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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**Docket No. 9345**
LABORATORY CORPORATION OF AMERICA, et al.,	)	**PUBLIC**
	)	
Respondents.	)	

COMPLAINT COUNSEL'S OPPOSITION TO NONPARTY SUN CLINICAL LABORATORIES' MOTION FOR AN ADDITIONAL BROADER PROTECTIVE ORDER

Pursuant to the Commission's Rules of Practice, 16 C.F.R. Part 3 *et seq.*, Complaint Counsel hereby submits its opposition to nonparty Sun Clinical Laboratories' motion, pursuant to Rules 3.22 and 3.31(d), 16 C.F.R. §§ 3.22, 3.31(d), for entry of a broader Protective Order governing the disclosure and use of confidential information in this proceeding. Sun Clinical Laboratories ("Sun") has asked for entry of an order prohibiting the Commission from "disclos[ing], disseminat[ing], release[ing], exchang[ing] to or with any party in this proceeding or us[ing], referenc[ing], quot[ing], or lodg[ing] as evidence for any purpose" the materials Sun provided to the Commission during the Commission's investigation of Respondents' Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") purchase of Westcliff Medical Laboratories, Inc. ("Westcliff"). A Protective Order Governing Discovery Material ("Protective Order") was issued in this matter on December 1, 2010 that prevents the disclosure of Sun's confidential or proprietary information to anyone beyond LabCorp's outside counsel, thus protecting the interests that Sun has identified in its Motion.[1] The materials at issue are an important component of the record, which will be less

[1] Additionally, a protective order was entered by the United States District Court for the Central District of California in Case No. SACV-10-1873 AG (MLGx) on January 4, 2011(the

complete without their inclusion, particularly with respect to market share calculations for LabCorp and Westcliff, which will be inaccurate if the parties are unable to rely on the market share data submitted by Sun. Therefore, Sun's Motion should be denied.

ARGUMENT

Pursuant to the Protective Order issued pursuant to 16 C.F.R. § 3.31(d), all the material that Sun desires to protect will be designated "Confidential" and may only be disclosed to LabCorp's outside counsel. Protective Order ¶¶ 1, 2, 3, 7. Outside counsel may only use this information "for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever." *Id.* ¶ 8. Based on these provisions, LabCorp cannot use Sun's documents or information to gain any competitive advantage over Sun and therefore Sun's concerns about LabCorp's potential misuse of Sun's information are unfounded.[2]

It is critical that the Commission be permitted to rely on and lodge into evidence the information submitted by Sun.[3] In order to most accurately calculate market shares of LabCorp

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"Federal Court Protective Order") that similarly prevents the disclosure of Sun's already submitted confidential or proprietary information to anyone beyond LabCorp's outside counsel. *See* Federal Court Protective Order ¶¶ 1, 2, 3, 7 (attached hereto as Exhibit A). Sun has filed a "Motion for an Additional Broader Protective Order" regarding the Federal Court Protective Order, and a hearing on that motion will be held on January 28, 2011.

[2] Despite Sun's assertion that Respondents have not demanded or requested that the Commission produce the materials Sun provided to the Commission, Respondents' First Request for Documents on the Federal Trade Commission, which was served on December 17, 2010, seeks, among other things, information and materials received from and communications with third parties during the FTC's investigation.

[3] Sun's assertion that it did not have a legal obligation to cooperate with the FTC and that it provided information to the FTC voluntarily is incorrect. Pursuant to its investigative authority under 15 U.S.C. § 57b-1 and 16 C.F.R. § 2.7, the FTC issued a issued a Civil Investigative Demand ("CID") to Sun on July 29, 2010. *See* CID Issued to Sun Clinical

and Westcliff in the relevant product market, it is necessary to aggregate sales data and other market share metrics from the competitors in the relevant market, even small fringe competitors like Sun. Further, the Commission has relied on the documents and data it received from Sun to refute LabCorp's claim that irrelevant fringe players like Sun are poised to replicate the competition that is lost with the acquisition of Westcliff. Evidence from Sun also supports the Commission's analysis of market definition, the likelihood and sufficiency of entry into the relevant market, and potential anticompetitive effects of the acquisition in the relevant market and the Commission should be able, with appropriate protections, to use that information as evidence in this matter. Finally, the Commission's economic expert, Dr. Frederick Flyer, has used information provided by Sun to calculate market shares.

Laboratories, July 29, 2010. Sun provided the documents for which it now seeks protection pursuant to this CID. *See* CID Response from Sun Clinical Laboratories, Aug. 23, 2010. Similarly, 15 U.S.C. § 49 provides the FTC with the authority to "require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." The FTC permitted Sun to submit a 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.

CONCLUSION

Because the existing Protective Order is sufficient to protect Sun's interests and because the Sun information will be a necessary component of the evidence in the administrative hearing, Complaint Counsel respectfully requests that Nonparty Sun's Motion for an Additional Broader Protective Order be denied.

A proposed order is attached.

Dated: January 21, 2011

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**Docket No. 9345**
LABORATORY CORPORATION OF AMERICA, et al.,	)	**PUBLIC**
	)	
Respondents.	)	

[PROPOSED] ORDER

Upon consideration of Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order, Complaint Counsel's opposition thereto, and the Court being fully informed,

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

Date: _____, 2011

_____
D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I filed via hand delivery an original and one paper copy and via electronic mail a .pdf copy that is a true and correct copy of the paper original of the foregoing **Opposition to Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order** with:

Donald S. Clark
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Federal Trade Commission
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I also certify that I delivered via hand delivery one paper copy and via electronic mail one .pdf copy that is a true and correct copy of the paper original of the foregoing **Opposition to Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order** to:

The Honorable D. Michael Chappell
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I also certify that I delivered via electronic mail one .pdf copy that is a true and correct copy of the paper original of the foregoing **Opposition to Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order** to:

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I also certify that I delivered via electronic mail one .pdf copy that is a true and correct copy of the paper original of the foregoing **Opposition to Nonparty Sun Clinical Laboratories' Motion for an Additional Broader Protective Order** to:

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January 21, 2011

By:

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EXHIBIT A

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

FEDERAL TRADE COMMISSION, Plaintiff, v. LABORATORY CORPORATION OF AMERICA, et al., Defendants.	No. SACV-10-1873-AG (MLGx) ~~[PROPOSED]~~ **ORDER GRANTING JOINT MOTION FOR A STIPULATED PROTECTIVE ORDER** Date: Time: Hon. Andrew J. Guilford

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. It shall include non-public trade secret or other research, development or commercial information, the disclosure of which would likely cause commercial harm to third parties or the defendants. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as confidential material: strategic plans, trade secrets, customer-specific evaluations or data, sales contracts, system maps, personnel files and evaluations, information subject to confidentiality or non-disclosure agreements, proprietary technical or engineering information, proprietary financial data or projections and proprietary consumer, customer or market research or analyses applicable to current or future market conditions. Confidential material shall be designated as either "Confidential – Attorneys' Eyes Only" or "Highly Confidential – Outside Counsel Only" as set forth in paragraphs 7 and 8. Any document provided to Plaintiff prior to the date this Order is entered and labeled or designated as "confidential" by a third party shall be treated as "Highly Confidential – Outside Counsel Only" material. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth

(other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof submitted by a party or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as either "Confidential - Attorneys' Eyes Only" or "Highly Confidential - Outside Counsel Only," including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of either "Confidential - Attorneys' Eyes Only" or "Highly Confidential - Outside Counsel Only" shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "Confidential - Attorneys' Eyes Only" or "Highly Confidential - Outside Counsel Only" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material and the appropriate level of confidentiality to be applied. Confidential information contained in electronic documents may also be designated either "Confidential - Attorneys' Eyes Only" or "Highly Confidential - Outside Counsel Only" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Material designated "Highly Confidential - Outside Counsel Only" shall be disclosed only to: (a) appropriate judges presiding over this proceeding, personnel assisting the judges, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any defendant, their

associated attorneys and other employees of their law firm(s), provided they are not employees of a defendant; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a defendant and have signed an agreement to abide by the terms of the Order; and (e) any witness or deponent who may have authored or received the information in question.

8. Material designated "Confidential - Attorneys' Eyes Only" may be disclosed to Kathryn Kyle, in-house counsel for defendants as well as those authorized under paragraph 7 above.

9. If any party seeks to challenge a designation of material as "Confidential - Attorneys' Eyes Only" or "Highly Confidential - Outside Counsel Only," the challenging party shall notify the producing party and all other parties of the challenge. Such notice shall identify with specificity (*i.e.*, by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The producing party may preserve its designation by providing the challenging party and all other parties a written statement of the reasons for the designation within five (5) business days of receiving notice of the confidentiality challenge. If the producing party timely preserves its rights, the parties shall continue to treat the challenged material as it is designated, absent a written agreement with the producing party or order of the Court providing otherwise.

10. If any conflict regarding a confidentiality designation arises and the parties involved have failed to resolve the conflict via good-faith negotiations, a party seeking to disclose designated "Confidential - Attorneys' Eyes Only" or "Highly Confidential - Outside Counsel Only" or challenging a confidentiality designation may make written application to the Court for relief. The application shall be served on the producing party and the other parties, and shall be accompanied by a

certification that good-faith negotiations have failed to resolve the outstanding issues. The producing party and any other party shall have five (5) business days after receiving a copy of the motion to respond to the application. While an application is pending, the parties shall maintain the pre-application status of the material.

11. Disclosure of confidential material to any person described in Paragraphs 7 or 8 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, or for the purpose of the preparation and hearing in the FTC administrative proceeding directly related to this proceeding, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking the appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

12. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Clerk of the Court, the Clerk shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of this Court, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7, 8 or 11. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material.

Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

13. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Court within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

14. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Court. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR

4.11(e), to discovery requests in another proceeding that are directed to the Commission.

15. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding and the administrative proceeding related to it, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

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

IT IS SO ORDERED.

Dated 4th day of Jan., 2011.

Hon. Andrew J. Guilford
United States District Judge