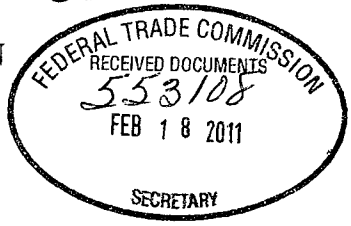
ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	
LABORATORY CORPORATION OF AMERICA	**DOCKET NO. 9345**
and	**PUBLIC REDACTED VERSION**
LABORATORY CORPORATION OF AMERICA HOLDINGS, et al	
Respondents.	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL DOCUMENT PRODUCTION

Respondents' Motion to Compel Document Production should be denied. The documents that LabCorp demands are shielded by the government deliberative process privilege and are also exempt from production under the work product doctrine, as discussed below, and supported by the attached declarations of Richard A. Feinstein, Director of the Federal Trade Commission's ("FTC") Bureau of Competition (App. A) and Natalie Manzo, Deputy Attorney General, Office of the Attorney General of California (App. B).

BACKGROUND

Complaint Counsel produced hundreds of thousands of pages with its Initial Disclosures and in subsequent iterations of document production. In its privilege logs, supplied on January 11 and 18 (and attached to LabCorp's Motion), Complaint Counsel identified only a few hundred specific documents to be withheld on the grounds of the work product doctrine and the governmental deliberative process privilege. All of these documents fall within one of the following two categories:

(1) communications between Commission staff and the Interim Monitor and Manager of the Westcliff assets and business, also known as "LabWest" and

(2) communications between Commission staff and the staff of the Office of the Attorney General of California ("AG") relating to coordination of the two agencies' parallel investigations of the same unlawful transaction. Feinstein Decl., ¶¶ 10-19, 20-26.[1]

Complaint Counsel's privilege logs did not identify or list internal communications within the Commission. *See* Commission Rule of Practice 3.31(c)(2).

ARGUMENT

I. The Government Deliberative Process Privilege Compels Denial of LabCorp's Motion

A. The Scope of the Privilege

The purpose of the governmental deliberative process privilege is "to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government," since "officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (internal quotations omitted); *see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). In order to qualify for the deliberative process privilege, a document: (1) must have been generated *before* the adoption of the relevant agency decision and (2) must contain opinions, recommendations, or advice about agency policies.

---

[1] Complaint Counsel identified a small subset of the documents as protected from disclosure by the government informant privilege. Each of these documents is also protected by the work product and deliberative process privileges, so this Opposition does not discuss the government informant privilege issues. Complaint Counsel reserves the right to do so later in the event it becomes necessary.

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents in which "the factual material . . . is so interwoven with the deliberative material that it is not severable" are also covered. *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam); *accord In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The privilege applies to documents generated by individual staff members or Commissioners, *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 707-08 (D.C. Cir. 1971); by units within the agency, *Warner*, 742 F.2d at 1160-62; and by outside consultants or contractors acting on behalf of the agency. *Klamath*, 532 U.S. at 10-11.

LabCorp contends that Complaint Counsel failed to demonstrate that the withheld documents listed in the privilege log are "pre-decisional" and that the agency decision to which the documents pertain was not identified. Mot. to Compel 4. But most of the documents at issue were generated as part of the pre-complaint investigation of the LabCorp/Westcliff acquisition, and pertain to the agency decisions on whether to issue a Complaint and what such Complaint should include. Those withheld documents generated subsequent to the date of the Complaint also pertain to ongoing decisions that may arise in the course of litigation. The Bureau staff's fact-gathering, "[a]nalyses and recommendations play a critical role in the Commission's decision whether or not to challenge a merger" and "go to the heart of the deliberative and policy-making processes." *Warner*, 742 F.2d at 1161; Feinstein Decl., ¶¶ 3-6.

B. The Deliberative Process Privilege Applies to FTC Communications With State Enforcement Agency Staff Where Such Communications Contribute to the FTC's Decision-Making

LabCorp contests Complaint Counsel's claim to the deliberative process privilege for communications between FTC staff and personnel in the AG's Office. Mot. to Compel 5. But as LabCorp concedes, the AG's Office has been conducting a parallel investigation into

"whether to bring a lawsuit of its own to challenge Respondents' acquisition of Westcliff." *Id.* at 7-8. The FTC and AG staffs closely coordinated their respective investigations, in which the two agencies' interests were closely aligned. Feinstein Decl., ¶¶ 20-26; Manzo Decl., ¶¶ 3-4, 6-8.[2] Consistent with applicable confidentiality restrictions (e.g., 16 C.F.R. § 4.11(c)), the FTC and AG staffs shared information with one another and exchanged views on the appropriate antitrust analysis, which informed the FTC staff's understanding of the issues and significantly contributed to the FTC's deliberations.

When federal and state agencies coordinate and their interactions contribute to the federal agency's deliberations, those communications are protected by the deliberative process privilege. For example, when the FTC and a state had parallel investigations of the same apparently anticompetitive conduct, the court held that discussions between the agencies about those investigations were protected from disclosure. *Mobil Oil Corp. v. FTC*, 406 F. Supp. 305, 315 (S.D.N.Y. 1976);[3] *accord Gen. Elec. Co. v. EPA*, 18 F. Supp. 2d 138, 141-42 (D. Mass. 1998) ("copies of communications sent from a federal agency to a state agency in the course of a coordinated regulatory effort may be withheld on the basis of the federal executive deliberative process privilege," and similarly, the privilege applies "when the federal agency asks the state

---

[2] LabCorp provides no support for its speculation that the two agencies' interests were "at odds" with one another. Mot. to Compel 5-6. In reality, the two matters do not seek divergent outcomes. This case seeks to preserve competition, whereas the other addresses differential pricing. The existence of the *qui tam* case does not signify that the AG is unconcerned about competition issues; in fact, the AG continues to evaluate the possibility of bringing an antitrust action. *See* Manzo Decl., ¶¶ 5-6.

[3] While the Second Circuit subsequently abrogated a FOIA-related portion of the decision, it did not disturb the portion of the decision relevant here. *Grand Central P'ship, v. Cuomo*, 166 F.3d 473, 484 (2d Cir. 1999).

agency for data . . . and then uses the data received" – i.e., "when the state agency is, in effect, drawn into the deliberative process and consulted as to the outcome").[4]

Thus, Director Feinstein appropriately invoked the deliberative process privilege in instructing Complaint Counsel to withhold the documents at issue. Feinstein Decl., ¶¶ 24-26. LabCorp provides no explanation at all for why it needs the requested materials, relying primarily on its inaccurate speculation that the AG has decided not to pursue litigation against the transaction.

C. The Deliberative Process Privilege Applies to FTC Staff Communications With the Interim Monitor and the Manager of the Held-Separate "LabWest" Business

Emmett Kane, the Interim Monitor of the held-separate LabWest business, plays a critical role in discharging his fiduciary duty to the Commission by overseeing the management of the business, monitoring its and LabCorp's compliance with the Hold Separate Agreement ("HSA") (PX 0006), and regularly reporting to Commission staff regarding the entity's business operations and its ability to operate independently as a viable, effective competitor if divestiture from LabCorp were ordered. Feinstein Decl., ¶¶ 10-19. Similarly, the Manager of LabWest, Daniel Shoemaker, in discharging his obligation under the HSA to report "directly and exclusively" to Mr. Kane, has provided critical and valuable information and analysis to the FTC staff, both directly and indirectly through Mr. Kane. The information and analysis developed through these interactions with Mr. Kane and Mr. Shoemaker are both "predecisional" and "deliberative" – they have been part of the staff's deliberations and recommendations regarding

---

[4] For these reasons, communications between FTC staff and the AG's staff, even after December 1, 2010, should be protected since the AG's Office has not made a final determination of how it will proceed.

the divestiture remedies sought in the Complaint and the real-world impact of LabCorp's acquisition of the Westcliff assets on competition – as well as related, potential enforcement matters that might be brought in the future. *Id.* Contrary to LabCorp's assertion, the Interim Monitor and the Manager are not fully "independent of the FTC." Mo. at 6. The HSA specifies that Mr. Kane bears fiduciary obligations to the Commission and that Mr. Shoemaker is to take direction exclusively from Mr. Kane, not from LabCorp management.

The Interim Monitor and the Manager thus fit squarely within the category of persons "acting in a governmentally conferred capacity" and "required to provide advice to the agency," whose communications "received by an agency, to assist it in the performance of its own functions," may be subject to the deliberative process privilege. *Klamath*, 532 U.S. at 10 (citing *Dept. of Justice v. Julian*, 486 U.S. 1, 18 n.1 (1986)).[5]

D. Complaint Counsel's Privilege Logs and the Feinstein Declaration Provide Sufficient Information for the Court to Evaluate and Approve the Privilege Claims

The Court should reject LabCorp's meritless assertion that Complaint Counsel "waived" the deliberative process privilege by failing to supply the senior official's declaration with its initial privilege logs. Mo. 3-4. The government's "obligation to formally invoke the [deliberative process] privilege [does] not arise until plaintiff file[s] a motion to compel." *Doe v. Dist. of Columbia*, 230 F.R.D. 47, 51 (D.D.C. 2005). As importantly, Complaint Counsel

---

[5] Unlike the Indian tribes in *Klamath*, whose communications with the agency were intended to advance their own pecuniary self-interests, 532 U.S. at 12, the Interim Monitor's and Manager's communications with the FTC are more in the nature of communications from a consultant or agent. They do not have "independent interests"; rather, the interests of the Interim Monitor and Manager are defined by the HSA and the responsibilities it imposes. Similarly, the communications between the California AG staff and the FTC in this case advance the AG's public mission of promoting competition and enforcing antitrust laws – activities parallel to those of the FTC – and (unlike the *Klamath* tribes) are unrelated to the AG's self-interests.

specifically stated that it would be providing such a declaration, but respondents allowed only three days to pass before filing its motion to compel. In any event, the purpose of providing a declaration is to ensure that the agency and not litigation counsel is the one invoking the privilege, which is what occurred here.

The privilege logs produced by Complaint Counsel amply satisfy established Commission precedent.[6] In addition, by submitting Mr. Feinstein's declaration, Complaint Counsel has complied with the D.C. Circuit's expectation of "(1) a formal claim of privilege by the 'head of the department' having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege." *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citations omitted); *accord, Moye, O'Brien, O'Rourke, Hogan & Pickert v. Nat'l R.R. Passenger Corp.*, 376 F.3d 1270, 1280 (11th Cir. 2004).

II. The Documents LabCorp Seeks Are Also Exempt From Production Under the Work Product Doctrine

The work product privilege, directly incorporated into Commission Rule 3.31(c)(4), protects materials that are: (1) "prepared in anticipation of litigation or hearing," (2) by or for a "party's representative (including the party's attorney, consultant, or agent)." Rule 3.31(c)(5); *see Hickman v. Taylor*, 329 U.S. 495 (1947); *NLRB v. Sears*, 421 U.S. at 154-55; *FTC v. Grolier Corp.*, 462 U.S. 19 (1983). If the requesting party demonstrates "substantial need" for the

---

[6] *See, e.g., Olin Corp.*, FTC Docket No. 9196 (Nov. 26, 1985) (privilege log sufficient that identified categories of documents and the type of privilege claimed, without "detailed information for each withheld document"); *R.J. Reynolds Tobacco Co.*, FTC Docket No. 9285 (Sept. 24, 1998) (finding sufficient a privilege log organized by category of documents).

materials and "undue hardship" in obtaining the equivalent by other means, the Court may order production of purely factual work-product materials, but not materials that reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party." Rule 3.31(c)(5).

All of the withheld materials originated by Commission attorneys and other staff, whether pre-decisional or not, were "prepared in anticipation" of the present litigation, and materials originated by the Interim Monitor or the Manager in order to provide FTC staff the information required under the HSA constitutes material prepared by agents for or representatives of the FTC staff. Such material particularly merits work product protection here, where those documents, including replies to emails from FTC staff, would tend to reveal the mental impressions and legal theories of the FTC attorneys themselves. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975). The non-disclosure agreements signed by Mr. Kane and Mr. Shoemaker were intended to provide further assurance that the FTC's work product information would not be disclosed to an adversary such as LabCorp. Feinstein Decl., ¶ 17.

Furthermore, given the common interests of the FTC and the California AG in antitrust enforcement and promoting competition, and the restrictions on the AG's disclosure of confidential FTC information, *see* Rule 4.11(c), the FTC staff did not waive or forfeit the work product privilege by sharing materials with the AG staff. *See United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Trustees for Elec. Workers Local No. 26*, 266 F.R.D. 1, 15 (2010) ("[A] party only forfeits the work-product privilege by a disclosure of privileged information in a manner that is inconsistent with preserving the secrecy of that information from an adversary. Disclosure to a person who shares a common interest with the party claiming the privilege cannot therefore work a forfeiture.").

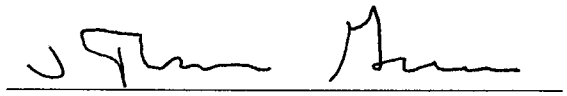
Finally, LabCorp "has not made a particularized showing of need" and it is "not enough that the information sought might be helpful" to LabCorp. *In re MSC.Software Corp.*, Docket No. 9299, Order Denying Respondent's Motion to Compel Production of Third-Party Transcripts, at 4 (May 7, 2002) (Chappell, C.J.).

CONCLUSION

For the reasons set forth above and in the accompanying declarations, LabCorp's Motion to Compel should be denied.

Dated: February 18, 2011

Respectfully submitted,



J. Thomas Greene

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580
Tel: (202) 326-2531
Fax: (202) 326-2655
tgreene2@ftc.gov

Complaint Counsel

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER

Upon consideration of Respondents' Motion to Compel Document Production, Complaint Counsel's Opposition thereto, and the Court being fully informed,

IT IS HEREBY ORDERED, that Respondents' Motion is DENIED.

Date: February __, 2011

D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I filed via hand delivery an original with signature and one paper copy and a .pdf via electronic mail that is a true and correct copy of the paper original of the foregoing ***PUBLIC*** **Complaint Counsel's Opposition to Respondents' Motion to Compel Document Production** with:

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

I also certify that I delivered via hand delivery one paper copy and one .pdf copy that is a true and correct copy of the paper original via electronic mail of the foregoing ***PUBLIC*** **Complaint Counsel's Opposition to Respondents' Motion to Compel Document Production** to:

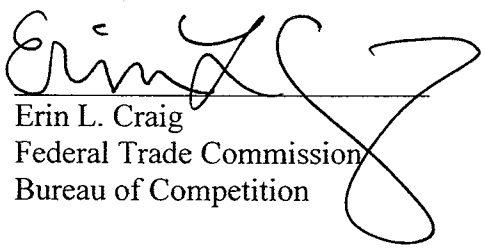
The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Rm. H-113
Washington, DC 20580
oalj@ftc.gov

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 ***PUBLIC*** **Complaint Counsel's Opposition to Respondents' Motion to Compel Document Production** to:

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

Counsel for Defendants
Laboratory Corporation of America and
Laboratory Corporation of America Holdings

February 18, 2011

By: 

Erin L. Craig
Federal Trade Commission
Bureau of Competition

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL DOCUMENT PRODUCTION

APPENDIX A

Declaration of Richard A. Feinstein

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

DECLARATION OF RICHARD A. FEINSTEIN

I, Richard A. Feinstein, declare as follows:

1. I am Director of the Bureau of Competition (the "Bureau") of the Federal Trade Commission ("FTC" or "Commission"). I have held this position since May 2009. I am an attorney and a duly admitted member of the District of Columbia bar. This declaration is based on my professional experience, personal knowledge, and information that I have received in my official capacity as Bureau Director.

I. The Roles of the Bureau Staff, Bureau Director, and Commissioners in Consulting, Deliberating, and Decision-Making On Whether to Open Investigations and Whether to File Complaints

2. Pursuant to Rule 0.16 of the FTC's Rules of Practice and Procedure, 16 C.F.R. § 0.16, the Bureau is responsible for enforcing federal antitrust and competition laws, including the Federal Trade Commission Act, the Clayton Act, and certain other statutes. In fulfilling its responsibilities, the Bureau investigates potential law violations and recommends to the Commission such further action as may be appropriate. Such action may include litigation – *i.e.*,

seeking injunctive and other equitable relief in federal district court or bringing administrative complaints which are tried before the agency's administrative law judges. One of the Bureau's most important responsibilities is to investigate mergers, acquisitions, and other transactions that may have the effect of substantially lessening competition in any line of commerce in any section of the country, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.

3. To authorize the issuance of an administrative complaint and commencement of an adjudicatory proceeding before the agency's administrative law judges, the Commission, acting by the affirmative concurrence of a majority of the participating Commissioners, must determine that it has "reason to believe" that a party may have violated or may be continuing to violate the laws enforced by the Commission, and that issuance of a complaint would be "in the interest of the public." *See* 15 U.S.C. § 45(b). The Supreme Court has found that the Commissioners' decision on whether to issue a complaint should be considered an "agency action" under the Administrative Procedure Act, 5 U.S.C. § 551(13), although it is not a "*final* agency action" that would be subject to judicial review. *See FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 238 n.7 (1980) (emphasis added).

4. Similarly, to authorize filing a complaint in federal court seeking injunctive relief, a majority of the Commissioners must conclude that there is "reason to believe" that a violation may have occurred, be occurring, or be about to occur, and must vote to authorize the filing of such a complaint. *See* 15 U.S.C. § 53(b).

5. The Commission's deliberations and decisions on whether to issue such complaints are guided by the analysis and recommendations of the Bureau's staff, as set forth both in formal memoranda, *see* FTC Op. Manual §§ 4.14.1, 11.5.6, and 13.7.3, and in less formal

communications and consultations. Such formal memoranda are routed through me, as Bureau Director, and in most cases, are accompanied by a separate memorandum consisting of my recommendations. *See, e.g., id.* § 4.14.2.

6. I supervise the Bureau's Assistant Directors, who in turn supervise the attorneys and other staff in their respective Divisions. I consider the advice and analysis of the Assistant Directors and the staff in making critical decisions regarding the opening of merger investigations and the conduct of those investigations. I also consider their advice and analysis in deciding, after the investigation has proceeded, whether to recommend to the Commission to bring an administrative complaint and/or a complaint for injunctive relief in federal court.

7. Although I am ultimately responsible for overseeing the activities of the Bureau's staff, I typically am not involved in all the details of the day-to-day conduct of litigation.

II. LabCorp's Acquisition of the Westcliff Assets, the Hold-Separate Agreement, and the Roles Played by the Interim Monitor and the Manager of the Former Westcliff Business

8. On June 2, 2010, the Bureau's staff learned that Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") were planning to acquire the assets of Westcliff Medical Laboratories, Inc. ("Westcliff"), then under the supervision of the U.S. Bankruptcy Court for the Central District of California, Santa Ana Division, as a result of a May 19, 2010 Chapter 11 bankruptcy filing by Westcliff, made to facilitate the sale to LabCorp. An investigation of the potentially anticompetitive effects of that proposed transaction was commenced shortly thereafter.

9. After learning of the Commission's investigation, LabCorp's counsel notified Commission staff that it would refrain from consummating the transaction until June 18, 2010. Westcliff obtained the Bankruptcy Court's permission to hold another auction of the Westcliff

assets with no minimum bid, which would be fully open to potential purchasers other than LabCorp. However, in contravention of its commitment to Commission staff, LabCorp consummated its acquisition of the Westcliff assets on June 16, 2010, and the second auction was cancelled.

10. In lieu of defending an imminent FTC challenge to the closing of the acquisition and integration of the Westcliff assets, LabCorp agreed to hold the Westcliff assets and business separate and apart, and permit the former Westcliff business to continue to operate as an independent entity, during the pendency of the Commission's investigation into whether the acquisition violated the antitrust laws. *See* Hold Separate Agreement, executed on June 25, 2010 ("HSA" or "Agreement") (PX 0006). Subsequently, LabCorp's obligation to continue complying with the HSA was incorporated into Temporary Restraining Orders issued by the U.S. District Court for the District of Columbia on December 3, 2010, and by the U.S. District Court for the Central District of California on December 10 and 16, 2010.

11. The HSA specifies that its purposes are to:

Id. at 14, ¶ II.G. The HSA thus was intended to prevent LabCorp from "scrambling" the Westcliff assets and business and fully integrating them into its own business while the investigation was pending. Ultimately, if the Commission were to bring a complaint and to prevail, the HSA would enable it to obtain an effective divestiture remedy that could re-establish

Westcliff as a viable competitor and restore competition in the relevant markets. *Cf.* Administrative Complaint, Docket No. 9345, at 12-13 (issued Nov. 30, 2010).

12. Among other things, the HSA provides for the appointment of an [redacted] HSA at 6, ¶ II.C.1. Further, the HSA [redacted] *Id.*, ¶ II.C.1.(b). The HSA delegates to the Interim Monitor [redacted] *Id.*, ¶ II.C.1.(c). The HSA also specifies that [redacted] *Id.* at 7, ¶ II.C.1.(h). Emmett Kane has been retained to serve as the Interim Monitor.

13. In addition, the HSA provides for the retention of a Manager who [redacted] and who [redacted] *Id.* at 7-8, ¶¶ II.C.2, II.C.2.(a). Daniel Shoemaker serves as the Manager pursuant to the HSA.

14. The appointment of the Interim Monitor and the Manager under the HSA is intended to ensure, *on behalf of the Commission*, that LabCorp refrains from interfering with the

operational independence of the held-separate Westcliff business – now commonly referred to as "LabWest" – and to provide ongoing information to the Commission staff regarding the operations of that business. Accordingly, Mr. Kane is not completely "independent" from the Commission. Rather, as the HSA explicitly provides, [redacted] In monitoring and implementing the HSA and operating the held-separate business, the Interim Monitor effectively serves as a consultant to the Commission. Similarly, as Manager under the HSA, Mr. Shoemaker reports [redacted] to Mr. Kane, so his fiduciary obligations are necessarily aligned with those of the Commission.

15. All documents and communications between either the Interim Monitor or the Manager, on the one hand, and Commission staff, on the other, further the Commission's ability to assess the HSA and LabCorp's compliance with the HSA, and thereby play a role in the Commission's deliberative process on whether to pursue separate enforcement action against LabCorp for violations of the HSA, or seek modifications to the HSA. Because the Interim Monitor is its fiduciary (and the Manager reports directly and exclusively to the Interim Monitor), the Commission needs to be able to communicate with the Interim Monitor (and with the Manager) freely and with candor. If documents between Commission staff and the Interim Monitor or Manager were provided to the very parties subject to the HSA, the Commission's deliberative process would be harmed, as would its ability to enforce the HSA and to litigate this case.

16. The Bureau's staff attorneys interact frequently with the Interim Monitor, Mr. Kane, both orally and by written communication. In turn, the Manager, Mr. Shoemaker must of necessity communicate regularly and openly with Mr. Kane, to whom he [redacted]

[redacted] reports. I have not personally participated in these communications, but I supervise the staff who do so and am regularly apprised of the content of the communications.

17. Both Mr. Kane and Mr. Shoemaker have signed non-disclosure agreements with the Commission, in which they have committed not to disclose materials or information obtained from the Commission or its staff in connection with the performance of their respective duties. Those agreements are intended to ensure that privileged communications from Commission staff are not shared with other parties.

18. These communications, and the monitoring and information-gathering that they facilitate, were critical to the Bureau staff's investigation of the LabCorp/Westcliff transaction prior to the issuance of the complaint in this proceeding and on an ongoing basis. To the extent that the Monitor had informed staff that LabCorp management was intruding upon the operations of LabWest, in violation of the HSA, it could further degrade the state of competition in the relevant markets – a factual circumstance that, had it occurred, would have been highly relevant to the Commission's decision-making with regard to the complaint. Moreover, the FTC staff attorneys, in their communications to the Interim Monitor and the Manager, are expected to, and in fact do, share their mental impressions, conclusions, opinions, and legal theories regarding significant disputed issues relating to the complaint (as well as the ongoing litigation), such as the extent to which LabWest could function effectively as a viable, independent business if it were divested from LabCorp. And in discharging their obligations under the HSA to respond to the Commission staff's inquiries and provide regular and frequent information to the staff, the Interim Monitor and the Manager are expected to, and in fact do, provide their own mental impressions, conclusions, and opinions regarding these matters.

19. I have not personally reviewed every email, report, or other document transmitted between the Bureau staff and the Interim Monitor and/or the Manager, listed in Complaint Counsel's privilege logs as subject to the work product doctrine and the deliberative process privilege. However, I have reviewed a representative sample of those documents. Based on that review, I have ascertained that these documents convey the analyses, conclusions, and opinions of the staff, the Interim Monitor, and the Manager, relating to the HSA, and that any factual information contained therein is so tightly intertwined with the analyses, conclusion, and opinions of the staff, the Interim Monitor, and the Manager that any disclosure would indirectly reveal the deliberative process used to evaluate the HSA and the remedies sought in the Complaint. Accordingly, I personally determined that the confidentiality of these communications must be preserved, and directed Complaint Counsel to invoke the deliberative process privilege with respect to these documents.

III. Consultation and Coordination With the California Attorney General's Office

20. The Commission frequently coordinates its investigations with state enforcement agencies that are responsible for enforcing their own antitrust and unfair competition laws. Given this mutual interest in law enforcement, it is often more efficient for the Commission and the state enforcement agencies to work together to fulfill our duties to faithfully enforce the laws within our respective jurisdictions. If we did not coordinate, the parties to the transactions under investigation and any relevant third parties might be forced to respond to separate agencies seeking largely the same information. Such consultations and (subject to applicable confidentiality protections) exchanges of information with state government agencies that may have jurisdiction over, and interest in, the same potential violations that the Commission may investigate are both authorized and encouraged. *See* FTC Op. Manual §§ 3.1.2.5. and 3.3.6.10. I

consider the Commission's cooperation and coordination with state enforcement agencies to be a vital and essential tool in fulfilling the Commission's mission of enforcing the nation's antitrust laws.

21. Because the Commission operates under strict confidentiality rules, including Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f) and Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), the Commission's ability to cooperate with state enforcement agencies is conditioned on its ability to share relevant information with the agencies without fear that it will be disclosed further. This includes not only Commission staff work product but also documents received from the parties to the investigation and any third parties. To that end, the Commission requires the state enforcement agency to abide by the Commission's policies on information-sharing, which allow access to information for official law enforcement purposes but requires the state enforcement agency to preserve the confidentiality of material submitted to the Commission. *See* 16 C.F.R. § 4.11(c) (governing the sharing of confidential information with state law enforcement agencies).

22. In this case, throughout the Commission's investigation of LabCorp's acquisition of the Westcliff assets, Commission staff coordinated its investigation with the Office of the Attorney General for the State of California Department of Justice ("AG"), which – as LabCorp observes in its Motion to Compel – has been conducting its own investigation into this transaction. LabCorp indicates in its filing that the California AG "apparently chose not to pursue litigation." This statement is untrue. I am informed that the California AG is continuing its investigation of the LabCorp acquisition of Westcliff, and has not yet reached a definitive decision on whether to bring a complaint. I do not know what the AG's ultimate position will be.

But at the very least, all communications to date with the AG's office have been with a governmental agency whose interests are not adverse to those of the Commission.

23. The Commission has no direct interest in the AG's *qui tam* litigation against LabCorp and other clinical laboratory companies. I understand that litigation is being handled by a separate staff division than the antitrust group managing the LabCorp/Westcliff investigation.

24. As Bureau Director, responsible for overseeing all investigations relating to mergers and acquisitions, I am authorized to invoke the government deliberative process privilege on behalf of the Commission. In consultation with members of our General Counsel's office, I advised Complaint Counsel in this litigation to withhold documents regarding communications with the AG on the basis of the government deliberative process privilege. The withheld documents are described on the privilege logs submitted by Complaint Counsel and generally consist of communications between Commission staff and the AG covering all aspects of the investigation, including internal memoranda of the AG and communications regarding which third-party interviews by Commission staff that the AG's staff chose to participate in. I personally reviewed categories of the documents at issue and have determined that the confidentiality of these communications should be preserved. Both I and members of the General Counsel's office have determined that disclosure of these communications would have an inhibiting effect upon the fullness and frankness of verbal and written expression among Commission staff and the AG and, thus, would have a detrimental effect on the Commission's decision-making processes.

25. The withheld documents relate to communications between Commission staff and the AG made during the Commission's and the AG's respective investigations. The substance of the communications relates solely to the investigations of the LabCorp/Westcliff acquisition.

Each category of relevant communications relate to information that Commission staff or the AG learned as a result of the investigation. The communications furthered staff's discussions with me and others in the Bureau, and helped inform the analysis that the Commission considered in deciding whether to commence the instant litigation. Moreover, the factual information contained in the documents is inextricably intertwined with the FTC and AG staffs' respective opinions, analyses, and conclusions, and production of those documents would indirectly reveal the Commission's decision-making process, including avenues of investigation that were pursued or rejected.

26. Further, the exchange of documents and communications occurred solely to further both agencies' mutual interest in effective and efficient law enforcement. Without the free flow of ideas and candid discussion between agencies charged with investigating the same transaction, we would not be able to coordinate our investigations. Any disclosure of the substance of the documents and communications would harm the Commission's ability to effectively determine whether or not to pursue enforcement actions because one of the tools it uses during investigations, namely coordination with state enforcement agencies, will be rendered useless. If these documents are revealed in this litigation or ever, the Commission will have to reconsider its policies relating to permitting state enforcement agencies or even other federal agencies to coordinate with the Commission's investigations in the future. The public, as well as the parties, benefit from the efficiencies resulting from enforcement agencies' cooperating in their investigations. Conversely, the public would be harmed if the Commission and other federal or state enforcement agencies were not able to coordinate their respective investigations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Richard A. Feinstein
Director, Federal Trade Commission, Bureau of Competition

Signed this 4th day of February, 2011,
in Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO COMPEL DOCUMENT PRODUCTION

APPENDIX B

Declaration of Patricia L. Nagler

PATRICIA L. NAGLER DECLARATION

I, Patricia L. Nagler, declare as follows:

1. I am a deputy attorney general in the Antitrust Law Section of the California Department of Justice, Office of the Attorney General ("CAAG"). I am admitted to practice law before California state and federal courts. I am one of the attorneys assigned to investigate the acquisition of Westcliff Medical Laboratories ("Westcliff") by the Laboratory Corporation of America ("LabCorp").

2. I understand that LabCorp is seeking information regarding the CAAG's role in the FTC investigation of the LabCorp acquisition. The Attorney General is the chief law enforcement officer in the State and is authorized to investigate unlawful activities. (Cal. Gov. Code section 11180 *et seq.*) The CAAG is also authorized to share information with other state and federal agencies. (*Id.*) This cooperation is so important and of such longstanding duration that the federal and state agencies have developed guidelines for the sharing of information in merger investigations. These guidelines have been in operation since 1998 and have been adopted by the FTC, US DOJ, and a great many other law enforcement agencies. (*Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General,* the "protocol," http://www.ftc.gov/os/1998/03/mergerco.op.htm.) "This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties." *(Id.)* The protocol is premised on a longstanding joint interest between the state and federal agencies with respect to enforcement of the antitrust laws.

3. Because the AG's law enforcement investigations are confidential, the CAAG does not confirm nor deny the existence of an investigation. Investigations are carried out with the utmost care to preserve the integrity of the investigation. Indeed, they are one of the few areas which are

protected under California's Public Records Act. (Cal. Gov. Code section 6250 *et seq.*) In this case however, LabCorp was informed of the investigation because the CAAG was seeking its cooperation in obtaining documents and information. LabCorp agreed to provide the CAAG with documents, and to waive its expectation of confidentiality to enable the FTC to share information it received from LabCorp and Westcliff with the CAAG.

4. During the course of our investigation, we have obtained documents and information submitted by the parties to the FTC and have obtained additional confidential material generated by our office, by the FTC, or by our joint efforts. We have reviewed and assessed these documents and information as part of our evaluation of the potential anti-competitive effects of this acquisition. We have used this information to update and inform supervisors and executives within the office of the CAAG as part of a continuing evaluation of this matter.

5. The CAAG's investigation into this matter is still ongoing.

6. LabCorp has referred to the existence of other litigation by the CAAG against LabCorp. That litigation is not in conflict with our investigation into LabCorp's acquisition of Westcliff. The CAAG enforces a multitude of state and federal laws. It is therefore not unusual for the CAAG to have multiple ongoing actions or investigations regarding a corporation involving the enforcement of different laws. This does not mean the matters are in conflict. We are reviewing LabCorp's acquisition of Westcliff in order to protect the market from potential anticompetitive effects that may lead to increased prices. At the same time, LabCorp is not allowed to engage in predatory or other unlawful conduct.

7. The CAAG has a strong interest in protecting the confidentiality of its investigations, which may include: internal documents and communications; confidential documents, information and communications shared with the FTC or other law enforcement agencies; and other confidential work product.

8. If LabCorp is successful in obtaining confidential materials shared between the CAAG and the FTC in this matter, it could greatly hamper coordinated or cooperative investigations between law enforcement agencies. It could make it difficult to share information generated in our respective investigations and inadvisable to exchange analyses, assessments of the evidence, and other work product that might later be subject to discovery. This could lead to duplicative efforts and a waste of scarce law enforcement resources. This result would undermine the goals set forth in the joint protocol referenced above in paragraph 2.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 18th day of February, 2011 at Los Angeles, California.

PATRICIA L. NAGLER