ORIGINAL

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**

RESPONDENTS' OPPOSITION TO HUNTER LABORATORIES' MOTION TO QUASH SUBPOENA

Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") respectfully request that the Court deny Non-Party Hunter Laboratories' ("Hunter") Motion to Quash. Hunter failed to comply with 16 C.F.R. § 3.22(g) prior to filing the motion, and the motion itself contains only meritless references to a discovery ruling in a different lawsuit and boilerplate assertions that LabCorp's subpoena is irrelevant, overly broad, and unduly burdensome. Hunter has failed to sustain its burden of proof that the subpoena should be quashed, therefore the motion should be denied.

BACKGROUND

On January 19, 2011, the FTC served its preliminary witness list on LabCorp. Among other witnesses, the list included Chris Riedel ("Riedel"), founder of Hunter, a clinical laboratory based in Campbell, California, and a competitor of LabCorp. The witness list [redacted]

[redacted]

[redacted]

[redacted]

On February 1, 2011, LabCorp served Hunter with a subpoena *duces tecum* ("Subpoena") that requested Hunter to produce documents related to its clinical laboratory business, its cost structure, and its plans – [redacted] The Subpoena was issued by Benjamin Holt of Hogan Lovells and directed Hunter to produce responsive materials to Hogan Lovells' office in Washington, DC. Counsel for Hunter did not contact Hogan Lovells, but instead sent a letter demanding unconditional withdrawal of the Subpoena to Martha Boersch at Jones Day in San Francisco.[1] (Hunter Exhibit D.) Jones Day, responded to the letter suggesting that counsel should direct "further questions relating to [the] subpoena . . . to Mr. Roush or Mr. Holt at Hogan Lovells." (Hunter Exhibit E.) Other than copying Hogan Lovells on the letter to Ms. Boersch, Hunter never attempted to contact LabCorp's counsel prior to filing the instant motion to quash.

ARGUMENT

Hunter's motion to quash should be denied for three reasons. First, Hunter failed to confer in good faith prior to filing the motion to quash. *See* 16 C.F.R. § 3.22(g). Second, Hunter's suggestion that a discovery order from another case controls this Court's discovery proceedings is disingenuous. Last, Hunter has failed to demonstrate that the Subpoena is irrelevant, overly broad, or unduly burdensome; nor could it – the information sought is directly probative of numerous issues of paramount importance to this case.

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[1] Martha Boersch and Jones Day are counsel for LabCorp in an ongoing *qui tam* litigation pending in California state court. *State of California ex rel. Hunter Laboratories v. Lab. Corp. of Am. et al.*, No. 34-2009-00066517 (Cal. Super. Ct.). In that case, Hunter and the State of California have sued numerous clinical laboratories including LabCorp alleging, among other things, that LabCorp's capitated prices are so low that they constitute kickbacks. Neither Ms. Boersch nor Jones Day have any involvement in the FTC's administrative proceeding or the related preliminary injunction proceeding in federal court.

A. Hunter Failed to Adhere to Commission Rule 3.22(g)

Commission Rule 3.22 requires that counsel "confer[] with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion" prior to filing a motion to quash. 16 C.F.R. § 3.22(g). Commission Rule 3.22(g) "is not satisfied by one party sending a single e-mail to another party, and particularly not where, as here, the e-mail indicates an intention to file a motion to compel and does not suggest any negotiation or compromise." *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003); *see also Cannon v. Cherry Hill Toyota*, 190 F.R.D. 147, 153 (D.N.J. 1999) (finding facsimile message demanding next business day response and threatening to move to compel insufficient to resolve the dispute); *Order Denying Complaint Counsel's Motion to Compel Document Production, In the Matter of Lab. Corp. of Am. et al.*, No. 9345 at 3 (F.T.C. February 8, 2011) (Chappell, J.) (denying motion to quash filed within 24 hours of a single e-mail failure to satisfy good faith conference requirement); *Order Denying Sun Clinical's Motion to Quash or Limit Subpoena Duces Tecum, In the Matter of Lab Corp. of Am. et al.*, No. 9345 at 2 (F.T.C. February 17, 2011) (Chappell, J.) (noting that three phone calls "scarcely amount to an effort in good faith to resolve the dispute").

The single letter Hunter sent to Jones Day, LabCorp's counsel in an entirely different lawsuit, prior to filing the motion falls far short of Hunter's duty under the Commission Rules. Indeed, counsel for Hunter failed to attempt to contact the appropriate counsel at Hogan Lovells to resolve the dispute after Jones Day suggested that Hunter do so. Moreover, Hunter's demand without discussion that LabCorp withdraw the Subpoena leaves no doubt that Hunter did not intend a good-faith negotiation to resolve the issues raised in this motion. The motion should therefore be denied for failure to comply with Rule 3.22(g).

B. The State Court Order Denying Discovery in a Separate Matter Is Irrelevant

Hunter suggests that the Subpoena is an attempt to evade a discovery order in the *qui tam* litigation pending in state court and attempts to impose a discovery ruling from that action on this Court. Hunter's assertion is baseless, and that ruling plainly does not control in this case.

1. The Protective Order Prevents the Use of Documents Produced in this Case in the *Qui Tam* Litigation

Hunter's suggestion that the Subpoena is a veiled attempt to obtain documents for use in the *qui tam* litigation is frivolous particularly because the Protective Order in this case ensures that information produced in response to the Subpoena cannot be used in another lawsuit.

The Protective Order states that information designated confidential "shall be disclosed only to . . . outside counsel of record for any respondent" and used "only for the purposes of the preparation and hearing of this proceeding, or appeal therefrom." *Protective Order, In the Matter of Lab. Corp. of Am.*, No. 9345 ¶¶ 7-8 (December 1, 2010) (Chappell, J.). The *qui tam* litigation is not part of "this proceeding," and LabCorp's counsel in this case is not even the same counsel as in the *qui tam* litigation. Therefore, information produced pursuant to the Subpoena may not be used to further the *qui tam* litigation without violation of the Protective Order and will not even be seen by counsel for LabCorp in that case.

2. No Basis Exists to Enforce the State Court's Discovery Ruling Here

Hunter cites to only one case to support its fanciful proposition that an order quashing a subpoena in one case should have precedential effect in a different case, in a different court, between different parties, regarding a different area of law. And that case, *United States ex rel. Singh v. Bradford Regional Medical Center*, does not actually stand for the principle for which Hunter cites it. Instead, it holds only that a relator's business documents and culpability are not relevant to the underlying *qui tam* litigation; it has nothing to do with applying a discovery order

to an unrelated case. No. 04-186, 2007 WL 1576406 (W.D. Pa. May 31, 2007). That reasoning does not apply to this case.

Definition of the relevant market, competitive effects analysis, the ability to coordinate, the likelihood of entry and expansion, and the determination of market power are core issues in an antitrust case; as a result, the business operations of industry participants are important discoverable facts. In this case, the relevance of such information is further apparent from the FTC's preliminary witness list, [redacted] *See* Ex. A at 14-61.[2] Indeed, this Court has stated that a competitor's internal business documents are "crucial," if not "the most relevant evidence" in an antitrust case. *In the Matter of No. Tex. Specialty Physicians*, No. 9312, 2004 WL 527340 at 3 (F.T.C. January 30, 2004) (Chappell, J.) (citations omitted). Thus, the reasoning upon which the state court's order is based simply does not apply to this case.

Moreover, the Commission Rules specifically provide that the *Administrative Law Judge* decides whether to limit discovery in the proceeding before him and that he shall do so upon considerations of relevancy *to the allegations and defenses in the complaint*, undue burden, and duplication. 16 C.F.R. § 3.31(c); *see also FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 105 (D.C. Cir. 1977) ("The subpoena is the subpoena of the Administrative Law Judge. It must be approved by him, and motions to quash or limit will be heard and passed on by him."). Permitting Hunter to import a non-applicable order from the *qui tam* litigation would usurp the power of the Administrative Law Judge and curtail relevant discovery based on concerns not related to the present case.

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[2] Complaint Counsel has informed LabCorp that its preliminary witness list is non-public. Accordingly, LabCorp has not included a copy of the witness list with the public version of its Opposition.

C. Hunter Has Not Met its Burden to Demonstrate Irrelevance

Hunter next argues that the requested documents are irrelevant to this action, or at least are so minimally probative that any burden on Hunter outweighs the benefit of production. Not so. The requested documents are directly relevant, and Hunter has failed to demonstrate that production would cause it hardship or any significant burden.

Commission Rules provide for extensive discovery, including any information that "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). A party moving to quash a subpoena has the burden to show the subpoena is improper. *See In the Matter of Intel Corp.*, No. 9341 2010 WL 2143904 at 2 (F.T.C. May 19, 2010) (Chappell, J.). Due to the strong public policy in favor of broad discovery, that burden is a heavy one. *Id.* ("The law is clear that a recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a heavy burden.").

As set forth above, the founder of Hunter is on the FTC's preliminary witness list, [redacted]

Consequently, the Subpoena seeks evidence of Hunter's business plans and ability to compete in the market proposed by Complaint Counsel, as well as the alternative markets proposed by LabCorp for the time period at issue. The documents requested are not only relevant, they are "crucial" to LabCorp's ability to prepare a defense given that Hunter's founder [redacted]

[redacted][3] *See In the Matter of No. Tex. Specialty Physicians*, 2004 WL 527340 at 3 (finding competitors' business documents "crucial" to antitrust cases); *Service Liquor Distributors, Inc. v. Calvert Distillers Corp.*, 16 F.R.D. 507, 509 (S.D.N.Y. 1954) (finding competitors' business documents "not only not immune from inquiry, but . . . the source of the most relevant evidence").

D. Hunter Has Not Shown Undue Burden

Hunter vaguely asserts that production of the requested documents would cause a substantial hardship but has failed to make any concrete showing of undue burden sufficient to quash the Subpoena.

The Court has held that general, boilerplate allegations of burden – such as those asserted by Hunter – will not suffice to quash a subpoena. *In the Matter of Intel Corp.*, No. 9341 2010 WL 2143904 at 2 (denying third-party's motion to quash where party only made "general allegations" of undue burden). "Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding." *In re Polypore Int'l Inc.*, 2009 FTC LEXIS 41 at *10 (Jan. 15, 2009) (Chappell, J.); *In re Kaiser Alum. & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976). Moreover, "the public interest seeking the truth in every litigated case" weighs in favor of production of all relevant documents. *In the Matter of No. Tex. Specialty Physicians*, 2004 WL 527340 at 3.

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[3] After Hunter filed the motion to quash, counsel for LabCorp contacted counsel for Hunter offering to withdraw the subpoena if the FTC would remove Riedel from the witness list. Counsel for Hunter averred that he would discuss the matter with the FTC and get back to counsel for LabCorp. He did not do so. Accordingly, it must be assumed the FTC intends to use Riedel as a witness at trial.

Hunter has provided the Court with nothing more than the vague assertion that it could "take months, and tens or even hundreds of thousands of dollars to comply with" the Subpoena. Motion at 8. Yet Hunter does not indicate what portions of the Subpoena are particularly burdensome or why it is unable to obtain the documents in a reasonable amount of time, and the actual cost of compliance with the Subpoena is noticeably absent from counsel's declaration. Hunter has made no attempt to actually quantify the cost or burden imposed. Moreover, counsel for LabCorp has attempted to minimize the burden on Hunter by offering to limit the Subpoena to only those documents held in the ordinary course of business.

Unable to meet the high threshold required to quash the Subpoena, Hunter tries to shift the burden to LabCorp to demonstrate that the information requested outweighs the burden to Hunter. But "[t]he law is clear that a recipient of a subpoena duces tecum issued in an FTC adjudicative proceeding who resists compliance therewith bears [the] burden."[4] *In the Matter of Intel Corp.*, 2010 WL 2143904 at 2. Accordingly, Hunter has provided no basis for the Court to find that the burden is so substantial it outweighs the Commission's strong policy in favor of broad discovery and LabCorp's significant need for the information.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the Court deny Hunter's Motion to Quash.

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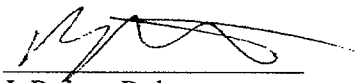
[4] Hunter vaguely suggests that the information sought by the Subpoena is available from other labs to whom Respondents have sent subpoenas and that this should excuse Hunter's compliance or shift the burden to LabCorp to justify the Subpoena. Motion at 8-9. This assertion misses the point. The FTC has indicated that it expects Hunter's founder to testify regarding [redacted] Regardless of what is available from other labs, documents from Hunter are necessary to permit Respondents to evaluate possible testimony from Hunter's representative.

Dated: February 18, 2011

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed via FTC e-file a .PDF copy that is a true and correct copy of the paper original of the foregoing PUBLIC with:

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I also certify that I caused to be filed by hand with the Secretary the original CONFIDENTIAL, unredacted, version of the foregoing document, one paper copy, and one .PDF copy that is a true and correct copy of the paper original.

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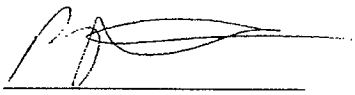

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