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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

FEDERAL TRADE COMMISSION Plaintiff, v. LABORATORY CORPORATION OF AMERICA, et al., Defendants.	No. SACV-10-1873-AG (MLGx) **PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS** Judge: Hon. Andrew J. Guilford

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I. Preliminary Statement

Plaintiff, the Federal Trade Commission (the "Commission" or "FTC"), respectfully opposes Defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 16(f) ("Def. 16(f) Mot." or "Motion for Sanctions") (Dkt. No. 117). Defendants' motion is based on an erroneous reading of this Court's Scheduling Order of December 29, 2010 ("Scheduling Order") (Dkt. No. 78). Further, while styled as a Motion for Sanctions, the motion actually amounts to a further argument of the preliminary injunction – one not contemplated by the very Scheduling Order Defendants' invoke in their motion.

The Scheduling Order that Defendants purport was violated was entered because LabCorp sought to have the FTC "identify the declarants on whom it *most* wishes to rely and that LabCorp be allowed to take abbreviated depositions of those individuals." Defs.' Notice of Mot. for Disc. & Evid. Hr'g 2 n.1 (filed Dec. 14, 2010) (Dkt. No. 41) (emphasis added). LabCorp claims that certain citations of record evidence in the FTC's Proposed Findings of Fact violate this Order.[1] But LabCorp's own actions up to the point it filed its Motion for Sanctions demonstrate that LabCorp interpreted the Scheduling Order the same way the FTC did: the primary third party declarants that are particularly probative should be identified and subject to deposition, but other evidence would remain in the record to be accorded appropriate weight. LabCorp itself cites numerous declarations of its employees that fall outside the scope of Section 1 of the Scheduling Order, none of which were tested in deposition or provided by third parties. It also cites to

[1] LabCorp points to two categories of record evidence: (1) citations to declarations other than those of the 15 identified pursuant to the Scheduling Order by each party, and (2) transcripts of hearings of Defendants' employees and officials conducted during the Commission's pre-complaint investigation. *See* Defs.' 16(f) Mot. 8-12.

declarations that neither party identified on their "relied upon" list and that were similarly untested. During briefing and argument, LabCorp had ample opportunity to move to strike evidence from the record, but did not do so. The Commission properly cited to the evidence in question in its Supplemental Memorandum filed on January 28, 2011 (Dkt. No. 91), and again referred to it at the preliminary injunction hearing on February 3, 2011, yet LabCorp never objected. In fact, LabCorp has both cited to this evidence in question and argued that it be given lesser weight in its Proposed Findings of Fact.

This common understanding, which both parties appear to have shared up until the filing of Defendants' 16(f) Motion, is consistent with the language of the Scheduling Order, which did not exclude the use of any evidence developed by the Commission. The Scheduling Order, by its unambiguous terms, only required the parties to "identify up to 15 third-party declarants on whom they will rely." Scheduling Order, Section 1. Indeed, the Scheduling Order itself contemplated the submission of "additional, non-expert, non-deposition evidence" up until January 28, long after the opportunity to conduct depositions would have passed. Scheduling Order, Section 4. Defendant took advantage of the latter provision when it submitted untested declarations on January 28, and relied upon them in its Proposed Findings of Fact and Conclusions of Law ("Defendants' Proposed Findings") (filed Feb. 10, 2011) (Dkt. No. 108).

Contrary to Defendants' assertions, no violation of the Scheduling Order has occurred, much less one that would rise to the level of monetary sanctions. Indeed, although it cites more than a dozen cases from myriad jurisdictions, Defendants did not offer a single instance where monetary sanctions were imposed on a party for citing or relying on evidence that was outside the record. *See infra* § IV. Defendants also overreach in the other sanctions they request. The proper

"sanction" for citation to non-record evidence is to strike the citation, not the finding itself (much less the entire findings of fact, as Defendants request in their proposed order), where, as here, the findings are amply supported by other evidence.

Because no violation of the Scheduling Order occurred, and because the sanctions Defendants seek are unwarranted, Defendants' motion should be denied.[2]

II. The Witness Declarations that the Defendants Accuse the Commission of Improperly Citing Are Evidence that the Court May Properly Consider in the Preliminary Injunction Context

A. Background

The record in this matter is voluminous. The Commission submitted approximately 135 exhibits in its initial filing in support of its motion for

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[2] Defense counsel's claim that he met and conferred with Plaintiff regarding his motion for monetary sanctions is, at best, a mischaracterization. LabCorp's counsel advised the Commission on February 11, 2011, that it intended to file a motion to strike. *See* Klarfeld Decl. ¶¶ 2-3. At the time, due to complications involving its local counsel, the Commission was seeking leave to file its Proposed Findings of Fact and Conclusions of Law out of time, and LabCorp required the Commission, as a condition of its assent to that motion, to inform the Court that LabCorp intended to file a motion to strike, which the Commission did. Pl.'s Appl. for Ext. of Time to File Docs. (filed Feb. 11, 2011) (Dkt. No. 111); Klarfeld Decl. ¶ 3; Ex. A to Klarfeld Decl. Later that day, LabCorp's counsel again mischaracterized its intentions, reiterating that the plan was to file a motion to strike. *See* Klarfeld Decl. ¶ 4. The first time that Plaintiff learned that Defendants' motion was for monetary sanctions, not a motion to strike, was when the motion was filed Monday evening. Klarfeld Decl. ¶ 6. LabCorp's failure to meet and confer regarding the substance of its motion prior to filing as required by this Court's rules is reason enough to deny its motion. L.R. 7-3 ("[C]ounsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly . . . the substance of the contemplated motion and any potential resolution.").

temporary restraining order and preliminary injunction, which was transferred to this Court on December 8, 2010 (Dkt. No. 19). The majority of the Commission's evidence consisted of documents from LabCorp's own files. That evidence was corroborated by 46 declarations provided by third parties. Approximately 90 additional exhibits were submitted with the Commission's subsequent filings. The Defendants' filings have also included a substantial number of exhibits, with most of its evidence having been submitted with its final filing on January 28, 2011. With a sizeable record, the Court directed the parties to prepare and submit proposed findings of fact and conclusions of law within a week. The purpose of submitting proposed findings of fact is to assist the court by cataloging the evidence in the record. *E.g., Gruenberg v. Lundquist*, 2007 WL 3171420 at *3, No. 06-C-0256 (E.D. Wis. Oct. 25, 2007) ("[T]he purpose of proposed findings of fact is to cite to evidentiary materials in the record"). Plaintiff's Proposed Findings of Fact addressed its own points and those that the Defendants have raised in their various briefs and their presentation to the Court, and supported those Proposed Findings with evidence that is in the record.[3]

B. <u>The declarations at issue were properly admitted</u>

The declarations at issue were admitted to the record as attachments to the Commission's initial motion for a temporary restraining order and preliminary injunction and the Commission's initial filing in this Court. *See* Mem. in Supp. of Pl. FTC's Mot. for TRO (filed Dec. 1, 2010) (Dkt. No. 4); Pl.'s Reply Mem. of

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[3] Only 6 of the Commission's 314 Proposed Findings of Fact cite solely to a declaration from a witness who was not among the up to 15 witnesses selected by each party. Pl.'s Proposed Findings of Fact and Concl. of Law ¶¶ 158, 159, 168, 169, 218, 258 (filed Feb. 10, 2011) (Dkt. No. 110). All other citations to the declarations at issue are part of string citations that include evidence that is not contested in Defendants' 16(f) Motion. *Id.* ¶¶ 17, 28, 31, 33-35, 37-41, 43, 44, 46-52, 59, 61, 63, 66-69, 98, 112, 137, 140-142, 157, 176, 250, 261.

Points and Auth. in Supp. of Its Mot. for a TRO (filed Dec. 10, 2010) (Dkt. No. 61). Although LabCorp has been aware that the Commission considered all of the evidence to be part of the record since at least January 28, 2011 – when the Commission cited several of these declarations in papers submitted to this Court – LabCorp has never sought to strike these declarations from the record. *See, e.g.*, Pl.'s Supplemental Mem. of Points & Auth. in Supp. of Its Mot. for Prelim. Inj. 22 n.78 & n.80 (filed Jan. 28, 2011) (Docket No. 97). Indeed, its own Proposed Findings of Fact presented to the Court explicitly acknowledge that Plaintiff had cited to declarations beyond the "fifteen on whom the FTC had previously chosen to rely," yet its request was not to strike that evidence, but rather that the Court afford it lesser weight. Defs.' Proposed Findings of Fact and Conclusions of Law 29 n. 3 (filed Feb. 10, 2011) (Dkt. No. 124). Defendants never moved to strike the declarations in question because they could not have prevailed on such a motion. The declarations were prepared by third party witnesses and bear directly on the broad-brush arguments that LabCorp has made in defense of its acquisition. It is well established that courts may consider declaration testimony of the type that LabCorp moves to exclude as appropriate evidence for a court to consider when deciding whether to issue a preliminary injunction. *See Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) (finding district court did not err by relying on affidavits in a preliminary injunction proceeding).[4] Likewise, the fact that they have not been "tested" by deposition or cross-examination does not mean that they cannot be relied upon. *See AssociationVoice, Inc. v. Athomenet, Inc.*, No. 10-cv-

[4] *See also Republic of the Phillippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc) ("It was within the discretion of the district court to accept this hearsay for the purposes of deciding whether to issue the preliminary injunction."); *Ross-Whitney Corp. v. Smith Kline & French Labs.*, 207 F.2d 190, 198 (9th Cir. 1953) ("[A] preliminary injunction may be granted upon affidavits.").

00109, 2011 WL 63508 at *3-4 (D. Colo. Jan. 6, 2011) (denying motion to strike affidavits where other testimony was subjected to cross examination in preliminary injunction action). Indeed, in the preliminary injunction context, declarations are considered probative evidence for the court to consider, whether or not some (or even all) of the declarations are "untested" by deposition. *See Sierra Club v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("[A]t the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissable evidence, including hearsay evidence. Thus, the district court can accept evidence in the form of deposition transcripts and affidavits.") (internal citations omitted).

C. The Scheduling Order did not preclude the parties from citing any declaration evidence in their proposed findings of fact

Because it cannot cite any authority that would support striking the declarations in question, Defendants seek to bootstrap the Court's Scheduling Order into a substantial evidentiary ruling – one that would amount to excluding a significant volume of admissible and probative evidence submitted by the Commission. The Scheduling Order provides that "Plaintiff and Defendants shall each identify up to 15 third-party declarants on whom they will rely." Scheduling Order, Section 1. Defendants sought this Scheduling Order in order to limit the number of depositions that it would conduct and defend. In its brief requesting discovery in this proceeding, Defendants stated: "LabCorp recognizes that taking full depositions of all 46 declarants on which the FTC relies may be excessive. As a result, LabCorp has proposed to the FTC that it identify the declarants *on whom it most wishes to rely* and that LabCorp be allowed to take abbreviated depositions of those individuals." Defs.' Notice of Mot. for Disc. & Evid. Hr'g 2 n.1(emphasis added). Under the Scheduling Order, other declarants, whether third parties not on

the list of fifteen or party declarants, could not be deposed. Far from excluding additional evidence, the Scheduling Order specifically provided that the parties were free to submit "additional non-expert, non-deposition evidence" up until a January 28, 2011 cutoff. Scheduling Order, Section 4. The interpretation Defendants now assert in their 16(f) Motion cannot be squared with the clear language of the Scheduling Order itself.

A proper interpretation of the Scheduling Order is that it required the parties to identify the declarants upon whom they intended to rely for the purposes of determining who would be deposed in the limited amount of time available for expedited discovery in a preliminary matter. Presumably, declarations that are buttressed by deposition testimony would be afforded more weight than those that were not, *see, e.g., Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 832 n.2 (C.D. Cal. 1998) ("the hearsay nature of the assertions goes to their weight, not their admissibility"); 11A Wright, Miller & Kane, *Federal Practice and Procedure*, § 2949 ("because [depositions] typically are taken under oath and involve some degree of cross-examination, depositions are given at least as much weight as, if not more than, affidavits"), but whether or not the witness was subsequently deposed does not affect admissibility in this preliminary injunction context. That was the Commission's interpretation, and indeed, that is precisely the interpretation of the Scheduling Order that Defendants had when they filed their proposed findings last week, stating that "to the extent that the Court chooses to take those [third party declarations not identified as relied upon] into account, LabCorp encourages the court to review those declarations closely." Defs.' Proposed Findings 29 n.3. It is for that reason that the Commission's Proposed Findings are generally supported by *both* "relied upon" witnesses, other declarations and, perhaps most importantly, documentary evidence.

D. LabCorp's 16(f) Motion unfairly seeks to sanction the FTC for citing precisely the same types of evidence that LabCorp itself cited in its own Memorandum, oral argument presentation, and Proposed Findings of Fact

In its zeal to strike Plaintiff's entire Proposed Findings of Fact and assess monetary sanctions, LabCorp overlooks the fact that its own Proposed Findings contain citations to the very evidence that it claims is so objectionable when cited by the Commission, which itself suggests that LabCorp interpreted the Scheduling Order in the same manner as the Commission until last Friday. For example, the declarant that signed LX-0647 was not on either parties' "relied upon" list, and therefore was not eligible for deposition. Yet, this individual's untested declaration is cited by LabCorp several times in its Proposed Findings of Fact.[5] Likewise, LabCorp cited the declarations labeled PX 0139, PX 0140, and PX 0111, all of which are from witnesses not among those identified by either party pursuant to Section 1 of the Scheduling Order. *See* Defs.' Proposed Findings ¶¶ 71, 143. In addition, while the Scheduling Order specifically states that only *third-party* declarations may be relied upon, 44 of LabCorp's 303 Proposed Findings of fact include citations *only* to declarations from its employees, who were neither third parties nor deposed pursuant to Section 1 of the Scheduling Order.[6] *See* Defs.' Proposed Findings ¶¶ 1-6, 21, 24, 27, 36, 38-41, 43-

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[5] Defendants attempt to excuse the citation to LX-0647 by asserting that the declarant is an official for the former employer of one of their other declarants, LX-0654. *See* Defs.' Mem. of Points & Auth. in Supp. Of Defs.' 16(f) Mot. 4 n.3. Of course, the Order explicitly provided that the parties needed to identify *declarants* upon which they intended to rely, not firms.

[6] Although some of the party declarants participated in investigational hearings in September and October of 2010, the declarations prepared on their behalf were signed long after the hearings took place and, as a result, were never tested. Defendant steadfastly refused to make any of these party witnesses

47, 49, 107, 167-68, 170, 173, 175-76, 252, 269, 271-77, 279, 281-283, 286, 299, 301, 303. LabCorp's Motion for Sanctions thus takes the position that Section 1 of the Scheduling Order permits LabCorp to cite and rely on testimony from witnesses other than "up to 15 third-party declarants," but does not permit the Commission to do so.

Moreover, in several instances, LabCorp cites evidence that is precluded by the plain language of the Scheduling Order. Despite the Scheduling Order's clear statement that "[n]o additional expert declarations or reports shall be submitted," Scheduling Order, Section 3(c), at least 2 of the exhibits filed with Defendants' January 28, 2011 Supplemental Memorandum were prepared by Defendants' expert witness and submitted for the first time after the Court issued its Scheduling Order. *See* Defs.' Opp. to Pl.'s Mot. for Prelim. Inj. 13 n.37, 14 n.40 & n.42 (citing LX-0641 and LX-0642) These same exhibits were again cited in Defendants' slides accompanying its argument to the Court. *See* Defendant's Presentation at Prelim. Inj. Hr'g (February 3, 2011), slides 37, 38, 46 (citing to LX-0641 and "Exhibit 5 to Wu Declaration (*Updated 2/2/2011*)") (emphasis added). When it came time to prepare its Proposed Findings of Fact, Defendants again cited to expert exhibits prepared long after the Scheduling Order was issued despite its clear language prohibiting such material. *See* Defs.' Proposed Findings ¶ 147 (citing "LX-0407 (Wu/McCarthy Decl.) Ex. 5; Ex. 5 (*Updated 2/2/2011*)") (emphasis added). Applying the rationale of LabCorp's Motion for Sanctions, its own citation to impermissible expert materials, non-"relied upon" third-party declarations, and declarations of its own officials would also be considered grounds for monetary sanctions.

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available for deposition to give the Commission the opportunity to test their after-the-fact declarations.

E. The interpretation of the Scheduling Order on which Defendants' 16(f) Motion is premised would be unjust

Most fundamentally, the one-sided interpretation of the Scheduling Order that LabCorp urges would be manifestly unfair. The Commission bears the burden of proving that it has raised "serious, substantial questions" justifying relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (2006). *E.g., FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1159-60 (9th Cir. 1984) (per curiam). LabCorp repeatedly argued that the FTC should not have discovery in this action because in its view "additional discovery is unnecessary, particularly given the FTC's voluminous [pre-complaint] discovery to date." Defs.' Opp. to Pl.'s Mot. for Scheduling Order 6 (filed Dec. 23, 2010) (Dkt. No. 71). The Commission submitted a voluminous record, more than enough to demonstrate that it had met the "serious, substantial questions" standard. Faced with that record, LabCorp sought a ruling requiring the Commission to focus its evidence on the "witnesses on whom it most wishes to rely," *see* Defs.' Notice of Mot. for Disc. & Evid. Hr'g 2 n.1, which was granted by the Court, *see* Scheduling Order, Section 1. At the same time, Defendants expanded their defense to include previously peripheral issues. The Commission has submitted declaration testimony that bears directly on these issues, but LabCorp, already having succeeded in reducing the comparative evidentiary value of those declarations by limiting the number of depositions it wanted to conduct, now argues that the Court should adopt an interpretation of the Scheduling Order that would disallow them entirely.

The unfairness of LabCorp's interpretation of the Scheduling Order is also evident in its position that it is free to submit unlimited numbers of declarations of party witnesses (i.e., from itself) that it deemed off-limits to deposition, while the Commission – which as prosecutor has no party witnesses – would be limited to a

total of 15 witnesses. LabCorp's interpretation resulted in a number of made-for-litigation party declarations being prepared in an attempt to refute the clear statements in its own documents. *See, e.g.*, LX-0403; LX-0404; LX-0405; LX-0406; LX-0645; LX-0651; LX-0652. Over the course of the proceeding, LabCorp produced declaration after declaration from its employees and never made these witnesses available for deposition. Indeed, for the one arguably party declarant that LabCorp did make available for deposition, LabCorp drafted and submitted a declaration *after the witness was deposed*, even though LabCorp had ample opportunity to question him on the subject of that declaration at the time of the deposition just a week earlier. *Compare* LX-0653 *with* LX-5009.

III. The Commission's Citations to Certain Pages in Investigational Hearing Transcripts that Were Not Excerpted Is, at Worst, Harmless Error

The Defendants seek to sanction the Commission for citing to portions of investigational hearing transcripts in Plaintiff's Proposed Findings of Fact because the pages cited by the Commission are not among the pages excerpted and attached to the Commission's previous filings.[7] Defs.' 16(f) Mot. 11-12. It is undisputed that statements contained in the investigational hearing transcripts at issue were cited in the Commission's various filings in this matter. Whenever the Commission cited statements from these transcripts, the first few pages of the transcript (which describe the investigational hearing and identify any exhibits introduced during the hearing) and the pages relevant to the Commission's citations were submitted as a plaintiff's exhibit and attached to those filings. The Commission submitted the relevant excerpts, rather than the entire transcript, to

[7] Defendants do not assert that the portions of these investigational hearings cited by the Commission in its Proposed Findings of Fact are not relevant or that they are barred by the Court's Scheduling Order. *See generally* Defs.' 16(f) Mot.

reduce the already-substantial volume of exhibits attached to the Commission's filings and to make it easier for the Court and its staff to identify the relevant page(s). The Commission cited pages of these investigational hearing transcripts that were not among the pages excerpted and attached to the Commission's previous filings in its Proposed Findings of Fact because the Commission considered these transcripts to be in the record in their entirety. Footnote 1 of the Commission's Proposed Findings of Fact identifies these transcripts and the corresponding excerpts cited in the Commission's previous filings.[8]

The investigational hearings in question were conducted in September and October of 2010. Defendants were immediately furnished copies of the transcripts, and, in fact, have cited to them frequently throughout these proceedings. Thus, Defendants do not dispute that they have been in possession of every transcript to which they now object to the Commission having cited. While they maintain that they have been prejudiced somehow by the Commission's citations to evidence that was actually in their hands and which they used, their complaint rings hollow. The reality is that they have at all times been free to cite to any portions of these transcripts, including in their briefs, their oral argument, and in their Proposed Findings of Fact.

Defendant dramatically overstates the extent to which the Commission relied upon the allegedly impermissible transcript citations. The reality is that only 13 of the Commission's 314 total findings of fact even reference the portions of the transcripts that Defendants complain have not been properly included in the record. Pl.'s Proposed Findings of Fact ¶¶ 8, 11, 25, 35, 38, 43, 44, 46, 47, 64, 87, 192, 194. Of that, a grand total of *two* cite exclusively to the portions of these

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[8] The Commission's Proposed Findings of Fact do not cite investigational hearing transcripts that were not cited in its filings.

transcripts that Defendants seek to strike. Pl.'s Proposed Findings of Fact ¶¶ 11, 192.[9] The balance are part of string cites and are supported by other evidence in the paragraph. *Id.* ¶¶ 8, 25, 35, 38, 43, 44, 46, 47, 64, 87, 194. Thus, even if the citations are stricken, the findings would be unaffected.

IV. There is No Basis for Imposing Sanctions in this Context

Where, as here, there has been no violation of the Court's order, Rule 16 sanctions are not appropriate. The Court's Scheduling Order makes clear that the only requirement under Section 1 is that the parties identify the "declarants on whom they will rely" so that the opposing party may conduct a deposition of that party. There is no dispute that the Plaintiff did exactly that. The one-sided interpretation propounded by LabCorp, is not only inconsistent with the Scheduling Order itself, it is also inconsistent with all of LabCorp's actions to date. Having failed to object to citations to the allegedly illicit evidence at earlier stages of this proceeding, LabCorp has effectively waived its right to a revised interpretation of the Scheduling Order at this late date. In any event, even assuming LabCorp's interpretation is correct and the Commission's Proposed Findings contain limited citations to non-record evidence, there is no basis in the case law for sanctions beyond striking the offending evidence, let alone the imposition of monetary sanctions.

A. Even if the Commission had implicitly violated the Court's Order, Defendants have overreached in their request for monetary sanctions

Rule 16(f)(2) explicitly recognizes that attorneys fees are not recoverable if

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[9] Paragraph 192 cites to PX 7000 at 35-39. Pl.'s Proposed Findings of Fact ¶ 192. The excerpts of PX 7000 that were submitted included pages 35, 37, and 38.

the "noncompliance was substantially justified or other circumstances make an award of expenses unjust." Defendants point to no caselaw where attorneys' fees were awarded or which sanctions were imposed on a party for citing or relying on evidence that was not considered part of the record. This is not surprising considering that the purpose of Rule 16(f) is primarily to address egregious conduct that undermines the trial court's ability to properly manage its docket.[10] The conduct in question here is not remotely analogous to the behavior at issue in the cases Defendants cite.

The cases implementing Rule 16(f), including those cited by LabCorp, are inapt and deal overwhelmingly with egregiously dilatory tactics by counsel that effectively undermine a district court's ability to manage its calendar and ensure that the pretrial matters before it proceed expeditiously. For example, in *Martin Family Trust v. Heco/Nostalgia Enterprises*, 186 F.R.D. 601 (E.D. Cal. 1999), the court noted that Rule 16(f) exists to ensure that lawyers and parties "*fulfill their high duty to ensure the expeditious and sound management of the preparation of cases for trial*." 186 F.R.D. at 603. Similarly, in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992), the court explained: "As the torrent of civil and criminal cases unleashed in recent years has threatened to

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[10] Courts are, and should be, reluctant to punish parties for mere mistakes. *See, e.g., Atlansky v. Acad. Pac. Bus. & Travel Coll.*, No. 90-55423, 1991 WL 113209, at *2 (9th Cir. June 24, 1991) (lower court abused its discretion when it sanctioned party for "inadvertent" failure to comply with pretrial order; violation at issue "distinguishable from [cases] in which a willful or repetitive violation . . . justified harsh treatment"); *Lee v. Lee*, 97 Cal. Rptr. 3d 516, 522 (Cal. App. Div. 5 Jul. 29, 2009) (lower court was correct in declining to impose sanctions and admitting documents into evidence when "there [was] no evidence that respondents willfully failed to comply"); *cf. In re Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984) (holding that a "*pattern* of negligence," despite admittedly adequate notice, warranted imposition of sanctions) (emphasis added).

inundate the federal courts, deliverance has been sought in the use of calendar management techniques. Rule 16 is an important component of those techniques." 975 F.2d at 611; *accord Tower Ventures, Inc. v. City of Westfield*, 296 F.3d 43, 46 (1st Cir. 2002) ("To manage a crowded calendar efficiently and effectively, a trial court must take an active role in case management. Scheduling orders are essential tools in that process - and a party's disregard of such orders robs them of their utility.").

The caselaw Defendants rely upon in the motion falls into two general categories: (1) the sanctioned party fails to appear at scheduled pretrial conferences with the judge, oftentimes subsequently failing to appear at show cause hearings to explain the absence;[11] and (2) clear and direct violations of court orders.[12]

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[11] *Softwareworks Group, Inc. v. Ihosting, Inc.*, No. C06-04301 HRL, 2007 WL 1279495 N.D. Cal. Apr. 30, 2007) (defendant sanctioned for failure to comply with three court orders requiring it, among other things, to contact judge's chambers to conduct a settlement conference, to obtain new counsel, and respond to outstanding discovery requests); *Crocker Nat'l Bank v. M.F. Sec. (Bahamas), Ltd.*, 104 F.R.D. 123, 126-27 (C.D. Cal. 1985) (defendant sanctioned for failure to comply with local rules, retain new counsel, and appear at hearing to show cause); *Miller v. Sears Holding Corp.*, No 10-cv-882 GSA LJO, 2010 WL 4236864 at *2-3 (E.D. Cal. Oct. 21, 2010) (attorneys' fees awarded when counsel did not appear at scheduling conference, as ordered, and failed to appear at hearing to show cause); *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990) (attorneys' fees awarded when counsel did not appear at a scheduled pretrial conference).

[12] *Valley Eng's Inc., v. Elec. Eng'g Co.*, 158 F.3d 1051, 1053-54 (9th Cir. 1998) (defendants' claims against counter-claim defendants dismissed after repeated failure to produce a document the court had ordered produced for two years); *Feezor v. H.I. Mgmt. of Rancho Cordova*, No. CIV S-06-1638 WBS DAD, 2007 WL 117917 at *1 (E.D. Cal. Jan. 10, 2007) (court found that plaintiff's filing of amended complaint was in "blatant disregard" of its previous court order that specifically prohibited amending pleadings); *Official Airline Guides, Inc. v. Goss*, 6 F.3d 1385, 1396-97 (9th Cir. 1993) (attorneys' fees awarded when counsel did

None of the cases Defendants extensively catalog impose attorneys' fees in circumstances similar to those presented here. Defendants do not identify a single case in which monetary sanctions were imposed on a party for citing or relying on evidence that is not in the record. The only authority they cite for the proposition that "relying on materials not before the court is prohibited" are two cases addressing the exclusion or nonconsideration of evidence; neither case so much as mentions the imposition of a monetary sanction of attorneys' fees. Defs.' Mot. for Sanctions 7 (citing *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 327 (C.D. Cal. 2004); *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1240 n.7 (11th Cir. 2003)). In *Cambridge Electrics Corp. v. MGA Electrics, Inc*., 227 F.R.D. 313 (C.D. Cal. 2004), the court notes that it is improper for a party to rely on a deposition transcript that is not in the record when opposing summary judgment. 227 F.R.D. at 327. The court continued, however, to decide that in the alternative summary judgment was appropriate even if the testimony is considered. *Id.* The court in *McCormick v. City of Ft. Lauderdale*, 333 F.3d 1234 (11th Cir. 2003), similarly declined to give consideration to deposition testimony that was not in the record. 333 F.3d at 1240 n.7. These cases stand for the noncontroversial proposition that a court may exclude or decline to consider evidence that is not in the record. *See id.*; *Cambridge Elecs. Corp*., 227 F.R.D. at 327. They are not, however, authority for the drastic remedy of monetary sanctions in the form of attorneys' fees. *See Baker v. Vantage Parts, Inc.*, 1997 WL 136488 at *6-8 (D. Or.

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not produce individual with settlement authority at settlement conference, as required by court order); *Flores v. Merced Irrigation Dist.*, No. 1:09cv1529 LJO DLB, 2010 WL 5168991 at *1-2 (E.D. Cal. Dec. 13, 2010) (court upheld imposition of attorneys' fees when court order granted counsel leave to file untimely request for admissions that were deemed admitted on the condition that counsel reimburse opposing counsel fees in filing various pleadings based on the deemed admissions).

Mar. 19, 1997) (specifically declining to impose sanctions where a party sought to introduce additional facts supporting the claim that had not been in the original complaint).

B. Defendants have also overreached in their request that the Commission's findings be stricken in whole or in part

In their proposed order, Defendants seek the extraordinary remedy of exclusion of the Commission's entire Proposed Findings of Fact. There is no basis for this request. Even assuming, counterfactually, that the Commission cited to evidence that the Court intended to be excluded from the record in the Scheduling Order, the allegedly offending citations are found in only 69[13] of the 314 findings of fact that the Commission submitted to the Court. In the vast majority of instances, the citations are merely additional authority (to be given the weight the Court deems appropriate) for the proposition. In only 8 paragraphs is the authority that Defendants complain about the sole citation for the finding.[14] To strike the entire Proposed Findings of Fact, and the assistance that they provide the Court in sifting through the evidence, would be a sanction grossly disproportionate to the offenses Defendants claim were committed by the Commission.

More importantly, the Rule 16(f) sanctions that Defendants seek are never applied in circumstances remotely analogous to the instant one where there has been complete compliance with the actual terms of the relevant court order. Rule 16(f) sanctions against parties are typically applied only where parties fail to appear at scheduled pretrial conferences or otherwise flagrantly disregard court orders or withhold evidence. Indeed, Defendants cannot cite to any authority that is reasonably analogous to the present dispute where Defendants are seeking to

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[13] *See infra* II(A) n.3; III.

[14] *Id.*

exclude evidence that has already been in the record. Here, the offense that LabCorp claims has been committed by the Commission – the one that allegedly created a "risk of prejudice to LabCorp" so "severe" that anything short of striking all of Plaintiff's Proposed Findings of Fact and imposition of over $20,000 in attorneys' fees would be manifestly unjust – is that the Commission cited to evidence Defendants have possessed for the entire proceeding. None of the FTC's conduct in this matter evinces wrongdoing, contumaciousness, nor anything resembling a pattern of negligence customarily required before relief under Rule 16(f) is granted.

V. Conclusion

For the foregoing reasons, Defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 16(f) should be denied.

A proposed order is attached.

Dated: February 16, 2011

Respectfully submitted,

By: __/s/_____

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 Pennsylvania Avenue N.W. Washington, D.C. 20580.

2. That on February 16, 2011, declarant served the PLAINTIFF FTC'S OPPOSITION TO DEFENDANTS' MOTION FOR SANCTIONS by emailing a true and correct PDF to J. Robert Robertson at robby.robertson@hoganlovells.com, Corey Roush at corey.roush@hoganlovells.com, and Benjamin Holt at benjamin.holt@hoganlovells.com.

Jonathan Klarfeld
Counsel for Plaintiff
Federal Trade Commission