Amy M. Gallegos (SBN 211379)
HOGAN LOVELLS US LLP
1999 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 785-4600
Facsimile: (310) 785-4601
amy.gallegos@hoganlovells.com

J. Robert Robertson (*pro hac vice*)
Corey W. Roush (*pro hac vice*)
Benjamin F. Holt (*pro hac vice*)
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
robby.robertson@hoganlovells.com
corey.roush@ hoganlovells.com
benjamin.holt@hoganlovells.com

Attorneys for Defendants
LABORATORY CORPORATION and
LABORATORY CORPORATION OF
AMERICA HOLDINGS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

LABORATORY CORPORATION OF AMERICA, et al.,

Defendants.

Case No. SACV 10-1873 AG (MLGx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SANCTIONS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 16(f)

Date:
Time:
Ctrm:

Judge: Hon. Andrew J. Guilford

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PRELIMINARY STATEMENT

On Friday, February 11, 2011, the Federal Trade Commission ("FTC") filed Proposed Findings of Fact on its Motion for a Preliminary Injunction. Apparently realizing that the evidence in the record is insufficient to satisfy its burden, the FTC decided to ***willfully ignore*** this Court's December 29, 2010, Scheduling Order (and common evidentiary practice) by citing over 220 times to 29 declarations that were explicitly ***excluded by that Order***. The FTC also cited 20 times to parts of seven investigational hearing transcripts ***not in evidence*** before this court. We respectfully do not believe the Court should countenance the FTC's violation of this Court's Order, Federal Rule of Civil Procedure 16(f), and common rules of practice.

On December 29, 2010, this Court issued a Scheduling Order that clearly set out the parameters of several different aspects of the discovery that was to occur before the February 3, 2011, hearing. In that Order, the Court concisely stated that "Plaintiff and Defendants shall each identify up to 15 third-party declarants on whom they will rely" and then permitted depositions of those individuals (if they had not previously been deposed, interviewed pursuant to subpoena power, or served with a subpoena). The Court's Order created a reasonable and feasible discovery schedule that took into account both the limited time available before the then-pending hearing and fairness in the form of allowing Defendants Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") to test the third-party statements on which the FTC almost solely relied. In so ruling, this Court rejected the FTC's argument that Defendants be limited to only 10 depositions and that the FTC be entitled to rely not just on those depositions but also on additional untested declarations from third-parties.

The parties then briefed the preliminary injunction motion relying on no more than 15 third-party declarants each. Following the February 3 hearing, the

Court ordered the parties to submit by February 10, 2011, Proposed Findings of Fact and Conclusions of Law. On February 10, 2011, Defendants, in turn, presented the Court with proposed findings of fact that included extensive evidence from the record properly before this Court demonstrating that the FTC is not likely to succeed in the underlying action and that the balance of equities tilts heavily in LabCorp's favor. The FTC, however, decided to take a different tack. In an apparent concession to the fact that the record evidence did not establish its case, the FTC filed on February 11, 2011, Proposed Findings that cited hundreds of times to untested declarations that were explicitly excluded by the Scheduling Order.[1] The FTC also inappropriately cited to transcripts of investigational hearing testimony not in evidence before this court.

The FTC's flagrant disobedience of the direct orders of this Court is highly prejudicial to LabCorp, and the FTC's reliance on untested declarations and documents and testimony not in the record reflect a deliberate attempt to mislead the Court. Pursuant to Federal Rule of Civil Procedure 16(f)(1), LabCorp respectfully requests that the Court sanction the FTC by striking the FTC's Proposed Findings of Fact in their entirety, or, in the alternative, striking each paragraph in those Proposed Findings in which the FTC relies upon unauthorized declarations and/or citations to transcripts not in evidence. LabCorp also respectfully requests the fees and costs incurred by counsel in preparing this motion pursuant to Federal Rule of Civil Procedure 16(f)(2).

BACKGROUND

On December 16, 2010, this Court entered an order granting LabCorp "reasonable discovery" and a hearing on an "expedited basis" in order to attempt to

[1] When counsel for LabCorp conferred with counsel for the FTC regarding their improper use of the additional declarations, counsel for the FTC said they would consider striking their references to these additional declarations if LabCorp agreed to strike its reference to the declarations provided by its own employees even though the FTC had already deposed/conducted investigational hearings of most of them and had been given an opportunity to depose at least one other. Roush Decl. ¶ 2. Counsel for the FTC did not provide any justification for its noncompliance with the scheduling order. Roush Decl. ¶ 2.

rebut the "evidence" collected by the FTC during its six month investigation and submitted in support of its Motion for a Preliminary Injunction. Dkt. No. 55. The Order did not grant the FTC any additional discovery beyond that which it had obtained during the six months of administrative investigation in which the agency not only collected almost 27 million pages of documents from LabCorp and hundreds of thousands of pages from third-parties, but also conducted a total of 13 investigational hearings (administrative depositions). After the Court issued the December 16 Order, the FTC asked LabCorp to limit the discovery rights granted to LabCorp by the December 16 Order. While LabCorp refused the FTC's extensive proposed limitations, LabCorp did offer a compromise that would allow both parties to conduct limited discovery. The FTC rejected that compromise, and on December 21, 2010, the FTC moved for a scheduling order, submitting a proposed order to the Court that sought to limit LabCorp to only 10 depositions of third-parties without imposing any limit on the number of third-parties on whom the FTC could rely. LabCorp opposed that scheduling order on December 23, 2010, on the basis that "limiting LabCorp to ten depositions without a corresponding limitation on the number of declarations on which the FTC may rely would drastically undermine LabCorp's ability to rebut the FTC's evidence." Dkt. No. 71.

The Court denied the FTC's motion on December 29, 2010, and instead entered a Scheduling Order that directed both the FTC and LabCorp to "each identify up to 15 third-party declarants on whom they will rely" for purposes of the preliminary injunction motion. Dkt. No. 78. The December 29 Scheduling Order permitted the parties to depose each of the other side's 15 declarants.[2] The FTC subsequently identified 15 third-party declarants on which it intended to rely, and LabCorp identified ten. With the understanding that the FTC would comply with

[2] The Court's December 29 Scheduling Order also limited depositions to declarants who "have not already been served with a subpoena, interviewed / required to testify at an investigational hearing pursuant to subpoena power, or deposed by the party seeking to take the deposition." Dkt. No. 78.

the Court's Scheduling Order and rely on only those 15 third parties, LabCorp deposed 13 of the FTC's 15 chosen third-party declarants and obtained a supplemental declaration from one of the 15. The FTC chose to depose one of LabCorp's third-party declarants and obtained supplemental declarations from four. The FTC also requested that it be allowed to depose two party witnesses to which LabCorp consented (with some limitation). The FTC ultimately decided to only depose one of those individuals.

In the briefing on the Preliminary Injunction motion, neither the FTC nor LabCorp relied on more than the thirty total third parties (fifteen from each side) in their respective briefs submitted to the Court on January 28. Likewise, in LabCorp's proposed findings of fact, LabCorp continued to limit its citations to no more than the permitted thirty third-parties.[3] However, notwithstanding the Court's Order explicitly prohibiting the parties from relying on more than fifteen third-party declarants and LabCorp's reliance on that Order, the FTC submitted Proposed Findings of Fact on February 11 that rely over 220 times on 29 other declarations that were ***not*** among the permitted thirty.[4] *See* Exhibit A. Furthermore, although the Scheduling Order required the parties to submit all additional evidence by January 28, 2011, the FTC relied 20 times upon parts of seven investigational hearing transcripts that ***were never entered into evidence***.[5] *See* Exhibit B.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 16(f)(1), a Court may sanction a

[3] To that end, LabCorp cited testimony from the FTC's 15 identified third parties and the following 11 individuals representing 10 companies: Curtis Lane, William Chin, James Mason, Mary Dempsey, Helene Beilman-Werner, Gary Bohamed, John Rossi, Robert O'Keefe, Jill Martin, Mark Marten, and Nancy Stephenson. Two of those individuals – Helene Beilman-Werner and Nancy Stephenson – provided testimony related to the same company Primary Provider Management Company, Inc., ("PPMC") for which Ms. Beilman-Werner previously worked and Ms. Stephenson currently works. Both provided declarations to the FTC after interviews that were in lieu of/pursuant to the FTC's subpoena power.

[4] The FTC also improperly relied upon three of those other declarants at the hearing before the Court on February 3, 2011. FTC Presentation p. 27 (unnumbered).

[5] The FTC entered into evidence only excerpts of the investigational hearing transcripts, yet cited to portions of these transcripts that are not in evidence and which this court does not have in its possession.

party or an attorney for "fail[ing] to obey a scheduling or other pretrial order." Such sanctions may include, among other things, "striking pleadings in whole or in part" and/or "dismissing the action or proceeding in whole or in part." *Id*.; Fed. R. Civ. P. 37(b)(2)(A). Furthermore, "the court ***must*** order the party, its attorney, or both to pay the reasonable expenses – including attorney's fees – incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2) (emphasis added).

"[T]he scope of the district court's authority over pretrial proceedings is broad," and Federal Rule of Civil Procedure 16 "recognizes the inherent power of the district court to enforce its pretrial orders through sanctions." *In re Arizona*, 528 F.3d 652, 657 (9th Cir. 2008) (per curiam), *cert. denied*, 129 S. Ct. 2852 (2009); *see also Martin Family Trust v. Heco/Nostalgia Enters.*, 186 F.R.D. 601 (E.D. Cal. 1999) ("Under Rule 16(f) courts have 'very broad discretion to use sanctions where necessary[.]'") (citation omitted). "An award of sanctions under Fed. R. Civ. P. 16(f) is within the discretion of the district court." *Ayers v. City of Richmond*, 895 F.2d 1267, 1269 (9th Cir. 1990).

Courts consider five factors in deciding which sanction to impose: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits[;] and (5) the availability of less drastic sanctions." *Thompson v. Housing Auth. of City of L.A.*, 782 F.2d 829, 831 (9th Cir. 1986) (citation omitted); *see also Churchill v. United States*, No. 1:09-cv-01846LJO JLT, 2011 WL 444849, at *9 (E.D. Cal. Feb. 8, 2011) (considering five factors and striking Plaintiff's expert witnesses pursuant to Fed. R. Civ. P. 16(f) for failure to timely disclose such witnesses pursuant to court's scheduling order). Imposition of sanctions under Federal Rule of Civil Procedure 16(f) does not require a showing of recklessness or bad faith; negligent failure to comply with

Rule 16 justifies imposition of appropriate sanctions. *See, e.g., Lucas Auto. Eng'g, Inc. v. Bridgestone / Firestone, Inc.*, 275 F.3d 762, 769 (9th Cir. 2001) (finding that imposition of 16(f) sanctions was proper even where "failure to appear was not intentional").

The rationale for sanctions under Federal Rule of Civil Procedure 16(f) is clear: "district courts cannot function efficiently unless they can effectively require compliance with reasonable rules." *Chism v. Nat'l Heritage Life Ins. Co.*, 637 F.2d 1328, 1332 (9th Cir. 1981), *overruled on other grounds sub nom. Bryant v. Ford Motor Co.*, 832 F.2d 1080 (9th Cir. 1987); *see also Martin Family Trust*, 186 F.R.D. at 603 ("[V]iolations of Rule 16 are neither technical nor trivial, but involve a 'matter most critical to the court itself: management of its docket' and the avoidance of unnecessary delays in the administration of its cases. ") (citation omitted). Indeed, "[i]t is well established that '[a]n attorney who believes a court order is erroneous is not relieved of the duty to obey it.'" *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 133 (9th Cir. 1987) (citation omitted).

Imposing sanctions for failure to comply with scheduling and discovery orders is particularly important. "A scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.' The district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [a] case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (citations omitted).

Dismissal of an entire action may be warranted for willful violations of scheduling or discovery orders. *See, e.g., Tower Ventures, Inc. v. City of Westfield*, 296 F.3d 43, 45 (1st Cir. 2002) (dismissing case with prejudice for failure to comply with scheduling order pursuant to Fed. R. Civ. P. 16(f)); *Valley Eng's Inc.*,

v. Elec. Eng'g Co., 158 F.3d 1051, 1056-58 (9th Cir. 1998) (finding dismissal appropriate where the discovery order violation "threaten[ed] to interfere with the rightful decision of the case") (citation omitted). Courts also frequently strike pleadings, or portions of pleadings, as sanctions under Federal Rule of Civil Procedure 16(f) for violation of court orders. *See, e.g., Softwareworks Group, Inc. v. Ihosting, Inc.*, No. C06-04301 HRL, 2007 WL 1279495, at *2 (N.D. Cal. Apr. 30, 2007) (striking answer pursuant to 16(f)); *Feezor v. H.I. Mgmt. of Rancho Cordova*, No. CIV S-06-1638 WBS DAD, 2007 WL 117917 (E.D. Cal. Jan. 10, 2007) (striking amended complaint pursuant to 16(f)); *Crocker Nat'l Bank v. M.F. Sec. (Bahamas), Ltd.*, 104 F.R.D. 123, 127 (C.D. Cal. 1985) (striking answer pursuant to 16(f)).

Courts have also regularly held that relying on materials not before the court is prohibited unless it is public information about which a court can take judicial notice. To that end, reliance on deposition testimony that is not in the record has been found to be improper. *See, e.g., Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 327 (C.D. Cal. 2004) (finding that reliance on a deposition transcript not in the record "is improper") (citing *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003) ("Because the deposition of [Plaintiff] is no part of the evidentiary record of the case, we give [Plaintiff's] passing references to the deposition no consideration.")).

Courts also recognize that a party is "entitled to reasonable attorney fees" under Federal Rule of Civil Procedure 16(f)(2) unless the offending party submits "evidence that the noncompliance was substantially justified or other circumstances make an award of expenses unjust." *Miller v. Sears Holding Corp.*, No. 10-cv-882 GSA LJO, 2010 WL 4236864, at *3 (E.D. Cal. Oct. 21, 2010); *see also Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385 (9th Cir. 1993); *Ayres v. City of Richmond*, 895 F.2d 1267 (9th Cir. 1990); *Flores v. Merced Irrigation Dist.*, No. 1:09cv1529 LJO DLB, 2010 WL 5168991 (E.D. Cal. Dec. 13, 2010) (awarding

attorneys fees under 16(f)(2) for failure to comply with scheduling order). Further, monetary sanctions are imposed regardless of whether the government is a party to the litigation because "[w]hen the United States comes into court as a party in a civil suit, it is subject to the Federal Rules of Civil Procedure as any other litigant." *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991) (citation omitted); *see also United States v. Sumitomo Marine & Fire Ins. Co., Ltd.*, 617 F.2d 1365, 1370-71(9th Cir. 1980) (holding that monetary sanctions may be assessed against government counsel personally).

ARGUMENT

I. The FTC Improperly Relies on Declarations in Violation of This Court's December 29, 2010, Scheduling Order.

The FTC's reliance on these additional declarations is highly prejudicial to LabCorp. Both LabCorp and the FTC had a fair and equal opportunity throughout the month of January to select their best, most representative third-party declarants, and then to test the declarations selected by the other side through depositions. This is particularly important here because instead of relying upon data or actual economic analysis, the FTC and its expert tied almost their entire case to declarations obtained by the FTC from third-parties. Indeed, the FTC and its expert claimed that those declarations supported every element on which the FTC had to demonstrate a likelihood of success, including product market, geographic market, lack of entry, and competitive effects.

However, once depositions began to occur, LabCorp and the FTC found that the declarations were misleading and incomplete such that the deposition testimony severely undermined the declarations. For example, the depositions revealed that the FTC's product market does not make sense because the deponents generally view clinical lab services reimbursed under a fee-for-service or capitated contract as interchangeable and readily acknowledge that competition for discretionary fee-for-service business affects the price of capitated or fee-for-service contracts with

physician groups. Defendants' Proposed Findings of Fact and Conclusions of Law ("Defs.' FOF/COL") ¶¶ 82-88, 91-93, 95-98, 100, 106, 108-109, 112, 114.

Similarly, the depositions showed that the FTC's geographic market does not make sense because the deponents prefer labs with a ***local*** PSC network that covers the geographic area of the physician group's membership, not a network that spans all of Southern California. Defs.' FOF/COL ¶ 118. Moreover, the fact that entry is likely has been proven by the FTC's ***own declarants,*** along with another national laboratory on which the FTC has not relied, actually entering and expanding. Defs.' FOF/COL ¶¶ 139, 150-153. The depositions also demonstrated that unilateral competitive effects are practically impossible because none of the declarants ever actually saw head-to-head competition between LabCorp and Westcliff. Defs.' FOF/COL ¶¶ 183-198. Finally, the depositions uncovered the fact that the vast majority of the deponents do not oppose the transaction. Defs.' FOF/COL ¶¶ 238-239. In short, the limited discovery authorized by this Court revealed what LabCorp already knew: the story portrayed in the FTC's declarations is inaccurate and incomplete.[6]

In an apparent last-ditch attempt to derail LabCorp's defense, the FTC has provided the Court with 120 pages of alleged "findings" of fact that rely over 220 times on 29 additional declarants that LabCorp has not had the opportunity to depose. *See* Exhibit A. This flagrantly violates both the letter and the spirit of the Court's Scheduling Order. LabCorp is confident that deposing each of these additional declarants would disprove the FTC's case in the same way that each of the prior depositions have done. Indeed, as LabCorp made clear to this Court and the FTC, it was prepared to depose as many of the declarants on whom the FTC was going to rely as possible. LabCorp's announcement that it planned to depose

[6] The Court should note that at least some of the declarations relied upon by the FTC appear to have been drafted by FTC employees ***before*** the FTC even interviewed the declarants. Indeed, these declarants have reported that they were told to sign these misleading declarations "on the spot" and that, if they did not sign the declarations, they would be deposed. *See* Defendants' Opposition to Plaintiff Federal Trade Commission's Motion for a Preliminary Injunction at p. 2.

all declarants in part sparked the FTC's motion seeking to limit LabCorp to only ten depositions with no corresponding limitation on the declarants on whom the FTC could rely. Given this Court's December 29, 2010, Scheduling Order, however, LabCorp did not depose every individual from whom the FTC obtained a declaration. Instead, LabCorp deposed the 15 non-expert third-parties on whome the FTC chose to rely to establish its case – arguably the best 15 witnesses the FTC could identify. Relying on the Court's Scheduling Order and the good faith expectation that the FTC would comply with that Order, LabCorp limited itself in its brief and its findings of fact to the identified group of declarants and to the evidence before this Court.

The fact that the FTC now wishes it could rely on different declarants does not justify its violation of this Court's Scheduling Order. Permitting the FTC to rely upon these additional declarants would encourage the very gamesmanship and unfairness the Court's Scheduling Order prevented. Violating the Court's Scheduling Order denies LabCorp the opportunity to test these declarants' statements. The fact that the FTC chose to sandbag LabCorp with untested "evidence" knowing that LabCorp has not had an opportunity to rebut that evidence suggests a distinct lack of good faith on the part of the FTC.

While the FTC claims that "[t]he Federal Trade Commission's third party witness statements (in the form of declaration and otherwise) are highly credible," the evidentiary weight of these additional declarations is actually highly suspect given the doubt cast on the FTC's original fifteen declarants by their depositions. Plaintiff's Proposed Findings of Fact and Conclusions of Law ("Pls.' FOF/COL") at ¶ 23. Indeed, even though there is deposition testimony from the FTC's fifteen identified third parties, the FTC still cites to those individual's declarations. In fact, for many proposed findings of fact, the FTC does not even cite to a single deposition. *See, e.g.*, Pls.' FOF/COL ¶ 28 (citing eighteen declarations – six from individuals who were part of the identified thirty and twelve from individuals who

were not of part of those thirty).[7]

II. The FTC Impermissibly Cites to Investigational Hearing Transcripts Not Found in the Record

In addition, the FTC's proposed Findings of Fact rely on documents and testimony that are ***not even in evidence*** in further violation of the Court's Scheduling Order and contrary to law. When the FTC filed its Motion for a Preliminary Injunction, it attached as exhibits excerpts from the various investigational hearings the FTC conducted over the preceding six months. In its Proposed Findings of Fact, the FTC cites 20 times to other portions of seven of those transcripts that were ***never submitted to this Court***. *See* Exhibit B.[8]

Footnote one of the FTC's Proposed Findings of Fact acknowledges that the transcripts were "previously submitted to the court as excerpts to reduce exhibit volume," and states that "[f]ull transcripts can be provided at the Court's request."[9] However, the FTC ignores the fact that these transcripts were never actually submitted to the Court and are, thus, not in evidence. Submitting supposed "findings" of fact to the Court that rest upon evidence the FTC never entered into

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[7] The FTC complains at Paragraph 26 of its Proposed Findings that the declarations that LabCorp submitted on behalf of its employees should not be credited because they "***were not tested in deposition.***" Pls.' FOF/COL ¶ 26 (emphasis added). Putting aside the irony in the FTC's two positions, it is important to note that many of the LabCorp and LabWest employees who submitted declarations were in fact deposed in investigational hearings when LabCorp provided every individual whom the FTC requested. To the extent that LabCorp submitted additional declarations, that testimony was always consistent with prior testimony and was typically in rebuttal to assertions that the FTC had made in its previous submissions. Since no witnesses were permitted at the hearing, LabCorp had no other way to get that testimony before the Court.

[8] The FTC also cited to other documents that were not evidence in the record. For example, the FTC cited to at least one document that was never entered into evidence. *See, e.g.*, Pl.'s FOF/COL ¶ 264 (citing PX6045). In addition, the FTC even cites to its ***own presentation*** given to the Court at the February 3 hearing as "evidence." *See, e.g.*, Pl.'s FOF/COL ¶ 7, 181. This presentation clearly is not evidence. Counsel for the FTC apparently has forgotten that statements written by counsel are not evidence.

[9] When counsel for LabCorp and counsel for the FTC conferred after the Proposed Findings were filed, counsel for the FTC indicated that its failure to provide the Court with complete transcripts (both then and now) was based on the desire to "save paper." Counsel for the FTC never suggested that they believed the entire transcripts were in evidence. Roush Decl. ¶ 3. Choosing to "save paper" rather than provide the Court with copies of the evidence relied upon in a pleading is clearly improper and disingenuous especially given that the excerpts themselves were submitted ***electronically***.

the record is both highly misleading to the Court and prejudicial to LabCorp. Burying a disclaimer in a footnote that the FTC's alleged "evidence" can be provided post-filing and post-close of the evidentiary record does not cure the FTC's improper reliance on these documents.

Furthermore, LabCorp would have cited to various passages of those investigational hearing transcripts in support of its Proposed Findings of Fact, but was unable to do so because the entire transcripts were not in the evidentiary record. Roush Decl. ¶ 5. Permitting the FTC to rely upon portions of these transcripts that were never submitted to the Court would be unfair and highly prejudicial.

****

Although dismissal of the FTC's claims against LabCorp and/or denial of the FTC's motion for a preliminary injunction may be warranted for its flagrant violation of the Court's scheduling order, striking the FTC's Proposed Findings of Fact is a "less drastic" sanction that can substantially reduce the risk of prejudice to LabCorp pursuant to Federal Rule of Civil Procedure 16(f)(1). Further, given the FTC's willfully disregard of this Court's Order and its provision of no justification (reasonable or otherwise) for doing so, an award of attorneys fees and costs is warranted pursuant to Federal Rule of Civil Procedure 16(f)(2). Roush Decl. ¶ 6.

CONCLUSION

For the reasons set forth herein, Defendants respectfully request that the Court strike the FTC's Proposed Findings of Fact in their entirety pursuant to Federal Rule of Civil Procedure 16(f)(1), or, in the alternative, strike each paragraph in those Proposed Findings in which the FTC relies upon unauthorized declarations and/or citations to transcripts not in evidence. Defendants also respectfully request the fees and costs incurred by counsel in preparing this motion pursuant to Federal Rule of Civil Procedure 16(f)(2).

Date: February 14, 2011

HOGAN LOVELLS US LLP

By: /s/

Amy M. Gallegos

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