

INTRODUCTION

Nonparty Sun Clinical seeks the entry of a broad and full protective order preventing the disclosure or use of its proprietary and confidential information.

Sun Clinical is not a party to the instant action. Sun Clinical is not a witness to any of the alleged anti-trust violation matter. Sun Clinical simply complied with the request for information from investigator(s) from the FTC – never realizing the information disclosed would be revealed to anyone. Had Sun Clinical realized the information it disclosed would someday be disclosed, it would not have participated in the investigation, as it does not appear Sun Clinical had any legal obligation to participate in the investigation.

Sun Clinical is a California corporation which performs clinical laboratory testing services headquartered in Monterey Park, California. Sun Clinical operates in direct competition with other clinical laboratory services, including Defendant in this action, Lab Corp and the entity involved in the merger, Westcliff.

During the FTC's investigation of the merger between Lab Corp and Westcliff, Sun Clinical was contacted by the FTC and provided, in confidence, information and documents to FTC investigators. (See Declaration of Frances Sun attached hereto as Exhibit A) This information was requested by the FTC, and Sun Clinical provided information and documents solely for the purposes of aiding FTC's investigation. Sun Clinical never intended, nor was informed by the FTC, that this information would be disclosed to any other party or used in a litigation setting. (See Declaration of Frances Sun attached hereto as Exhibit A) This included company documentations, financial reports, as well as a declaration of Frances Sun (the "Frances Sun FTC Declaration"), an officer of Sun Clinical. In fact, the Frances Sun FTC Declaration, which was prepared with the assistance of the FTC, states:

"I am submitting this declaration to the Federal Trade Commission voluntarily in lieu of subpoena. I understand that by submitting this declaration to the Federal Trade Commission I have not waived my rights or my company's rights to confidentiality as protected by the FTC Act or other law. I hereby request that my identity, my company's identity, and the content of this declaration be kept confidential and be exempt from

public disclosure as provided by applicable law.”

As the FTC’s inquiry involved Sun Clinical’s competitive standing with Lab Corp and Westcliff, the information provided by Sun Clinical to the FTC investigators included confidential and proprietary information which it holds as trade secrets. (See Declaration of Frances Sun attached hereto as Exhibit A) However, the FTC has recently informed Sun Clinical that the Frances Sun FTC Declaration has already been fully produced to Lab Corp during the administrative hearing prior to this action. (See Declaration of Frances Sun attached hereto as Exhibit A)

This grossly contradicts the representations by the FTC that were made to Sun Clinical regarding the confidentiality of Sun Clinical’s information. Had Sun Clinical been informed that the FTC intended to turn over the information and documents to Lab Corp, Sun Clinical would never have cooperated with the FTC’s investigation to the extent which it did by divulging confidential and proprietary information, unless it had received a subpoena. (See Declaration of Frances Sun attached hereto as Exhibit A)

Frances Sun’s declaration was disclosed, and Sun Clinical’s confidential and proprietary information is in danger of being released, despite Lab Corp never demanding or requesting these documents in its discovery. Sun Clinical is informed and believes that Lab Corp has not made any demands or discovery requests to the FTC for the release of Sun Clinical’s documents or information. If this is the case, Sun Clinical has been intentionally misled by the FTC, which made representations that the information provided by Sun Clinical would never be disclosed to a third party. Furthermore, the confidential information provided by Sun Clinical is irrelevant to the underlying proceeding, as even the Defendant in the action does not require the information.

Thus, Sun Clinical requires the broader and full protective order it proposes because the limited protective order in place currently for this action is insufficient to protect the interests of Sun Clinical as it allows for the dissemination and disclosure of Sun Clinical’s confidential information to Lab Corp’s outside counsel. Any disclosure or dissemination of this sensitive

information leaves open the possibility that this information could be used to gain a competitive advantage by Lab Corp which would lead to irreparable harm to Sun Clinical's business.

ARGUMENT

a. A Protective Order is Needed to Safeguard Confidential Information.

According to Rule 3.31(d) of the Commission's Rules of Practice, 16 C.F.R. § 3.31(d), a protective order shall be issued in order to protect third parties against improper disclosure of confidential information. An order denying discovery, or any other order which justice requires, may be issued to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. *16 C.F.R. § 331.(d)*.

This rule is similar to the Federal Rule of Civil Procedure Section 26(c)(1), where it states that a court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1). Furthermore, Rule 26(c)(1)(G) states the court may issue protective orders limiting or setting conditions on the disclosure of "trade secret[s] or other confidential research, development, or commercial information." Fed. R. Civ. P. 26(c)(1)(G).

To justify the entry of a protective order, a movant need only make a "threshold showing of good cause to believe that discovery will involve confidential or protected information." *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988). Indeed, "[a] 'blanket' protective order (*e.g.*, forbidding each party from disclosing any information produced in discovery absent permission from the other party or the court) is often obtained without a substantial showing of good cause for each document covered by the order." SCHWARZER ET AL., CAL. PRAC. GUIDE: FED. CIV. PRO. BEFORE TRIAL, § 11:1126.5 (Rutter 2007).

FTC currently holds confidential, proprietary, and private commercial and financial information pertaining to Sun Clinical--which Sun Clinical provided to FTC during its investigation of this case. This matter is especially sensitive as the Defendants in this action are the direct competitors of Sun Clinical. Sun Clinical's information is protectable as confidential

information as it is such that would cause substantial economic harm to the competitive position of the producer. See *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987); *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 697 (D. Nev. 1994).

The FTC has stated its intention to disclose and use confidential and proprietary documents which include sensitive information such as Sun Clinical's: customers; business model; business volume; partnerships; yearly revenue; and commercial strategy in the clinical laboratory market. (See Declaration of Frances Sun attached hereto as Exhibit A) This confidential and proprietary information is vital to Sun Clinical in order to maintain its business against competitors such as Lab Corp and Westcliff. The dissemination and disclosure of this information could be used by Lab Corp or other competitors to gain a business advantage, resulting in irreparable harm to Sun Clinical.

Furthermore, Sun Clinical cannot rely on the FTC to protect its rights and interests in this case. The FTC has made representations to Sun Clinical regarding the confidentiality of documents provided to the FTC, only to later turn over the Frances Sun FTC Declaration containing confidential and sensitive information to Sun Clinical's direct competitor, even without a demand or discovery request by Lab Corp. A broader protective order is required in order to prevent any further irreparable harm to Sun Clinical's business and ability to compete with Defendant Lab Corp. Thus, there is good cause for this Court to enter the broad protective order sought by Sun Clinical.

b. The Limited Protective Order Currently in Place is Insufficient to Protect Sun Clinical's Interests and to Prevent Irreparable Harm.

A limited protective order is currently in place for this action; however it is insufficient to properly protect the rights and interests of Sun Clinical as it relates to its confidential and proprietary information. The limited protective order allows for the dissemination and disclosure of all confidential information to outside counsel of record for Lab Corp, a direct competitor of Sun Clinical. This protection is insufficient.

The court in *U.S. Steel Corp v. United States* cautioned against protections dependent on

arbitrary distinctions based on the type of counsel employed, noting that in practice the risk of disclosure of trade secrets obtains equally for all counsel. *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984); *see also Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9th Cir. 1992). Instead, protection against an unacceptable opportunity for disclosure must be determined by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel. *U.S. Steel Corp.*, 730 F.2d at 1468.

In this case, Sun Clinical has provided confidential and proprietary information to the FTC which would allow Lab Corp to gain a significant competitive advantage by gaining knowledge of its direct competitors. Simply limiting this disclosure to Lab Corp's outside counsel based on the classification of counsel would not provide the protection required for this sensitive confidential information.

Furthermore, if the information provided by Sun Clinical is later admitted as evidence by either Plaintiff or Defendant in this action, Sun Clinical is sure to suffer irreparable harm as this knowledge will be known to its direct competitors in the clinical laboratory market. As Sun Clinical clearly cannot rely on the FTC to protect the rights and interests of Sun Clinical's business, a broad protective order prohibiting the disclosure, dissemination, or use of any information provided by Sun Clinical to the FTC is required.

Basing a limited protective order solely on classification of counsel is misguided and insufficient as stated by the Court in *U.S. Steel*. In addition, Sun Clinical as a third party cannot rely on the FTC or the limited protective order currently in place to protect its business interests in this case. Thus, a broad restrictive protective order is the only solution to ensure that Sun Clinical's rights and interests are adequately protected in this case.

c. The Disclosure of Sun Clinical's Confidential Information and Trade Secrets is Irrelevant and Would Lead to Irreparable Harm.

Lab Corp or the FTC may intend to use the documents and information provided to the FTC by Sun Clinical in preparation for the hearing on the FTC's motion for Preliminary Injunction. However, not only is the information confidential and proprietary, it is wholly

irrelevant to the pending motion against Lab Corp and is not likely to lead to the discovery of admissible evidence.

The documents include sensitive information such as Sun Clinical's: customers; business model; business volume; partnerships; yearly revenue; and commercial strategy in the clinical laboratory market. (See Declaration of Frances Sun attached hereto as Exhibit A) Confidential information such as the finances or revenue of Sun Clinical is irrelevant to the action against Lab Corp, and any market analysis regarding the laboratory clinical testing market can be obtained through other sources. To place the burden on Lab Corp's competitors to reveal confidential and proprietary commercial and financial information is unreasonable, harmful to the third parties, and overly burdensome.

Requiring the disclosure and dissemination of confidential and proprietary information of Sun Clinical to a direct competitor of the company directly violates the rights and interests of Sun Clinical; and only results in a benefit to Lab Corp. Placing the burden on the FTC or Lab Corp to obtain market information from other sources is insignificant when balanced with the extreme injustice and irreparable harm faced by Sun Clinical as a result of its confidential and proprietary information being disclosed to one of its largest competitors.

Furthermore, requiring the disclosure of the documents provided to the FTC by Sun Clinical would effectuate a deception upon Sun Clinical and its officer Frances Sun, who voluntarily cooperated with FTC's requests while being assured of the information's confidentiality. Frances Sun and Sun Clinical 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. (See Declaration of Frances Sun) The Frances Sun FTC Declaration, prepared with the assistance of the FTC, states:

"I am submitting this declaration to the Federal Trade Commission voluntarily in lieu of subpoena. I understand that by submitting this declaration to the Federal Trade Commission I have not waived my rights or my company's rights to confidentiality as protected by the FTC Act or other law. I hereby request that my identity, my company's identity, and the content of this declaration be kept confidential and be exempt from

public disclosure as provided by applicable law.”

Under this assurance, Sun Clinical and Frances Sun provided confidential documentation and information requested by the FTC during its investigation.

Additionally, Sun Clinical is informed and believes that its confidential and proprietary information is in danger of being released despite Lab Corp never demanding or requesting the FTC to produce these documents in its discovery. If this is the case, Sun Clinical has been intentionally misled by the FTC, which made representations that the information provided by Sun Clinical would never be disclosed to a third party. Furthermore, the relevance of Sun Clinical’s information is put into question if even the Defendant does not demand or request the production of these documents in defending against FTC’s action.

CONCLUSION

The court must issue a broad protective order that all documents and information provided by Sun Clinical to the FTC is strictly confidential and is not to be produced, disclosed, disseminated, or admitted as evidence in this action. The documentation contains confidential and proprietary information, and disclosure through discovery would lead to irreparable harm to Sun Clinical. The burden placed on Lab Corp by restricting the production of Sun Clinical's documents is insignificant compared to the extreme injustice and irreparable harm faced by Sun Clinical as a result of its confidential and proprietary information being disclosed to one of its largest competitors.

For the reasons stated above, nonparty Sun Clinical motions this Court to protect its business interests and ability to compete by granting the proposed Protect Order.

Dated: January 12, 2011

Respectfully Submitted,



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*Attorney for Nonparty SUN CLINICAL
LABORATORIES*

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

In the matter of)	
)	
LABORATORY CORPORATION OF AMERICA)	Docket No. 9345
)	
and)	
)	
LABORATORY CORPORATION OF AMERICA HOLDINGS, corporations)	
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**NONPARTY SUN CLINICAL LABORATORIES'
MOTION FOR PROTECTIVE ORDER**

EXHIBIT A

Declaration of Frances Sun

1 **DECLARATION OF FRANCES SUN IN SUPPORT OF NONPARTY SUN CLINICAL**
2 **LABORATORIES' MOTION FOR PROTECTIVE ORDER**

3 I, FRANCES SUN, declare:

4 1. I am an officer of Sun Clinical Laboratories ("Sun Clinical"), a nonparty to this
5 action and am authorized to act on its behalf. I spoke with the FTC and provided information to
6 FTC. If called upon to testify as to the matters set forth herein, I could and would competently
7 testify thereto as the matters set forth in this declaration that are personally known to me to be
8 true. As to those matters stated on information and belief, I would competently testify thereto as I
9 believe those matters to be true.

10 2. Sun Clinical is a clinical laboratory testing company headquartered in Monterey
11 Park, California, and has been in the business of providing clinical laboratory testing services for
12 about 30 years. Sun Clinical operates in direct competition with Laboratory Corporation of
13 America ("Lab Corp") to provide laboratory testing services.

14 3. Sun Clinical was contacted by Catherine M. Sanchez of the Federal Trade
15 Commission requesting information from Sun Clinical to be used in an FTC investigation.

16 4. Sun Clinical was not informed of the subject of the investigation nor was Sun
17 Clinical informed of the intended use of the information and documents provided by Sun Clinical.

18 5. I was not informed that the documentation and information provided by Sun
19 Clinical would be turned over to Lab Corp or produced as evidence in a case against Lab Corp. I
20 was not informed that the documents and information would be disclosed to anyone, other than the
21 FTC.

22 6. The information in the documentation and the declaration I provided to the FTC
23 investigation contains commercial and financial confidential proprietary information which Sun
24 Clinical maintains as trade secrets. None of the information provided is readily available in the
25 public domain.

26 7. I have been informed that the FTC has attached my declaration as part of the
27 administrative proceeding, without redaction. This is completely contradictory to the
28

1 understanding that my Declaration would remain confidential and my identity would not be
2 disclosed.

3 8. If the FTC had informed Sun Clinical and I that the information and
4 documents provided for their investigation had the potential to be disseminated and would
5 be turned over to Lab Corp, or anyone else, Sun Clinical and I would have refused to
6 cooperate without a subpoena in order to protect the business interests of Sun Clinical. It
7 that time, Sun Clinical did not have a legal obligation to cooperate and if Sun Clinical had
8 been fully informed would not have cooperated, at least not without a subpoena.

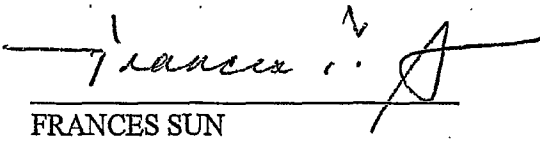
9 9. The information provided to the FTC includes information regarding Sun
10 Clinical's: customers; business model; business volume; partnerships; yearly revenue; and
11 commercial strategy in the clinical laboratory market, including detailed statistics of the business.
12 In total Sun Clinical provided several spreadsheets and manual to the FTC.

13 10. Dissemination of this confidential and proprietary information to Lab Corp and/or
14 Sun Clinical's other competitors would be extremely harmful and result in irreparable harm to Sun
15 Clinical's business and ability to compete.

16
17 I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE AND CORRECT.

18 SIGNED UNDER THE PENALTY OF PERJURY UNDER THE LAWS OF THE ^{UNITED STATES} STATE OF ~~CALIFORNIA~~ ^{RS}
19 ~~OF AMERICA~~ CALIFORNIA, ON THE DATE SET FORTH BELOW, IN MONTERY PARK, CALIFORNIA.

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21 Dated: 1/4/11


FRANCES SUN

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of)	
)	
LABORATORY CORPORATION OF AMERICA)	Docket No. 9345
)	
and)	
)	
LABORATORY CORPORATION OF AMERICA HOLDINGS, corporations)	
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[PROPOSED] ORDER

Upon consideration of Nonparty Sun Clinical Laboratories' Motion for Protective Order, any opposition thereto, and the court being fully informed,

IT IS HEREBY ORDERED, that Nonparty Sun Clinical Laboratories' Motion is GRANTED.

IT IS FURTHER ORDERED, that any document or portion thereof submitted by SUN CLINICAL LABORATORIES during a Federal Trade Commission investigation as well as any information taken from any portion of such document, shall be treated as confidential material for the purposes of this Order.

IT IS FURTHER ORDERED, that confidential material relating to SUN CLINICAL LABORATORIES shall not be disclosed, disseminated, released, exchanged to or with any party in this proceeding or used, referenced, quoted, or lodged as evidence for any purpose, and any disclosure, dissemination, use, or reference of this confidential information shall be considered a

direct and willful violation of this Protective Order.

The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission or the submitter or further court order, continue to be binding after the conclusion of this proceeding.

Date: _____

Hon. D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed via Fed Ex an original with signature, two paper copies and electronic mail a PDF copy that is true and correct copy of the foregoing documents to:

- *Notice of Appearance*
- *Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order*
- *[Proposed Order]*

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

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

- *Notice of Appearance*
- *Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order*
- *[Proposed Order]*

D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-113

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

- *Notice of Appearance*
- *Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order*
- *[Proposed Order]*

J. Thomas Greene
Michael R. Moiseyev
Jonathan Klarfeld
Stephanie A. Wilkinson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

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

- *Notice of Appearance*
- *Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order*
- *[Proposed Order]*

J. Robert Robertson
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555 Thirteenth Street, N.W.
Washington, DC 20004

January 14, 2011

By: 
DAVID DETTORRE