

ORIGINAL

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



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In the Matter of)
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LABORATORY CORPORATION)
OF AMERICA)
)
)
and)
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LABORATORY CORPORATION)
OF AMERICA HOLDINGS,)
)
Respondents.)

DOCKET NO. 9345

**ORDER DENYING COMPLAINT COUNSEL'S
MOTION TO COMPEL DOCUMENT PRODUCTION**

I.

On January 31, 2011, Complaint Counsel filed a Motion to Compel Document Production ("Motion"). Respondents filed an Opposition to the Motion on February 7, 2011 ("Opposition"). For the reasons set forth below, Complaint Counsel's Motion is DENIED.

II.

Complaint Counsel filed its Motion to Compel pursuant to Commission Rules 3.37(b) and 3.38(a), and Additional Provision 4 of the Scheduling Order entered in this case on December 20, 2010. Commission Rule 3.37(b) governs the deadline for responses or objections to requests for documents and Commission Rule 3.38(a) allows a party to apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery. 16 C.F.R. §§ 3.37(b), 3.38(a). Complaint Counsel's Motion to Compel is also subject to the Commission rule governing motions, Rule 3.22, which states in pertinent part:

[E]ach motion to compel or determine sufficiency pursuant to § 3.38(a) . . . shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. . . . The statement shall recite the date, time, and place of each such conference between counsel, and the

names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

16 C.F.R. § 3.22(g). In addition, Additional Provision 4 of the Scheduling Order requires:

Each motion (other than a motion to dismiss or a motion for summary decision) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Motions that fail to include such statement may be denied on that ground.

Scheduling Order, December 20, 2010, p. 5.

III.

Complaint Counsel states that, on December 28, 2010, it served ten document requests on Respondents which requested Respondents to produce responsive documents by Friday, January 28, 2011. Complaint Counsel further states that on January 28, 2011, Respondents served their Answers and Objections to Complaint Counsel's document requests, but did not serve responsive documents. Complaint Counsel next states that it "tried to meet and confer with counsel for LabCorp before filing this motion by sending an electronic mail stating [its] concerns on the morning of [Sunday,] January 30, 2011." Motion at 2. The e-mail, attached to the Motion, states in pertinent part:

While we did receive your Answers and Objections . . . , it appears that no documents were produced Instead, you state that you will be producing documents on a "rolling basis." At the very least, you should be able to produce immediately the primary documents responsive to Request No. 5, as revised We are available to talk to you about your production at any point this weekend so that we can understand your plans, in particular what production schedule you have in mind. But given the fact that party depositions are set to commence in little more than a week, we will have no choice but to move to compel

Motion Exhibit D.

Because Respondents had not responded to the January 30, 2011 e-mail, Complaint Counsel says it felt "compelled" to file its motion the following day, Monday, January 31, 2011. Complaint Counsel attaches to its motion what it titled a "Certificate of Conference," asserting that Complaint Counsel "attempted to confer with Respondents' Counsel in an effort in good faith to resolve by agreement the issues raised

by Complaint Counsel's Motion . . . but Respondents' Counsel has not responded to the email sent on January 30, 2011 as of the filing of this motion which we are forced to bring immediately because of the time frames involved in the requested relief."

Respondents argue that Complaint Counsel's Motion is defective because Complaint Counsel failed to confer with Respondents' Counsel as required. Respondents further state that, had Complaint Counsel actually conferred with LabCorp, Complaint Counsel would have known that LabCorp planned to begin its production the week of January 31, 2011 and is committed to prioritizing its production to provide Complaint Counsel with materials for individuals noticed for deposition at least three days prior to those depositions. Moreover, Respondents state, LabCorp has already begun producing documents and is working diligently to respond completely and quickly to the document requests.

Respondents note that although Complaint Counsel advised that it was "available to talk" about Respondents' production schedule "at any point this weekend," Complaint Counsel did not indicate that it needed a response by the next morning, January 31, 2011, or inquire about Respondents' counsel's availability on that day. In fact, Respondents argue, Complaint Counsel did not allow LabCorp even one full day to respond to that e-mail prior to filing its Motion.

IV.

Counsel for parties moving to compel discovery have a duty to make reasonable efforts to confer with opposing counsel before filing a motion to compel. 16 C.F.R. § 3.22(g). One single e-mail to counsel, sent on a Sunday, two calendar days after timely receiving Answers and Objections to the document request, and one calendar day before filing a motion to compel, without awaiting a response to that e-mail, does not constitute a good faith effort to resolve by agreement the issues raised by the motion. Courts have found similar "attempts to confer" insufficient to satisfy conference requirements. *E.g.*, *Hoelzel v. First Select Corp.*, 214 F.R.D. 634, 636 (D. Colo. 2003) ("The rule 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."); *Marsch v. Rensselaer County*, 218 F.R.D. 367, 372 (N.D.N.Y. 2003) ("Where . . . the moving party has sent a single letter to opposing counsel and taken no further steps to confer on the issue, the moving party has not satisfied its duty to make a good faith effort to resolve the dispute before seeking court intervention."); *Williams v. Bd. of County Comm'rs of Unified Gov't of Wyandotte County*, 192 F.R.D. 698, 700 (D. Kan. 2000) (single letter does not satisfy the duty to confer); *Cannon v. Cherry Hill Toyota*, 190 F.R.D. 147, 153 (D.N.J. 1999) (demanding a response to a facsimile the next business day and threatening to move to compel constituted a "token effort" to resolve the dispute without intervention of the court and thus did not meet the good faith meet and confer requirement).

Because Complaint Counsel did not, as required, confer with opposing counsel in an effort in good faith to resolve by agreement the issues raised by its motion, Complaint Counsel has not complied with Rule 3.22(g) and Additional Provision 4 of the Scheduling Order in this case.

V.

Complaint Counsel failed to comply with Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Accordingly, Complaint Counsel's Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 8, 2011