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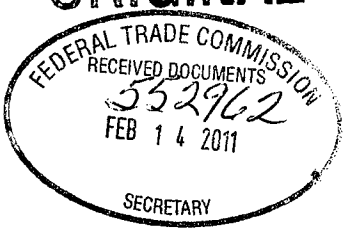

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	
LABORATORY CORPORATION OF AMERICA	**Docket No. 9345**
and	**PUBLIC**
LABORATORY CORPORATION OF AMERICA HOLDINGS, corporations.	

RESPONDENTS' OPPOSITION TO SUN CLINICAL LABORATORIES' MOTION TO QUASH SUBPOENA AND/OR LIMIT SUBPOENA DUCES TECUM AND PROTECTIVE ORDER

Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") respectfully request that the Court deny Non-Party Sun Clinical Laboratories' ("Sun Clinical") Motion to Quash and/or Limit Subpoena Duces Tecum and Protective Order. Sun Clinical failed to comply fully with 16 C.F.R. § 3.31(g) prior to filing the motion, and the motion itself is entirely devoid of support for its boilerplate assertions that LabCorp's subpoena is overly broad and unduly burdensome. The motion is simply an attempt to rehash arguments already made by Sun Clinical and rejected by this Court, and it should be denied.

BACKGROUND

On December 1, 2010, the Court entered a protective order governing discovery in this matter. Broad in scope, the protective order requires that all confidential, proprietary, and business information from non-parties (including competing labs) be seen only by LabCorp's outside counsel and used only to further the relevant evidentiary record in this action. It further

states that the parties must provide advance notice to a non-party before using any of the non-party's confidential information in court, allowing the non-party to move for *in camera* treatment of the evidence.

Dissatisfied with the protective order, Sun Clinical filed a "Motion for Additional Broader Protective Order" on January 18, 2011. The motion sought to prevent LabCorp from discovering confidential information Sun Clinical had already voluntarily revealed to the FTC during the course of the investigation. On January 28, 2011, the Court denied the motion, finding an additional protective order unnecessary in light of the procedural safeguards of Commission Rule 3.31(d) and the protective order already in place.

On February 1, 2011, LabCorp served Sun Clinical with a Subpoena Duces Tecum. The subpoena requests that Sun Clinical produce documents directly related to contested issues in this action. On February 2 and 3, counsel for Sun Clinical called counsel for LabCorp regarding the subpoena. Sun Clinical's counsel was aware that counsel for LabCorp was fully occupied those days with the preliminary injunction hearing in the related federal case[1] and states that he had no doubt that counsel for LabCorp would return Sun Clinical's messages the next day. Motion at 4. Sun Clinical nevertheless immediately served and filed the instant motion to quash without conferring with counsel for LabCorp. Sun Clinical asserts in its motion that it needed to serve the motion on February 3rd "[b]ecause of the stringent time constraint to file this Motion." *Id.* at 5. However, pursuant to 16 C.F.R. § 3.34(c), the deadline for Sun Clinical to move to quash or limit the subpoena did not run until February 11, 2011.

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1 *See FTC v. Lab. Corp. of Am.*, No. 8:10-cv-1873 (C.D. Cal., Southern Division).

ARGUMENT

Sun Clinical's motion was filed without a good faith attempt to confer, in breach of Commission Rule 3.22(g), and is essentially an attempt to have the Court reconsider its previous order denying a "broader" protective order. Both of those procedural failings serve as a valid basis for denial of the pending motion. Nevertheless, the motion should also be denied because it is wholly without merit. Sun Clinical has presented absolutely no valid factual basis for the Court to quash the subpoena or to enter an additional protective order.

A. Sun Clinical Has Failed to Comply With Commission Rule 3.22

Commission Rule 3.22 requires that counsel "confer[] with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion" prior to filing a motion to quash. 16 C.F.R. § 3.22(g). Although counsel for Sun Clinical left messages for LabCorp's counsel, such outreach alone cannot be deemed a good faith attempt to resolve the issues because, knowing LabCorp's counsel was predisposed those days, he did not allow counsel for LabCorp adequate time to respond. Although Sun Clinical's counsel implies he was required to file the motion immediately, there is no basis for this implication. Commission Rule 3.34(c) provides that motions to quash a subpoena must be filed "within the earlier of 10 days after service thereof or the time for compliance therewith." 16 C.F.R. § 3.34(c). The subpoena was served on February 1, 2011, with the date of compliance being February 28, 2011. Accordingly, counsel had until February 11, 2011 to file the instant motion. Instead, counsel filed the motion within 48 hours of his first attempt to contact opposing counsel, despite knowing that counsel for LabCorp was consumed with a preliminary injunction hearing those very days. That effort falls short of the "duty to make reasonable efforts to confer with opposing counsel" embodied by Rule 3.22(g). *Order Denying Complaint Counsel's Motion to Compel Document Production, In the*

Matter of Lab. Corp. of Am. et al., No. 9345 at 3 (F.T.C. February 8, 2011) (Chappell, J.); *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 635-36 (D. Colo. 2003) (good faith attempt to confer not made where counsel made a phone call, learned opposing counsel was unavailable for the next two days, and filed motion to compel the next day). Accordingly, the motion should be dismissed for failure to comply with rule 3.22(g).

B. Sun Clinical's Motion Attempts to Relitigate Issues Already Decided by the Court

Sun Clinical's motion should also be dismissed because it is nothing more than a second attempt to obtain the "broader" protective order that was considered and rejected by this Court last month. *See Order Denying Sun Clinical's Motion for Broader Protective Order, In the Matter of Lab. Corp. of Am. et al.,* Docket No. 9345 (F.T.C. January 28, 2011) (Chappell, J.). Sun Clinical tries to distinguish the present motion by emphasizing that the documents now at issue are different from those voluntarily produced to the FTC during the FTC's administrative investigation. Sun Clinical makes a distinction without a difference. The Court's earlier ruling explicitly found that the protective order in place was sufficient to protect Sun Clinical's interests in its proprietary and confidential business information. *Id.* at 2. Sun Clinical has not articulated any basis for finding that a protective order sufficient to protect some of its proprietary business information is inadequate to protect all of it. Indeed, Sun Clinical's general concerns of inadvertent disclosure of confidential information are not different, two weeks later, simply because Sun Clinical declined to voluntarily produce to the FTC all the documents LabCorp now seeks in its subpoena. This motion should be rejected as an improper second attempt to obtain a ruling already rejected by the Court. *See, e.g., In the Matter of Daniel Chapter One et al.,* No. 9329, 2009 WL 569722 (F.T.C. Feb 23, 2009) (Chappell, J.) (rejecting an attempt to recharacterize, rehash, and repeat arguments already raised and rejected by the Court).

C. The Protective Order in this Case Is Sufficient to Protect Sun Clinical's Interests

LabCorp does not take issue with Sun Clinical's general proposition that its confidential business information should be protected from public disclosure. But Sun Clinical's reliance on case law advocating issuance of a protective order to safeguard confidential information is inapposite because *there is already a protective order in place*. As the Court has already found, the protective order entered by the Court is entirely adequate to prevent disclosure of Sun Clinical's confidential and proprietary information to competitors. Indeed, courts routinely address concerns that a business's confidential information will be disclosed to competitors by issuing a protective order restricting information to outside counsel only, as the Court has done here. *See Order Denying Sun Clinical's Motion for Broader Protective Order, In the Matter of Laboratory Corporation of America et al.,* No. 9345 (F.T.C. January 28, 2011) (Chappell, J.).

Moreover, Sun Clinical provides no suggestion of what a "broader" protective order would entail. Anything short of an exemption from all further discovery obligations appears unacceptable to Sun Clinical. Such a result is contrary to established law. "The fact that discovery might result in the disclosure of sensitive competitive information is not a basis for denying such discovery." *LeBaron v. Rohm and Hass Co.*, 441 F.2d 575, 577 (9th Cir. 1971); *see also In the Matter of No. Tex. Specialty Physicians*, No. 9312, 2004 WL 527340 at 3 (F.T.C. January 30, 2004) (Chappell, J.) (quoting *LeBaron*). As this Court has stated, "information on competitors is frequently crucial" in antitrust cases, and therefore even extremely sensitive information is discoverable. *In the Matter of No. Tex. Specialty Physicians*, at 3. Where adequate safeguards are in place to ensure sensitive information will not be misused, the burden of production does not outweigh a party's need for the documents requested or the public's

interest in seeking the truth in every case. *Id.*; *In the Matter of Union Oil*, No. 9305, 2003 WL 21642422 (F.T.C. June 30, 2003) (Chappell, J.).

Sun Clinical has not met that burden. Sun Clinical has entirely failed to substantiate its concerns that the current protective order is inadequate or to distinguish its current concerns from those already rejected by the Court. Sun Clinical has not provided any specific reason for the Court to find that Sun Clinical's need for confidentiality outweighs LabCorp's need for the requested information. Accordingly, the motion should be denied and Sun Clinical should be ordered to produce the subpoenaed documents.

D. The Information Requested Is Discoverable, Reasonable, and Not Overly Burdensome

The motion makes boilerplate assertions that the subpoena requests "wholly irrelevant" information, is "unreasonable," and compliance with it would be "overly burdensome." Again, however, the motion is barren of any factual support for these contentions.

The Commission Rules provide for discovery "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). A party seeking to quash a subpoena has the burden of demonstrating the request is unduly burdensome. *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178 at *12 (D.D.C. April 26, 1977); *In the Matter of Intel Corp.*, No. 9341, 2010 WL 2143904 (F.T.C. May 19, 2010) (Chappell, J.) (finding generalized allegation of burden insufficient to support motion to quash). Due to the strong public policy in favor of broad discovery, that burden is a heavy one. *In the Matter of Intel Corp.*, at 2. Indeed, "[e]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the

proceeding." *In re Kaiser Alum. & Chem. Corp.*, No. 9080 1976 FTC LEXIS 68 at *19-20 (Nov. 12, 1976); *see also In the Matter of Intel Corp.* at 2 (quoting *In re Kaiser Alum. & Chem. Corp.*). Moreover, general, boilerplate allegations of burden are insufficient. *In the Matter of Intel Corp.*, at 3 ("[a movant's] general allegation that the [] Subpoena is unduly burdensome is insufficient to carry its burden of showing why the requested discovery should be denied.").

Even a cursory reading of the subpoena reveals that all requested documents are, at least, "reasonably expected to yield information relevant" to LabCorp's arguments in this proceeding. The requested documents relate directly to Sun Clinical's current and prospective ability to compete for clinical lab service contracts in California, an essential element of this case. Sun Clinical has not articulated a basis for finding that any specific document request is irrelevant or burdensome, and at no point does Sun Clinical attempt to quantify, either in terms of time or cost, the alleged burden posed by the subpoena.

Indeed, Sun Clinical partially quotes eight of the sixteen document requests and again restates its mantra that the documents are irrelevant and the subpoena is unreasonable. However, each of the eight quoted requests is directly relevant to the issues in this proceeding. Paragraph four requests Sun Clinical's business plans from January 2008 to the present related to clinical laboratory testing services in California. Paragraph five seeks specific data regarding Sun Clinical's current cost structure. Paragraph thirteen asks for documents discussing the impact of legal requirements on Sun Clinical's business. Paragraph fourteen requires disclosure of any actual plans to expand its business within California. Documents responsive to these requests are relevant to the FTC's claim that entry and expansion of other labs into the relevant market is unlikely. Proof that other labs are able to enter (or expand within) the alleged market directly supports LabCorp's defense that anticompetitive effects will not result from the merger.

Paragraph six seeks copies of contracts for the provision of laboratory testing services with physician groups and health plans, and paragraphs seven and eight request information on bids Sun Clinical has made to provide services to physician groups since 2005. Paragraph sixteen requests information about Sun Clinical's network of patient service centers and lab facilities. All of these requests directly address Sun Clinical's status as a competitor and its ability to compete in the relevant product market for the time period at issue in this case.

As to the burden of these production requests, LabCorp has attempted to minimize the burden on Sun Clinical by limiting the dates of most requested documents to 2008 or more recent. Moreover, counsel for LabCorp has offered to work with Sun Clinical to further reduce any burden that might result from the subpoena, but Sun Clinical's position is apparently that it will not produce any documents due to its concerns of confidentiality.

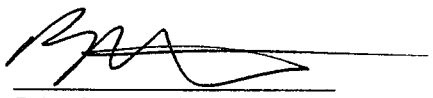
In short, though Sun Clinical seeks to quash LabCorp's subpoena as overly burdensome, Sun Clinical has provided no indication of the burden involved in producing the requested documents. Nor has it explained how the solicited documents are irrelevant. The scant allegations presented to the Court in Sun Clinical's motion cannot be sufficient to sustain the "heavy burden" required to quash the subpoena.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the Court deny Sun Clinical's Motion to Quash and/or Limit Subpoena Duces Tecum and Protective Order.

Dated: February 14, 2011

Respectfully Submitted,



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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:

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

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