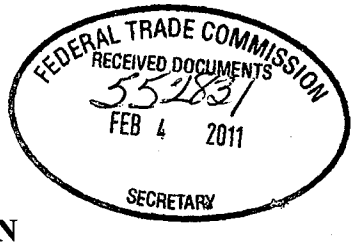
ORIGINAL




**UNITED STATES OF AMERICA**

**BEFORE THE FEDERAL TRADE COMMISSION**

| | |
|---|---|
| **In the matter of** | |
| **LABORATORY CORPORATION OF AMERICA** | **Docket No. 9345** |
| | **PUBLIC** |
| **and** | **EXPEDITED TREATMENT REQUESTED** |
| **LABORATORY CORPORATION OF AMERICA HOLDINGS, corporations** | |

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

Pursuant to Rules 3.31 and 3.34 of the Rules of Practice of the Federal Trade Commission, Nonparty Sun Clinical Laboratories ("Sun Clinical") respectfully moves to quash or limit the Subpoena Duces Tecum (attached hereto as "EXHIBIT A", referred to herein as "Subpoena") served by Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively referred to herein as "Lab Corp"). 16 C.F.R. §§ 3.31, 3.34. This motion is brought pursuant to Rules 3.31 and 3.34 on the grounds that the Subpoena is overly broad and unduly burdensome, the documents and information demanded contain privileged, confidential, proprietary, and trade secret information and good cause exists for relief to prevent the disclosure, dissemination, and use of Sun Clinical's trade secrets and confidential commercial information to its direct competitor, Laboratory Corporation of America ("Lab Corp"). Sun Clinical's requested protective order and Motion to Quash provides necessary safeguards to prevent irreparable damage and harm to Sun Clinical's business and

ability to compete, and to prevent annoyance, embarrassment, oppression, and undue burden and expense to Sun Clinical.

**Due to the fact that the subpoena due date in this matter is February 28, 2011, Sun Clinical Laboratories respectfully requests expedited consideration of this motion.**

## INTRODUCTION

On February 1, 2011, nonparty Sun Clinical Laboratories was served with a Subpoena Duces Tecum issued at the behest of Respondents Lab Corp. Nonparty Sun Clinical seeks to quash the Subpoena and a protective order to prevent the disclosure or use of its proprietary and confidential information.

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.

Sun Clinical is not a party to the instant action. The Subpoena would be burdensome even if issued against a party, and as it is issued against a non-party, it is especially unreasonably burdensome and must be quashed. Respondent Lab Corp has served the Subpoena making numerous document demands from Sun Clinical containing sensitive and confidential information. These overly-expansive demands include documents containing Sun Clinical's analysis of its competitors, market shares, supply, demand; Sun Clinical's business plans; monthly business records, contracts and agreements with customers; documents related to all bids submitted by Sun Clinical; history of pricing; analysis of impact of state and federal laws on its own business; business expansion plans; as well as all information related to Sun Clinical's customers and providers. All the demanded information involves sensitive and confidential information which, if disclosed to a competitor, would be extremely harmful to Sun Clinical. In addition, this information has no bearing or relevance to Lab Corp's case involving the FTC and must be prevented from disclosure.

Sun Clinical is not a witness to the alleged anti-trust violation matter involving Lab Corp.

Sun Clinical previously cooperated with requests 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.

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. However, **during the FTC's investigation, Sun Clinical expressly and explicitly declined to cooperate when the FTC requested the documents and information being demanded in Lab Corp's current subpoena**. The documents being demanded by Lab Corp contains extremely confidential and proprietary information vital to Sun Clinical. To force Sun Clinical to disclose this type of sensitive information, even just to Lab Corp's outside counsel, creates an unreasonable threat to Sun Clinical's business and ability to compete.

It should be noted that the FTC did not issue a Subpoena to Sun Clinical seeking the confidential and proprietary information when Sun Clinical refused to produce those documents voluntarily. Sun Clinical did produce documents which were less sensitive.

Thus, Sun Clinical requires a protective order from this and future discovery by Lab Corp and for the Subpoena to be quashed. 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.

**ATTEMPTS TO MEET AND CONFER**

Shortly after Sun Clinical was served with the Subpoena, it immediately forwarded the Subpoena to its counsel, the Law Offices of Doo & Chong. On February 2, 2011, attorney Robert Chong called and left a message for Benjamin Holt, the issuing attorney on the Subpoena.

On February 3, 2011, Mr. Chong again called Mr. Holt and left another message to the same effect that he was attempting to meet and confer with Mr. Holt about Lab Corp limiting or

withdrawing its Subpoena. Mr. Chong also left a message for Amy Gallegos, an attorney from the Los Angeles firm of Hogan Lovells, Lab Corp's attorney.

Apparently, all of Lab Corp's attorneys were in Court attending to the Preliminary Injunction hearing in Santa Ana. This was confirmed by Mr. Holt's assistant, Sharon Abarack.

Mr. Chong then sent an email to Mr. Holt and Mr. Corey Roush, in attempts to telephonically communicate with either of Lab Corp's attorneys.

Because of the stringent time constraint to file this Motion, Mr. Chong had to finalize this Motion for overnight delivery. As such, attempts to meet and confer were unsuccessful. However, Mr. Chong expects to hear from Mr. Holt when he is available, but, the Motion was finalized without meet and confer discussions.

Mr. Holt was well aware that Sun Clinical was represented by counsel and could have reached out to Mr. Chong before issuing the Subpoena, or, at the very least, contacted Mr. Chong about possibly accepting service of the Subpoena.

## ARGUMENT

### a. Quashing the Supoena and Issuing a Protective Order is Necessary to Safeguard Confidential Information.

Like the federal courts, an Administrative Law Judge in an FTC proceeding should quash or limit any subpoena that is unduly burdensome or requires the disclosure of privileged or confidential and proprietary information. 16 C.F.R. § 3.31(c)(1)(iii) (use of subpoena and other discovery methods "shall be limited by the Administrative Law Judge" where the "burden and expense of the proposed discovery outweigh its likely benefit"); 16 C.F.R. § 3.31(c)(2) (authorizing Administrative Law Judge to "enter a protective order denying or limiting discovery to preserve" a privilege); Fed. R. Civ. P. 45(c)(3) (a court "shall quash or modify the subpoena if it... requires disclosure of privileged or other protected matter... [or] subjects a person to undue burden"). 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 also 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).

Lab Corp is currently demanding numerous documents containing extremely sensitive and confidential information vital to Sun Clinical's business and ability to compete. The subpoena makes unreasonable and overly burdensome demands such as:

> "All Documents discussing or analyzing your Business Plans..." (Exhibit A, page 1, paragraph 4.)
>
> "For each month since January 1, 2008, Documents or data sufficient to identify and describe your [(costs, revenue, patients, etc.)]..." (Exhibit A, page 1-2, paragraph 5.)
>
> "Each contract and/or agreement with any Physician Group or Health Plan related to the provision of clinical laboratory services in California executed and/or agreed upon after June 1, 2001, including any amendments or modifications thereto." (Exhibit A, page 2, paragraph 6.)
>
> "Documents or data sufficient to identify and describe every instance in which you have submitted a bid or proposal on a contract or agreement with a Physician Group or Health Plan related to the provision of clinical laboratory services in California..." (Exhibit A,

page 2-3, paragraph 7.)

"Documents sufficient to identify and describe every instance in which a Physician Group or Health Plan has requested from you a bid or proposal on a contract or agreement related to the provision of clinical laboratory services in California..." (Exhibit A, page 3, paragraph 8.)

"All Documents discussing or analyzing the prices, quality, and quantity of clinical laboratory services provided to physician groups in California..." (Exhibit A, page 4, paragraph 13.)

"All Documents related to your actual or potential Business Plans with respect to expansion or entry into any aspect of the provision of clinical laboratory services in California..." (Exhibit A, page 4, paragraph 14.)

"Documents sufficient to identify and describe the addresses of each of your patient service centers, each of your STAT labs, and each of your clinical laboratories..." (Exhibit A, page 4-5, paragraph 16.)

All of the demands contained in the Subpoena are equally egregious in their demands for confidential information, and these are provided only by way of example.

This information 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). 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.

In addition, the demands made by Lab Corp in the Subpoena are unreasonable and overly burdensome. The Subpoena requires Sun Clinical to produce documents dating as far back as 2001 (Exhibit A, page 3, paragraphs 10 and 11, as examples.), and also demands documents relating to its costs and revenues for every month dating back to 2005 (Exhibit A, page 3, paragraph 8). Not only is this information strictly confidential and proprietary, the mere efforts involved in responding to these demands are unreasonable and severely burdensome.

Furthermore, Lab Corp's need for this confidential information in its current FTC action is insignificant when balanced against the dangers posed to Sun Clinical's business and ability to compete. Disclosure of such confidential information would ruin Sun Clinical's competitive standing and grant its competitor's all the information needed to effectively strategize against Sun Clinical's business plans and ultimately wipe out its business.

**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, **for information which Sun Clinical has already voluntarily disclosed**. This protection is insufficient **because Lab Corp now seeks confidential information which Sun Clinical adamantly and steadfastly refused to disclose. A new Protective Order and/or Motion to Quash are now necessary.**

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, Lab Corp demands extremely confidential and proprietary information and documents containing Sun Clinical's business model, future business plans, history of bids, costs, revenues, market analysis and customer information, among a long list of other confidential material. 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.**

Not only is the information demanded by Lab Corp's Subpoena extremely 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.

Information is not discoverable if it is not relevant. Fed. R. Civ. P. 26(b)(1). Moreover, discovery request are overbroad, even if some responsive information is conceivably relevant, when only a fraction of the millions of documents requested are relevant. *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.,* 981 F.2d 429, 438-39 (9th Cir. 1992).

The extremely large number of documents in this case includes sensitive information such as Sun Clinical's business model, future business plans, history of bids, costs, revenues, market analysis and customer information. Confidential information such as the finances or revenue of Sun Clinical is irrelevant to the action against Lab Corp, and Sun Clinical's own confidential market analysis regarding the laboratory clinical testing market is immaterial to the legitimacy of Lab Corp's underlying case. To place the burden on Lab Corp's competitors to

reveal confidential and proprietary commercial and financial information such as Sun Clinical's costs, revenues, and history of bids is unreasonable, harmful to the business and competition of third parties, and overly burdensome.

Even during the FTC's investigation and Sun Clinical's subsequent cooperation, Sun Clinical expressly refused its cooperation when requested to produce documents and information similar to that being demanded by Lab Corp. The FTC did not issue a subpoena, and this extremely sensitive and confidential information was not requested or required in the FTC's investigation related to the underlying case. This calls into question the relevance of the information currently being demanded, as well as Lab Corp's need for these documents in its case with the FTC.

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.

## CONCLUSION

The Commission must issue a protective order excusing Sun Clinical from the Subpoena Duces Tecum issued by Lab Corp. The documentation and information being demanded contains extremely sensitive, confidential, and proprietary information, and disclosure through a subpoena 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.

The existing Protective Order is insufficient, as Lab Corp's Subpoena seeks the disclosure of new and extremely confidential information.

For the reasons stated above, nonparty Sun Clinical respectfully motions this Commission to protect its business interests and ability to compete by quashing Lab Corp's Subpoena Duces Tecum and granting the proposed Protect Order, and that it be awarded its reasonable attorney's fees and costs, as well as such other relief, both legal and equitable, to which it may show itself justly entitled.

Dated: Feb 3, 2011

Respectfully Submitted,

ROBERT W. CHONG
Law Offices of Doo & Chong
2596 Mission Street, Ste. 302
San Marino, CA 91108
Telephone: (626)403-3332
Facsimile: (626)403-7733
robertchong@doochonglaw.com
*Attorney for Nonparty SUN CLINICAL LABORATORIES*

# DECLARATION OF ROBERT W. CHONG

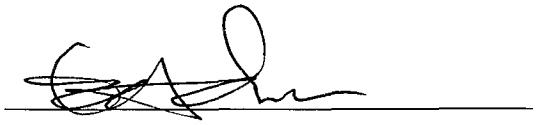
I, ROBERT W. CHONG, declare as follows:

1. I am an attorney duly licensed to practice in the United States District Court in the Central District of California. I am the counsel retained by Sun Clinical Laboratories to represent them as a non-party in the matter of Respondents Laboratory Corporation of America, et al. and in production of documents pursuant to Respondents' Subpoena.
2. I submit this declaration according to facts and circumstances for which I have personal knowledge. For all other facts and circumstances, I testify based on information and belief. If called upon, I would and could competently testify hereto.
3. On February 2, 2011, I initiated a telephonic conversation with Benjamin F. Holt, the attorney of record for Respondents Laboratory Corporation of America in attempts to confer in an effort to resolve by agreement the issues raised by this motion. Unfortunately, I was only able to leave a message on his voicemail system.
4. On February 3, 2011, I again placed a telephone call to Mr. Holt. I was only able to speak with Sharon Abarak, Mr. Holt's assistant. Ms. Abarak informed me that Mr. Holt, and all attorneys at Hogan Lovells are in Los Angeles for the Preliminary Injunction Hearing in Federal Court, in Santa Ana. I asked Ms. Abarak to ask Mr. Holt to call me when he is available. I also called Ms. Amy Gallegos, who is with the Los Angeles office of Hogan Lovells, in an attempt to perhaps locate Mr. Holt in the Los Angeles office. Unfortunately, I was only able to leave a telephone message with Ms. Gallegos. Ms. Abarak later called and left a message confirming that all the attorneys for Lab Corp, including Mr. Holt were in Court.
5. As a final effort, I sent an email to Mr. Holt and Mr. Corey Roush, asking either gentleman to call me when they are available.
6. Unfortunately, due to the limited time available to file this Motion, my efforts to resolve

by agreement these issues were unsuccessful, and the accompanying Motion and this Declaration were immediately filed pursuant to 16 C.F.R. § 3.22.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES THAT THE ABOVE FACTS ARE TRUE AND CORRECT.

Executed this 3rd day of February at San Marino, California.



ROBERT W. CHONG, ESQ.

**UNITED STATES OF AMERICA**

**BEFORE THE FEDERAL TRADE COMMISSION**

| | | |
|---|---|---|
| **In the matter of** | ) | |
| | ) | **Docket No. 9345** |
| **LABORATORY CORPORATION OF AMERICA** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **LABORATORY CORPORATION OF AMERICA HOLDINGS,** | ) | |
| **corporations** | ) | |
| | ) | |

**[PROPOSED] ORDER**

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

IT IS HEREBY ORDERED, that Nonparty Sun Clinical Laboratories' Motion to Quash and for Protective Order is GRANTED.

IT IS FURTHER ORDERED, that the subpoenaed nonparty is hereby ORDERED not to produce any documents to Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings.

IT IS FURTHER ORDERED, that Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings and the Federal Trade Commission are ORDERED from seeking confidential, proprietary, and privileged information and documents from nonparty Sun Clinical Laboratories relating to its business plans, market analysis, customers, providers, costs, revenues, and any other non-public information related to its clinical laboratory business

by way of Subpoena, Subpoena Duces Tecum, or by any other form of discovery allowable under this proceeding.

The provisions of this Order Quashing Subpoena and Order for 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:

- ***(Expedited Treatment Requested)Nonparty Sun Clinical Laboratories' Motion to Quash and/or Limit Subpoena Duces Tecum and 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:

- ***(Expedited Treatment Requested)Nonparty Sun Clinical Laboratories' Motion to Quash and/or Limit Subpoena Duces Tecum and 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:

- ***(Expedited Treatment Requested)Nonparty Sun Clinical Laboratories' Motion to Quash and/or Limit Subpoena Duces Tecum and 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

///
///
///
///

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

- ***(Expedited Treatment Requested)Nonparty Sun Clinical Laboratories' Motion to Quash and/or Limit Subpoena Duces Tecum and Protective Order***
- ***[Proposed Order]***

J. Robert Robertson
Corey Roush
Benjamin Holt
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004

February 3, 2011

By:_____
SUSAN DIXON

**UNITED STATES OF AMERICA**

**BEFORE THE FEDERAL TRADE COMMISSION**

| | | |
|---|---|---|
| **In the matter of** | ) | |
| | ) | **Docket No. 9345** |
| **LABORATORY CORPORATION OF AMERICA** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **LABORATORY CORPORATION OF AMERICA HOLDINGS,** | ) | |
| **corporations** | ) | |
| | ) | |

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

# EXHIBIT A

18428

# SUBPOENA DUCES TECUM

**Provided by the Secretary of the Federal Trade Commission, and Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)**

| 1. TO | 2. FROM |
|---|---|
| Sun Clinical Laboratories<br>210 N. Garfield Avenue<br>Monterey, CA 91754<br>Attn: Frances Sun | UNITED STATES OF AMERICA<br>FEDERAL TRADE COMMISSION |

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

| 3. PLACE OF PRODUCTION | 4. MATERIAL WILL BE PRODUCED TO |
|---|---|
| Hogan Lovells US LLP<br>555 Thirteenth Street NW<br>Washington DC 20004 | Benjamin F. Holt, Hogan Lovells US LLP |
| | 5. DATE AND TIME OF PRODUCTION<br>February 28, 2011 at 9:00 AM |

6. SUBJECT OF PROCEEDING

In the Matter of Laboratory Corporation of America and Laboratory Corporation of America Holdings, Docket No. 9345

7. MATERIAL TO BE PRODUCED

Please see Exhibit A

| 8. ADMINISTRATIVE LAW JUDGE | 9. COUNSEL AND PARTY ISSUING SUBPOENA |
|---|---|
| Honorable D. Michael Chappell<br>Chief Administrative Law Judge<br><br>Federal Trade Commission<br>Washington, D.C. 20580 | Benjamin F. Holt<br>Hogan Lovells US LLP<br>202-637-8845<br>Counsel for Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings |

| DATE SIGNED | SIGNATURE OF COUNSEL ISSUING SUBPOENA |
|---|---|
| 1/27/11 | |

## GENERAL INSTRUCTIONS

### APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

### MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

### TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

## RETURN OF SERVICE

*I hereby certify that a duplicate original of the within subpoena was duly served:* (check the method used)

- ☐ *In person.*
- ☐ *by registered mail.*
- ☐ *by leaving copy at principal office or place of business, to wit:*

*on the person named herein on:*

(Month, day, and year)

(Name of person making service)

(Official title)

## EXHIBIT A

## DOCUMENTS REQUESTED

Please provide all of the following non-privileged documents maintained in your files Capitalized terms are defined beginning on page 5, and the relevant time period is from January 1, 2008 to the present, unless otherwise noted in a specific request.

1. All Documents discussing or analyzing the Acquisition, the FTC Acquisition Review, and the Action.

2. All Documents since June 1, 2001, discussing or analyzing competition for contracts with Physician Groups or Health Plans for the provision of clinical laboratory services in California.

3. All Documents discussing or analyzing competition, competitors, market shares, market power, market concentration, geographic markets, product markets, entry, expansion, supply, demand, or any other market conditions related to the provision of clinical laboratory services to physicians in California.

4. All Documents discussing or analyzing your Business Plans with respect to the provision of clinical laboratory services to physicians in California, including but not limited to your Business Plans with respect to providing clinical laboratory services to Physician Groups and/or Health Plans pursuant to capitated or fee-for-service billing arrangements.

5. For each month since January 1, 2008, Documents or data sufficient to identify and describe, with respect to the provision of clinical laboratory services to physicians in California: (1) your average number of accessions per day; (2) your average price per accession ("PPA"); (3) your revenue; (4) your total number of covered patient lives; (5) your average cost per accession ("CPA"); (6) your supply costs (or other measure of marginal cost); and (7) your total average costs. State items (1) through (4) above separately for each payment source, including but not

limited to: Medicare; Medicaid; patient (out-of-pocket); client (direct-bill physicians, hospitals, laboratories, etc.); capitated Health Plans or Physician Groups; fee-for-service Health Plans or Physician Groups; or any other source (identify each source).

6. Each contract and/or agreement with any Physician Group or Health Plan related to the provision of clinical laboratory services in California executed and/or agreed upon after June 1, 2001, including any amendments or modifications thereto.

7. Documents or data sufficient to identify and describe every instance in which you have submitted a bid or proposal on a contract or agreement with a Physician Group or Health Plan related to the provision of clinical laboratory services in California since January 1, 2005, whether the bid or proposal was unsolicited, solicited through a formal bidding process, or solicited through an informal request for pricing, including: (1) the name of the Physician Group or Health Plan; (2) the date you submitted the bid or proposal; (3) whether you won or lost each such bid or proposal; (4) if you lost such a bid or proposal, the name of the competitor(s) who won the contract or agreement; (5) the proposed and actual duration of the contract or agreement; (6) any rights to exclusivity under the contract or agreement; (7) the conditions and notifications (if any) required for early termination of the contract or agreement; (8) the total number of capitated lives covered by the contract or agreement; (9) any "carve outs" for tests excluded from capitated rates under the contract or agreement; (10) the proposed and actual capitated or fee-for-service rate(s) included in each such bid or proposal; (11) the basis for the proposed capitated or fee-for-service rate(s) included in each such bid or proposal, including but not limited to estimated utilization, actual and projected costs (including cost per test accession), actual and projected direct revenue from the contract per month, actual and projected indirect revenue (including

"discretionary" or "pull through" revenue) from the contract per month, estimated price per accession, and the estimated profit margin from the contract.

8. Documents sufficient to identify and describe every instance in which a Physician Group or Health plan has requested from you a bid or proposal on a contract or agreement related to the provision of clinical laboratory services in California since January 1, 2005, where you declined to submit such a bid or proposal, whether the bid or proposal was requested as part of a formal bidding process or an informal request for pricing, including: (1) the name of the Physician Group or Health Plan; (2) the approximate date of the communication regarding the bid or proposal; and (3) the reason why you declined to submit a bid or proposal.

9. Documents sufficient to identify all of your actual or potential competitors with respect to the provision of clinical laboratory services in California.

10. Since June 1, 2001, all Documents, testimony, declarations, or other information provided by you in response to any formal or informal request from the FTC (including but not limited to subpoenas or civil investigative demands) concerning the Quest / Unilab Acquisition, or any other merger or acquisition of clinical laboratories in California, and all correspondence related to such requests (including but not limited to the request itself, correspondence with the FTC, draft declarations, and any comments on draft declarations).

11. All Documents since June 1, 2001, related to Communications between you and the FTC regarding the Action, the Acquisition, the FTC Acquisition Review, the Quest / Unilab Acquisition, and the Quest / Unilab Acquisition Review including but not limited to Communications related to the Bankruptcy Proceeding, the liquidation value of Westcliff's assets, potential alternative purchasers of Westcliff's assets, and the FTC's intent to challenge the Acquisition.

12. All Documents discussing or analyzing the prices, quality, and quantity of clinical laboratory services provided to physician groups in California, including but not limited to Documents related to historic changes in the price, quality, or quantity of both capitated and fee-for-service clinical laboratory services over time and Documents related to projected changes in the price, quality, or quantity of both capitated and fee-for-service clinical laboratory services in the future.

13. All Documents discussing or analyzing the impact of local, state, or federal laws or regulations on the price, quality, or quantity of clinical laboratory services provided to physicians in California, including but not limited to the impact of the False Claims Act, Anti-Kickback Statute, Stark Law, California Business and Professions Code § 17043 (Sales under cost; gifts), and licensure requirements on the price, quality, and quantity of clinical laboratory services provided to physicians in California.

14. All Documents related to your actual or potential Business Plans with respect to expansion or entry into any aspect of the provision of clinical laboratory services in California (or any geographic region in California), including but not limited to your Business Plans with respect to providing such services to Physician Groups or Health Plans; and your Business Plans with respect to providing such services pursuant to a capitated or fee-for-service billing arrangement.

15. Any presentations, studies, surveys, spreadsheets, analyses, summaries, reports, or other similar business records related to any prior or planned merger(s), acquisition(s), or joint venture(s) involving you and any other clinical laboratory in California, including but not limited to Documents discussing your reasons for the acquisition(s), merger(s), or joint venture(s).

16. Documents sufficient to identify and describe the address of each of your patient service centers, each of your STAT labs, and each of your clinical

laboratories; the number of phlebotomy chairs and phlebotomists working at each such patient service center; locations of any patient service centers that you plan to open; and the locations where you have attempted to open a patient service center but have been unable to do so because of exclusivity rights held by another clinical laboratory at the location (identify the other clinical laboratory).

**DEFINITIONS**

Unless the terms of a document request specifically indicate otherwise, the following definitions are applicable throughout the requests and are incorporated into each specific request.

1. "Action," as used herein, means: (1) the case pending in the United States District Court for the Central District of California entitled *Federal Trade Commission v. Laboratory Corporation of America, et al.*, Case No. SACV-10-1873-AG (MLGx); (2) the pending FTC administrative proceeding entitled *In re Laboratory Corporation of America, et al.*, Docket No. 9345; (3) the pending adversary proceeding before the United States Bankruptcy Court for the Central District of California entitled *LabWest, Inc., et al. v. Federal Trade Commission*, Case No. 8:10-AP-01564-TA.; and (4) any other related action filed by the FTC and/or LabCorp in this matter.

2. The "Acquisition," as used herein, refers to the acquisition of Westcliff assets by LabWest, a wholly-owned subsidiary of LabCorp, on June 16, 2010.

3. "All" and "each," as used herein, shall be construed as all and each.

4. "And" and "or," as used herein, shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed outside of its scope.

5. "Any," as used herein, means each and every.

6. "Bankruptcy Proceeding," as used herein, means Westcliff's petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101 *et*

*seq.* before the United States Bankruptcy Court for the Central District of California, Santa Ana Division, in the case *In re: Westcliff Medical Laboratories, Inc., and Biolabs, Inc.*, Case Nos. 8:10-BK-16743 and 8:10-BK-16746.

7. "Business Plan," as used herein, means Your formal and informal intentions about the course and objectives of Your business, regardless of their level of development and implementation, and includes, but is not limited to, short and long-term strategies, budget and financial projections, expansion or retrenchment plans, and research and development efforts and aims.

8. "Clinical laboratory services," as used herein, means clinical laboratory services provided by hospitals and independent laboratories to physicians pursuant to either a capitated or fee-for-service billing arrangement.

9. "Communication," as used herein, means all modes of conveying information, including but not limited to telephone calls, e-mails, letters, conversations, interviews, meetings, hearings, and other written or spoken language or graphics, between two or more persons.

10. "Concerning" and "related to," as used herein, mean analyzing, alluding to, concerning, considering, commenting on, constituting, comprising, containing, describing, dealing with, evidencing, identifying, involving, reporting on, relating to, reflecting, referring to, regarding, studying, mentioning, or pertaining to, in whole or in part.

11. "Defendant," as used herein, means LabCorp.

12. "Document" is used in the broadest sense and includes, but is not limited to, all writings, drawings, graphs, charts, spreadsheets, sound and video recordings, electronic data, or data compilations, and any other materials described in Fed. R. Civ. P. 34(a), whether printed, recorded, produced, stored, or reproduced by any mechanical or electronic process, or written or produced by hand. A draft or non-identical copy (including one with notations) is a separate Document within the

meaning of this term.

13. The "FTC," means the United States Federal Trade Commission.

14. The "FTC Acquisition Review," as used herein, refers to any investigative steps, including, but is not limited to, the issuance of subpoenas or civil investigative demands, formal or informal requests for Documents or testimony, the taking of any testimony, the conduct of any interviews or hearings, market research, and any other gathering of facts, that were taken in connection with a review of the Acquisition, FTC File No. 101-0152 and/or Docket No. 9345, under either Part 2 or Part 3 of the FTC Rules of Practice.

15. "Health Plan," as used herein, means any health maintenance organization, preferred provider organization, managed health care plan of any kind, self-insured health benefit plan, other employer or union health benefit plan, Medicare, Medicare Advantage, Medicaid, Medi-Cal, CHAMPUS, or private or governmental health care plan or insurance of any kind.

16. "LabCorp," as used herein, means Laboratory Corporation of America Holdings and its domestic or foreign parents, subsidiaries, divisions, affiliates, partnerships, joint ventures, and businesses, wherever located, including but not limited to LabWest, Inc., LabCorp's West Division, National Genetics Institute ("NGI"), Esoterix, and US LABS.

17. "Person," as used herein, means any natural person or any business, legal, or governmental entity or association.

18. "Physician Group," as used herein, means any group medical practice, intermediary physician organization, individual practice association, independent physician association, IPA, physician service organization, management service organization, medical foundation, or physician/hospital organization, that directly or indirectly provides, or through which physicians contract to provide, physician services to enrollees of pre-paid health plans.

19. "Plaintiff," as used herein, means the FTC.

20. The "Quest / Unilab Acquisition," as used herein, refers to the acquisition of Unilab Corp. by Quest Diagnostics, Inc., pursuant to an asset purchase agreement signed on April 2, 2002.

21. The "Quest / Unilab FTC Acquisition Review," as used herein, refers to any investigative steps, including, but is not limited to, the issuance of subpoenas or civil investigative demands, formal or informal requests for Documents or testimony, the taking of any testimony, the conduct of any interviews or hearings, market research, and any other gathering of facts, that were taken in connection with a review of the Quest / Unilab Acquisition, FTC File No. 021-0140, Docket No. C-4074.

22. "Subpoena," as used herein, means this subpoena including all exhibits and attachments.

23. "Westcliff," as used herein, means Westcliff Medical Laboratories, Inc., and its domestic or foreign parents, subsidiaries, divisions, affiliates, partnerships, joint ventures, and businesses, wherever located, including, but not limited to BioLabs, Inc.

24. "You," "your," and "Sun," as used herein, refers to Sun Clinical Laboratories, each and every name by which you are known or have been known, and each and every predecessor in interest, successor in interest, domestic or foreign parent, division, subsidiary, affiliate, partnership, joint venture, business, director, officer, employee, attorney, agent, representative, or other Person acting on behalf of Sun.

## INSTRUCTIONS

1. Furnish all responsive Documents in Your possession, custody, or control or in the possession, custody, or control of Your representatives and agents.

2. Where a claim of privilege is asserted in objecting to any request or

sub-part thereof, and any document is withheld (in whole or in part) on the basis of such assertion, you shall provide a privilege log consistent with Fed. R. Civ. P. 26(b)(5)(a).

3. If You at any time had possession, custody, or control of a Document responsive to these requests and if such Document, or portion of such Document, has been lost, destroyed, purged, or otherwise is not presently in Your possession, custody, or control, then: (a) identify the authors, addressees, recipients, date, subject matter, and type of Document; (b) state the date of its loss, destruction, purge, or separation from Your possession or control; (c) state the circumstances surrounding its loss, destruction, purge, or separation from Your possession or control; and (d) state its present or last known location, including the name, address, and telephone number of each person believed to have possession of such Document.

4. If you assert that part of a request is objectionable, respond to the remaining parts of the request to which you do not object. For those portions of any Document request to which you object, please state the reason for such objection and describe the Documents or categories of Documents that are not being produced.

5. These Document Requests shall not be deemed to call for identical copies of Documents. "Identical" means precisely the same in all respects; for example, a Document with handwritten notes or editing marks shall not be deemed identical to one without such notes or marks.

6. The Documents responsive to these requests are to be produced as they were kept in the ordinary course of business and are to be labeled in such a way as to show which files and offices they came from.

7. In producing Documents in connection with these Document Requests, each Document to be produced shall include all attachments, all enclosures, any

cover letter(s), and any cover email(s) referred to in the Document or originally associated with the Document.

8. The specificity of any single request shall not limit the generality of any other request.

9. Unless clearly indicated otherwise: (a) the use of a verb in any tense shall be construed as the use of that verb in all other tenses; (b) the use of the feminine, masculine, or neuter genders shall include all genders; and (c) the singular form of a word shall include the plural and vice versa.