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21 LABORATORY CORPORATION and
22 LABORATORY CORPORATION OF
23 AMERICA HOLDINGS

24 UNITED STATES DISTRICT COURT
25 CENTRAL DISTRICT OF CALIFORNIA
26 SOUTHERN DIVISION

27 FEDERAL TRADE COMMISSION,
28
29 Plaintiff,

30 v.

31 LABORATORY CORPORATION
32 OF AMERICA, et al,
33
34 Defendants.

35 Case No. SACV 10-1873 AG
36 (MLGx)

37 **DEFENDANTS' REPLY IN**
38 **FURTHER SUPPORT OF**
39 **DEFENDANTS' MOTION FOR**
40 **SANCTIONS**

41 Date: TBD
42 Time: TBD
43 Ctrm.: 10D

44 Judge: Hon. Andrew J. Guilford

1 **PRELIMINARY STATEMENT**

2 While the FTC has developed creative *post hoc* rationalizations for blatantly
3 ignoring this Court’s December 29 Scheduling Order, such justifications should not
4 be tolerated. The FTC made a calculated decision to violate this Court’s Order; its
5 decision was disrespectful to the Court and prejudiced Defendants from an
6 evidentiary perspective. The FTC now attempts to justify its behavior in essentially
7 two ways: (1) by claiming that the Scheduling Order did not mean what its clear
8 language says and (2) by asserting that the FTC should be allowed to ignore the
9 Scheduling Order because the Order was unfair. Both are obviously false.
10 LabCorp therefore files this brief reply to respond to several statements made by the
11 FTC in its opposition brief.

12 **ARGUMENT**

13 **I. The FTC’s Claim That It Interpreted the Order as Allowing Reliance on**
14 **Third-Party Declarations Beyond the Fifteen Contemplated in the**
15 **Scheduling Order Is Disingenuous.**

16 The FTC’s argument that it believes that the December 29 Scheduling Order
17 permitted the parties to rely on more than fifteen third-party declarations is belied
18 by the FTC’s earlier statements to LabCorp and by the fact that the FTC actually
19 adhered to the Scheduling Order in its Supplemental Brief in Support of its Motion
20 for Preliminary Injunction. Dkt. No. 97.

21 On January 4, 2011, counsel for LabCorp and the FTC corresponded by e-
22 mail regarding the third-party declarants on which the parties would rely pursuant
23 to the December 29 Scheduling Order. In identifying the first 10 of its 15
24 declarants, counsel for the FTC explicitly stated:

25 At this time, we can confirm that *we intend to rely* upon the following
26 ten of the total of fifteen third-party declarants in the federal district
27 court proceeding pursuant to Judge Guilford’s Scheduling Order. We
will supplement this list with the additional five declarants as soon as
we make our final determinations.

28 Ex. A to Roush Feb. 17 Decl. (emphasis added). This statement directly undercuts

1 the FTC's new position that it only had to designate fifteen third-party declarants
2 for deposition purposes and no more.

3 Largely consistent with the January 4 statement, the FTC filed its
4 Supplemental Brief with only a handful of improper citations in two footnotes at
5 the end of the brief. The FTC asserts that these minimal citations and the fact that
6 LabCorp did not object to them constitutes a waiver by LabCorp of its right to
7 object to the over 220 such citations in the FTC's Proposed Findings of Fact.
8 Opp'n 5. This position is nonsensical. As an initial matter, the offending footnote
9 citations pertained solely to an affirmative defense that LabCorp did not seek to
10 argue before this Court (but may argue in the administrative proceeding). Such
11 trivial and infrequent improper citations do not warrant complaining to the Court
12 particularly because they could not validly be considered prejudicial to LabCorp.

13 While it is possible that the FTC was "testing the waters" to see if LabCorp
14 would object, those three footnote citations are a far cry from the FTC's citation
15 *over 220 times* to unauthorized declarations in its Proposed Findings of Fact.
16 Indeed, the FTC's January 4 email to LabCorp and the FTC's shift from three
17 improper citations to over 220 suggests that the FTC fully understood the Court's
18 Scheduling Order when it filed its Supplemental Brief and then affirmatively
19 decided to violate that Order in its Proposed Findings.

20 The FTC now claims that LabCorp interpreted the Scheduling Order in the
21 same manner because LabCorp acknowledged that the FTC's previous improper
22 reliance on unauthorized third-party declarations in LabCorp's own Proposed
23 Findings of Fact, Opp'n 5, and because LabCorp cited to three of those same
24 declarations, *id.* at 8. This is incorrect.

25 First, as counsel for LabCorp, we hereby represent to the Court that LabCorp
26 did not interpret the Scheduling Order in the way that the FTC claims. The briefing
27 submitted in connection with the FTC's motion for a scheduling order bears this
28 out. *See infra* at 4-5.

1 Second, LabCorp’s acknowledgement of the FTC’s improper citation of
2 unauthorized declarations in LabCorp’s Proposed Findings of Fact is clearly
3 mischaracterized by the FTC. That reference – in a footnote – explains that the
4 FTC inappropriately cited to several of the declarations that were not supposed to
5 be before the Court in its presentation at the February 3, 2011 hearing. Defs.’
6 Proposed Findings of Fact and Conclusions of Law 29 n.3 (Dkt. No. 124). Far
7 from being an admission by LabCorp that the declarations were fair game – as the
8 FTC suggests – the footnote explicitly notes that the declarations *should not have*
9 *been cited. Id.*

10 Third, because LabCorp did not interpret the Scheduling Order in the manner
11 the FTC now claims, counsel for LabCorp specifically avoided citing to the
12 unauthorized declarations in question. The three citations that the FTC identified,
13 Opp’n 8, were placeholder citations that counsel intended to remove from the
14 Proposed Findings of Fact once other, appropriate citations were identified. When
15 counsel identified and added appropriate cites to the Findings, counsel inadvertently
16 neglected to remove the placeholders. *See* Defs.’ Proposed Findings ¶¶ 71, 143.
17 These mistakes should not have happened. Counsel for LabCorp would be happy
18 to resubmit its Proposed Findings of Fact to correct this inadvertent error.¹

19 Nevertheless, the bottom line is that counsel for LabCorp made three citation
20 errors in its Proposed Findings of Fact. The FTC made an affirmative decision to
21 ignore this Court’s Scheduling Order over 220 times. The two actions are not
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27 ¹ Even with these three errors – wherein LabCorp cited to declarations obtained by the FTC
28 from declarants with whom LabCorp’s counsel had never spoken, LabCorp still only cited to less
than the fifteen that it was allotted.

1 comparable, and one does not justify the other.²

2 **II. The FTC's Unhappiness With the Court's Scheduling Order Does Not**
3 **Justify Disregarding the Order.**

4 In attempting to justify its actions, the FTC paints the Court's December 29
5 Scheduling Order as unfair and seeks to re-litigate the motion that resulted in that
6 Order. *See* Opp'n 10-11. In that motion, the FTC moved for a scheduling order
7 following this Court's December 17, 2010, decision to grant LabCorp the right to
8 take discovery. In its proposed scheduling order, the FTC sought to limit LabCorp
9 to 10 depositions of third parties while permitting the FTC to rely on all 46 of its
10 third-party declarations. Pl.'s Mem. of Points and Authorities in Supp. of its Mot.
11 For Scheduling Order 12-13 (Dkt. No. 66-5). LabCorp explained in opposing the
12 motion the problem with the FTC's proposal:

13 [L]imiting LabCorp to ten depositions without a corresponding
14 limitation on the number of declarations on which the FTC may rely
15 would drastically undermine LabCorp's ability to rebut the FTC's
16 evidence. For example, if LabCorp impeaches one declarant, the FTC
17 could simply base its arguments on a duplicative declarant whom
18 LabCorp was not permitted to depose.

19 Defs.' Opp'n to Pl.'s Mot. for Scheduling Order 3 (Dkt. No. 71). The Court
20 apparently agreed with LabCorp and rejected the FTC's proposed scheduling order.
21 *See* Dkt. No. 77 (Order Denying Plaintiff's Motion for Scheduling Order). The
22 Court instead entered the December 29 Scheduling Order limiting *both* the number
23 of third-party declarants on which each side could rely for purposes of the FTC's
24 preliminary injunction motion and the number of depositions in the case. Dkt. No.

25 ² Nor is the FTC's disregard for the Scheduling Order justified by what it contends were
26 improperly submitted "expert reports" by LabCorp. Opp'n 9. The FTC identifies three summary
27 charts used in LabCorp's pre-hearing brief and at the preliminary injunction hearing. *Id.* Two of
28 these charts, LX-0641 and LX-0642, are summaries of voluminous data that is in the possession
of both parties, which is explicitly permitted under Federal Rule of Evidence 1006. The third
chart simply provides a list of laboratories with capitated contracts drawn from the pre-existing
expert reports of both Dr. Flyer and Dr. Wu. These documents include absolutely no expert
opinion and are neither "additional expert declarations" nor additional "reports" within the
meaning of section 3 of the Scheduling Order. Indeed, both sides and their experts have relied on
similar data compilations and summaries at various stages of the proceedings without objection.
The FTC's argument on this point is simply a red-herring.

1 78 (Scheduling Order). The FTC's unhappiness with the Court's decision is not a
2 basis to ignore the Court's order and do exactly what LabCorp predicted might
3 occur.

4 The briefing in connection with the motion for a scheduling order also
5 undermines the FTC's suggestion that LabCorp's reliance on its own employee
6 declarations is somehow improper. Opp'n 10-11. In its brief in support of that
7 motion, the FTC argued that it should be permitted to depose again several
8 LabCorp employees to avoid LabCorp drafting and relying on "self-serving" party
9 declarations. Pl.'s Mem. of Points and Authorities in Supp. of its Mot. For
10 Scheduling Order (Dkt. No. 66-5) 4-5. Given the limited number of days of
11 discovery and the fact that the FTC had already taken investigational hearings
12 (administrative depositions) of 10 party witnesses, the Court rejected the FTC's
13 request, and instead entered the December 29 Scheduling Order that established a
14 general filing deadline and imposed limits on discovery that applied *only* to third-
15 party and expert discovery. Given that the FTC anticipated that LabCorp would
16 submit declarations from its employees if the Court did not grant additional party
17 declarations and given the Court's ultimate rejection of the FTC's request, it is
18 entirely disingenuous of the FTC to now pretend that LabCorp's reliance on its own
19 employee declarations is a surprise or improper.³

20 Moreover, if the FTC genuinely believed that LabCorp's submission of those
21 declarations violated the Court's Scheduling Order, as it now claims, Opp'n 10-11,
22 the FTC could have raised that complaint with the Court immediately after the
23 submission of those declarations on January 28, 2011.⁴ The FTC should not have

24 ³ Moreover, as noted in LabCorp's Motion for Sanctions, since no witnesses were permitted
25 at the February 3, 2011 Hearing, LabCorp had no way of presenting testimony from its employees
26 to this Court. Such testimony is highly probative on both the FTC's likelihood of success and the
equities.

27 ⁴ Indeed, if the FTC had concerns about LabCorp's reliance on the declaration of Ms.
28 Nancy Stephenson, Opp'n 8, or on LX-0641 and LX-0642 (the two data summaries), *id.* at 9, –
all of which were submitted to this Court on January 28, 2010 – the FTC should have raised those
issues with the Court at that time rather than using them as justification for subsequently relying
on improper evidentiary citations over 220 times.

1 taken those submissions as justifications to blatantly disregard the Court's clear
2 instructions in its December 29 Scheduling Order.

3 **CONCLUSION**

4 For the reasons set forth herein and in Defendants' Motion for Sanctions and
5 memorandum in support of that motion, Defendants respectively request that the
6 Court grant Defendants' Motion for Sanctions.

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8 Date: February 17, 2011

HOGAN LOVELLS US LLP

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10 By: /s/ _____

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