitled to review evidence on which the FTC relied in order to initiate this enforcement action.

First, and most importantly, a broad, binding protective order has already been entered in this case. On December 1, 2010, this Court entered a Protective Order Governing Discovery Material. The Protective Order provides that any document that was provided by any third-party to the FTC during the FTC's investigation shall be designated as "confidential" and disclosed only to LabCorp's outside counsel. Protective Order ¶¶ 1, 2, 7. Further, any such disclosure to LabCorp's outside counsel "shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever." *Id.* at 8 (emphasis

added).¹ Therefore the terms of the Protective Order explicitly prevent LabCorp or its attorneys from using Sun Clinical's documents or information to "gain a significant competitive advantage" over Sun Clinical. Motion at p. 7.

Second, disclosure of Sun Clinical's documents to LabCorp's outside counsel pursuant to the Protective Order governing this case would not harm Sun Clinical. Courts routinely allow the disclosure of confidential information on an outside-counsel-only basis in order to safeguard the very interests Sun Clinical seeks to protect. *See, e.g., ODS Techs., L.P. v. Magna Entm't Corp.*, 583 F. Supp. 2d 1141, 1143 (C.D. Cal. 2008) (protective order providing access to outside counsel); *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 546 F. Supp. 2d 951, 954 (S.D. Cal. 2008) (same); *E-Smart Tech., Inc. v. Drizin*, No. C 06-05528, 2008 WL 1930639 (N.D. Cal. May 1, 2008) (same); *Biovail Labs., Inc. v. Anchen Pharm., Inc.*, 463 F. Supp. 2d 1073, 1076 (C.D. Cal. 2006) (same). Indeed, the cases cited by Sun Clinical deal only with the issue of whether disclosure to inside counsel is also appropriate; the courts in those cases had already permitted disclosure to outside counsel. *See Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992); *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1466 (Fed. Cir. 1984).

Courts assess the risk of "inadvertent disclosure" of confidential information to competitors when determining the scope of protective orders under Fed. R. Civ. P. 26(c). *Brown Bag Software*, 960 F.2d at 1470. Consistent with this approach, courts generally find that disclosure to counsel is permissible where the counsel is not involved in "competitive decisionmaking." *Id.* Outside counsel who are not involved in competitive decisionmaking are routinely permitted access to confidential documents of other parties. *Id.*; *see also U.S. Steel*

¹ These provisions reflect the standard procedure for litigation before the FTC. *See* 16 C.F.R. § 3.31, Appendix A ("Standard Protective Order").

Corp., 730 F.2d 1465; *ODS Technologies*, 583 F. Supp. 2d 1141; *Presidio Components*, 546 F. Supp. 2d 951; *E-Smart Tech.*, 2008 WL 1930639; *Biovail Laboratories*, 463 F. Supp. 2d 1073.

In this case, Sun Clinical does not argue that LabCorp's outside litigation counsel for this matter is involved in competitive decisionmaking on behalf of LabCorp. Moreover, litigation counsel for LabCorp has certified that it is not involved in LabCorp's competitive decisionmaking, and has no involvement whatsoever in any competitive decisions such as pricing decisions, bidding decisions, sales and marketing efforts, or product development. *See* Roush Decl. in Support of Defendants' Opposition to Sun Clinical Laboratories' Motion for an Additional Broader Protective Order ("Roush Decl."). Therefore restricting LabCorp's outside counsel's access to third-party documents and information would do nothing other than impose an unnecessary hardship on LabCorp and "render adversarial proceedings impossible." *U.S. Steel Corp.*, 730 F.2d at 1467.

Third, contrary to Sun Clinical's statements, LabCorp has submitted document requests and interrogatories to the FTC that, among other things, request the FTC to produce information and materials it received from third-parties as part of its investigation into LabCorp's acquisition of Westcliff. Documents and information from third-party competitors such as Sun Clinical are highly relevant to multiple issues in this proceeding, such as: (1) the reliability and veracity of the declarations provided by third-parties; (2) market definition and market shares; (3) entry and/or expansion into the relevant market by existing competitors; and (4) the potential competitive effects of the acquisition in the relevant market. Sun Clinical even admits in its motion that it is a "direct competitor" to LabCorp. Motion at p. 4.

The FTC's disclosure of these materials to LabCorp's outside counsel imposes no burden whatsoever on Sun Clinical, and will help discovery proceed efficiently, both for the February 3,

2010, hearing before the United States District Court for the Central District of California and for proceeding before this Court . Sun Clinical’s proposed protective order would prevent LabCorp from discovering relevant documents provided by third-parties to the FTC and would create a much more burdensome discovery process in which LabCorp would have little choice but to seek additional document discovery directly from third-parties such as Sun Clinical.

Fourth, although Sun Clinical states that it “would surely have not cooperated with the FTC’s investigation to the fullest extent if they had known the information and documents provided would be turned over to one of its largest competitors,” Motion at p. 9, the FTC Act and FTC regulations regarding confidentiality are clear that third party material may be disclosed in the course of an enforcement action such as this one.² LabCorp is in no position to know what was discussed between Sun Clinical and the FTC, but preventing LabCorp from obtaining documents and information that the FTC has already reviewed and relied on in bringing its enforcement action would unduly prejudice LabCorp, particularly when, as here, Sun Clinical has made no showing that disclosure to LabCorp’s outside counsel would harm Sun Clinical’s interests.

² Section 21 of the FTC Act explicitly permits “the disclosure of relevant and material information in Commission adjudicative proceedings or judicial proceedings to which the Commission is a party,” and provides that “[a]ny disclosure of relevant and material information in Commission adjudicative proceedings or in judicial proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings or by court rules or orders.” 15 U.S.C. § 57b-2. Commission Rules of Practice also state that materials obtained in an investigation “may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate.” 16 C.F.R. § 4.10. Pursuant to Commission Rule of Practice 3.31, the ALJ handling a Part 3 administrative proceeding shall issue a protective order “in order to protect the parties and third-parties against improper use and disclosure of confidential information.” 16 C.F.R. § 3.31 (emphasis added). The Protective Order in this case protects these interests, and is consistent with the FTC’s Standard Protective Order. *Id* at Appendix A.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the Court deny nonparty Sun Clinical's Motion for an Additional Broader Protective Order.

Dated: January 24, 2011

Respectfully Submitted,



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*Attorneys for Laboratory Corporation of
America and Laboratory Corporation of
America Holdings*

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed via hand delivery an original with signature and one paper copy, and via FTC e-file a .PDF copy that is a true and correct copy of the paper original, of the foregoing document with:

Donald S. Clark
Secretary, Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580
secretary@ftc.gov

I also certify I delivered via electronic mail and hand delivery a copy of the foregoing document to:

D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-113
Washington, DC 20580
oalj@ftc.gov

I also certify I delivered via electronic mail a copy of the foregoing document to:

J. Thomas Greene
Michael R. Moiseyev
Jonathan Klarfeld
Stephanie A. Wilkinson
Federal Trade Commission
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Date: January 24, 2011



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21 AMERICA HOLDINGS

22 UNITED STATES DISTRICT COURT
23 CENTRAL DISTRICT OF CALIFORNIA
24 SOUTHERN DIVISION

25 FEDERAL TRADE COMMISSION,

26 Plaintiff,

27 v.

28 LABORATORY CORPORATION
OF AMERICA, et al,

Defendants.

Case No. SACV 10-1873 AG (MLGx)

**DECLARATION OF COREY W.
ROUSH IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
NONPARTY SUN CLINICAL
LABORATORIES' MOTION FOR
AN ADDITIONAL BROADER
PROTECTIVE ORDER**

Date: January 10, 2011

Judge: Hon. Andrew J. Guilford

1 I, Corey W. Roush, declare and state as follows:

2 1. I am an attorney at law duly licensed to practice in the District of
3 Columbia. I am a partner at Hogan Lovells US LLP, and an attorney of record for
4 Defendants Laboratory Corporation of American and Laboratory Corporation of
5 America Holdings (“Defendants” or “LabCorp”), in this action. I submit this
6 Declaration in Support of Defendants’ Opposition to Nonparty Sun Clinical
7 Laboratories’ Motion for an Additional Broader Protective Order. The following is
8 based on my personal knowledge and if called as a witness, I could and would
9 competently testify thereto.

10 2. Hogan Lovells US LLP has been retained to represent Defendants in
11 the above-captioned proceeding as well as the administrative proceeding pending
12 before the Federal Trade Commission.

13 3. Litigation counsel representing Defendants in these proceedings are
14 not involved, either directly or indirectly, in competitive decisionmaking at
15 LabCorp. Moreover, litigation counsel have no involvement whatsoever in any
16 competitive decisions, including but not limited to pricing decisions, bidding
17 decisions, sales and marketing efforts, or product development.

18 4. Counsel representing Defendants in these proceedings will uphold the
19 terms of the Protective Order Governing Confidential Material entered by this
20 Court on January 4, 2010 and will make every effort to prevent the disclosure to
21 LabCorp of confidential materials provided by third-parties to the FTC as part of
22 the FTC’s investigation as specified in that Order.

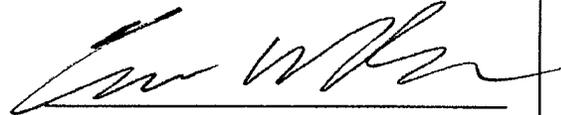
23 5. Documents and information produced in response to LabCorp’s
24 discovery requests will be maintained at the offices of Hogan Lovells US LLP in a
25 location that is inaccessible to LabCorp employees responsible for competitive
26 decisionmaking.

27 6. On January 6, 2011, I sent a copy of The Protective Order Governing
28 Confidential entered by this Court to counsel for Sun Clinical by e-mail. A true and

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correct copy of this e-mail is attached as Exhibit A.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of January, 2011, in Washington, DC.



Corey W. Roush

Exhibit A

From: Roush, Corey W.
Sent: Thursday, January 06, 2011 1:40 PM
To: 'Robert Chong'
Cc: Holt, Benjamin F.
Subject: RE: FTC v. Lab Corp; Case No.: 8:10-cv-01873-AG-MLG

Robert,

It was a pleasure speaking with you. As we discussed, I have attached a copy of the Protective Order issued by Judge Guilford in the case pending in the Central District of California.

Please let me know if you have any questions.

Corey

Corey Roush
Partner

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Please consider the environment before printing this e-mail.

From: Robert Chong [mailto:robertchong@doochonglaw.com]
Sent: Wednesday, January 05, 2011 9:58 PM
To: tgreene2@ftc.gov; jklarfeld@ftc.gov; jjacobs@ftc.gov; swilkinson@ftc.gov; mmoiseyev@ftc.gov; smohr@ftc.gov; Robertson, J. Robert; Gallegos, Amy Marshall; Roush, Corey W.; Holt, Benjamin F.
Cc: Robert Chong
Subject: FTC v. Lab Corp; Case No.: 8:10-cv-01873-AG-MLG

Dear All:

1/10/2011

Please see attached.

Very Truly Yours,
Robert W. Chong, Esq.
Attorney at Law

1/10/2011