

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL



In the Matter of)
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)

LABORATORY CORPORATION OF)
AMERICA)
)

and)
)
)

LABORATORY CORPORATION)
OF AMERICA HOLDINGS, et al)
_____)

DOCKET NO. 9345

PUBLIC REDACTED VERSION

Respondents.)
)
_____)

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION TO COMPEL DOCUMENT PRODUCTION

- (1) communications between Commission staff and the Interim Monitor and Manager of the Westcliff assets and business, also known as "LabWest" and
- (2) communications between Commission staff and the staff of the Office of the Attorney General of California ("AG") relating to coordination of the two

the divestiture remedies sought in the Complaint and the real-world impact of LabCorp's acquisition of the Westcliff assets on competition – as well as related, potential enforcement

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specifically stated that it was not the purpose of the Commission to

three days to pass before filing its motion to compel. In any event, the purpose of providing a declaration is to ensure that the agency and not litigation counsel is the one invoking the privilege, which is what occurred here.

The privilege logs produced by Complaint Counsel amply satisfy established Commission precedent.⁶ In addition, by submitting Mr. Feinstein's declaration, Complaint Counsel has complied with the D.C. Circuit's expectation of "(1) a formal claim of privilege by

materials and “undue hardship” in obtaining the equivalent by other means, the Court may order production of purely factual work-product materials, but not materials that reveal the “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.” Rule 3.31(c)(5).

All of the withheld materials originated by Commission attorneys and other staff, whether pre-decisional or not, were “prepared in anticipation” of the present litigation, and materials originated by the Interim Monitor or the Manager in order to provide FTC staff the information required under the HSA constitutes material prepared by agents for or representatives of the FTC staff. Such material particularly merits work product protection here, where those documents, including replies to emails from FTC staff, would tend to reveal the mental impressions and legal theories of the FTC attorneys themselves. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975). The non-disclosure agreements signed by Mr. Kane and Mr. Shoemaker were intended to provide further assurance that the FTC’s work product information would not be disclosed to an adversary such as LabCorp. Feinstein Decl., ¶ 17.

Furthermore, given the common interests of the FTC and the California AG in antitrust enforcement and promoting competition, and the restrictions on the AG’s disclosure of confidential FTC information, *see* Rule 4.11(c), the FTC staff did not waive or forfeit the work product privilege by sharing materials with the AG staff. *See United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Trustees for Elec. Workers Local No. 26*, 266 F.R.D. 1, 15 (2010) (“[A] party only forfeits the work-product privilege by a disclosure of privileged information in a manner that is inconsistent with preserving the secrecy of that information from an adversary. Disclosure to a person who shares a common interest with the party claiming the privilege

cannot therefore work a forfeiture.”)

Finally, LabCorp “has not made a particularized showing of need” and it is “not enough

that the information sought might be helpful” to LabCorp. *LabCorp v. GSK*, 2014 WL 1234567, at *10 (D. Minn. 2014).

[REDACTED]

[REDACTED]

[REDACTED]

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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[PROPOSED] ORDER

Upon consideration of Respondents' Motion to Compel Document Production,
Complaint Counsel's Opposition thereto, and the Court being fully informed,

IT IS HEREBY ORDERED, that Respondents' Motion is DENIED.

Date: February __, 2011

D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I filed via hand delivery an original with signature and one paper copy and a .pdf via electronic mail that is a true and correct copy of the paper original of the foregoing **PUBLIC Complaint Counsel's Opposition to Respondents' Motion to Compel Document Production** with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W., Rm. H-159
Washington, DC 20580
secretary@ftc.gov

I also certify that I delivered via hand delivery one paper copy and one .pdf copy that is

Counsel's Opposition to Respondents' Motion to Compel Document Production to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue N.W. Rm. H-113

UNITED STATES OF AMERICA

In the Matter of)

LABORATORY CORPORATION OF)
AMERICA, et al.,)

Respondents.)
_____)

Docket No. 9345

PUBLIC REDACTED VERSION

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENTS' MOTION TO COMPEL DOCUMENT PRODUCTION

APPENDIX A

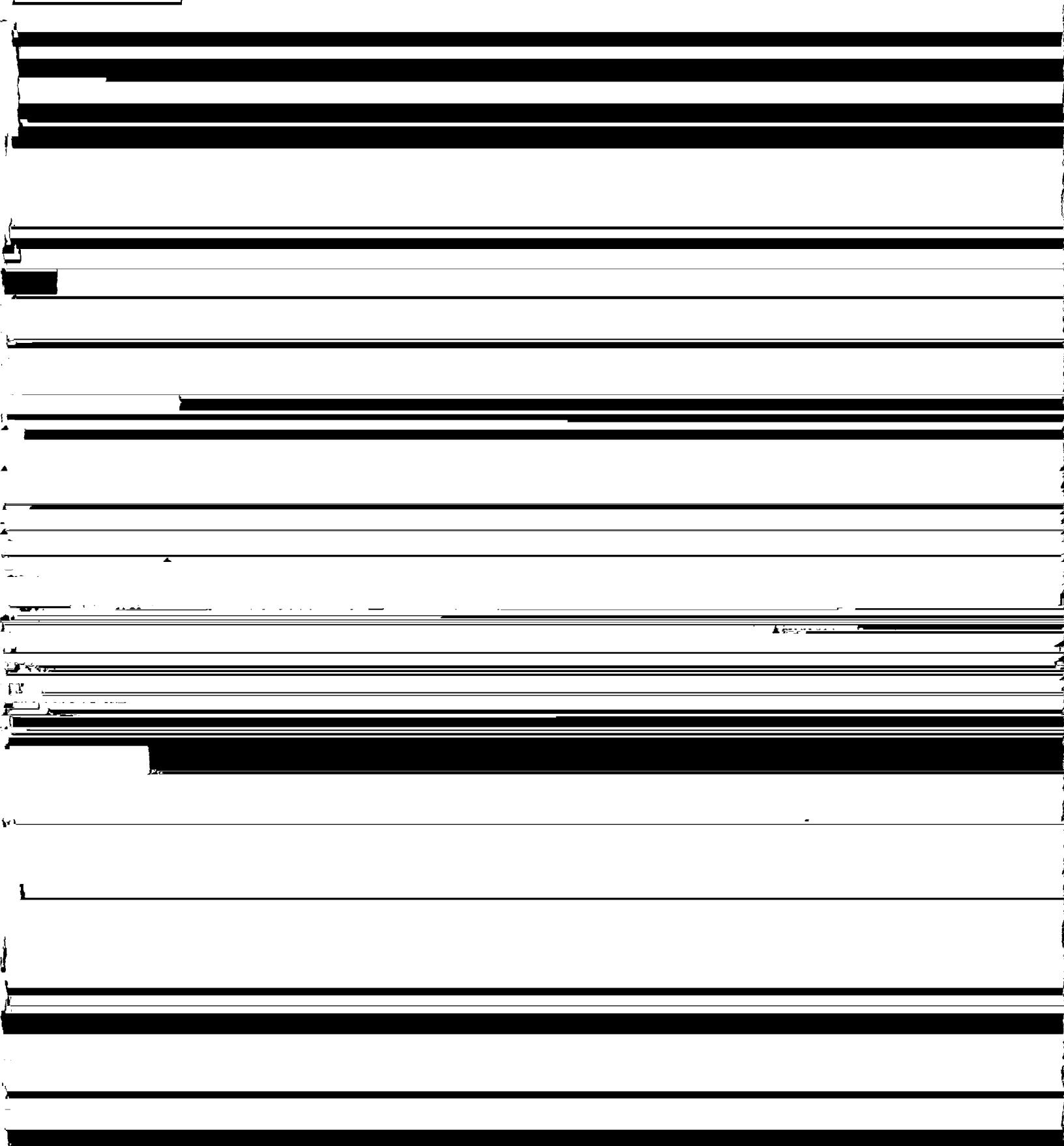
Declaration of Richard A. Feinstein

cooling, inductive and other suitable materials. The following is a list of the materials used:

complaints which are tried before the agency's administrative law judges. One of the Bureau's

assets with no minimum bid, which would be fully open to potential purchasers other than

LabCorp. However, in contravention of its commitment to Commission staff, LabCorp



Westcliff as a viable competitor and restore competition in the relevant markets. *Cf.*

Administrative Complaint, Docket No. 9345, at 12-13 (issued Nov. 30, 2010).

12. Among other things, the HSA provides for the appointment of an [REDACTED]

[REDACTED] HSA at 6, ¶ II.C.1.

Further, the HSA [REDACTED]

[REDACTED] *Id.*, ¶ II.C.1.(c).

The HSA also specifies that [REDACTED]

[REDACTED] *Id.* at 7, ¶ II.C.1.(h). Emmett Kane has been retained to serve as the Interim

operational independence of the held-separate Westcliff business – now commonly referred to as “LabWest” – and to provide ongoing information to the Commission staff regarding the operations of that business. Accordingly, Mr. Kane is not completely “independent” from the

[REDACTED] In monitoring and implementing the HSA and operating the held-separate business, the Interim Monitor effectively serves as a consultant to the Commission. Similarly, as Manager under the HSA, Mr. Shoemaker reports [REDACTED] to Mr. Kane, so his fiduciary obligations are necessarily aligned

15. All documents and communications between either the Interim Monitor or the Manager, on the one hand, and Commission staff, on the other, further the Commission’s ability to assess the HSA and LabWest’s compliance with the HSA and the requirements of the

19. I have not personally reviewed every email, report, or other document transmitted between the Bureau staff and the Interim Monitor and/or the Manager listed in Complaint

consider the Commission's cooperation and coordination with state enforcement agencies to be a vital and essential tool in fulfilling the Commission's mission of enforcing the nation's antitrust laws.

21. Because the Commission operates under strict confidentiality rules, including

~~§ 4(f), 15 U.S.C. § 57, and 15 U.S.C. § 58, the Commission's ability to cooperate with state enforcement agencies is conditioned on~~

~~§ 4(f), the Commission's ability to cooperate with state enforcement agencies is conditioned on~~

But at the very least, all communications to date with the AG's office have been with a governmental agency whose interests are not adverse to those of the Commission.

23 The Commission has no direct interest in the AG's *qui tam* litigation against

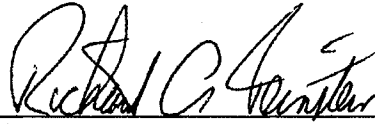
Each category of relevant communications relate to information that Commission staff or the AG learned as a result of the investigation. The communications furthered staff's discussions with me and others in the Bureau, and helped inform the analysis that the Commission considered in deciding whether to commence the instant litigation. Moreover, the factual information contained in the documents is inextricably intertwined with the FTC and AG staffs' respective opinions, analyses, and conclusions, and production of those documents would indirectly reveal the

rejected.

26. Further, the exchange of documents and communications occurred solely to further

I declare under penalty of perjury that the foregoing is true and correct to the best of my

knowledge and belief.

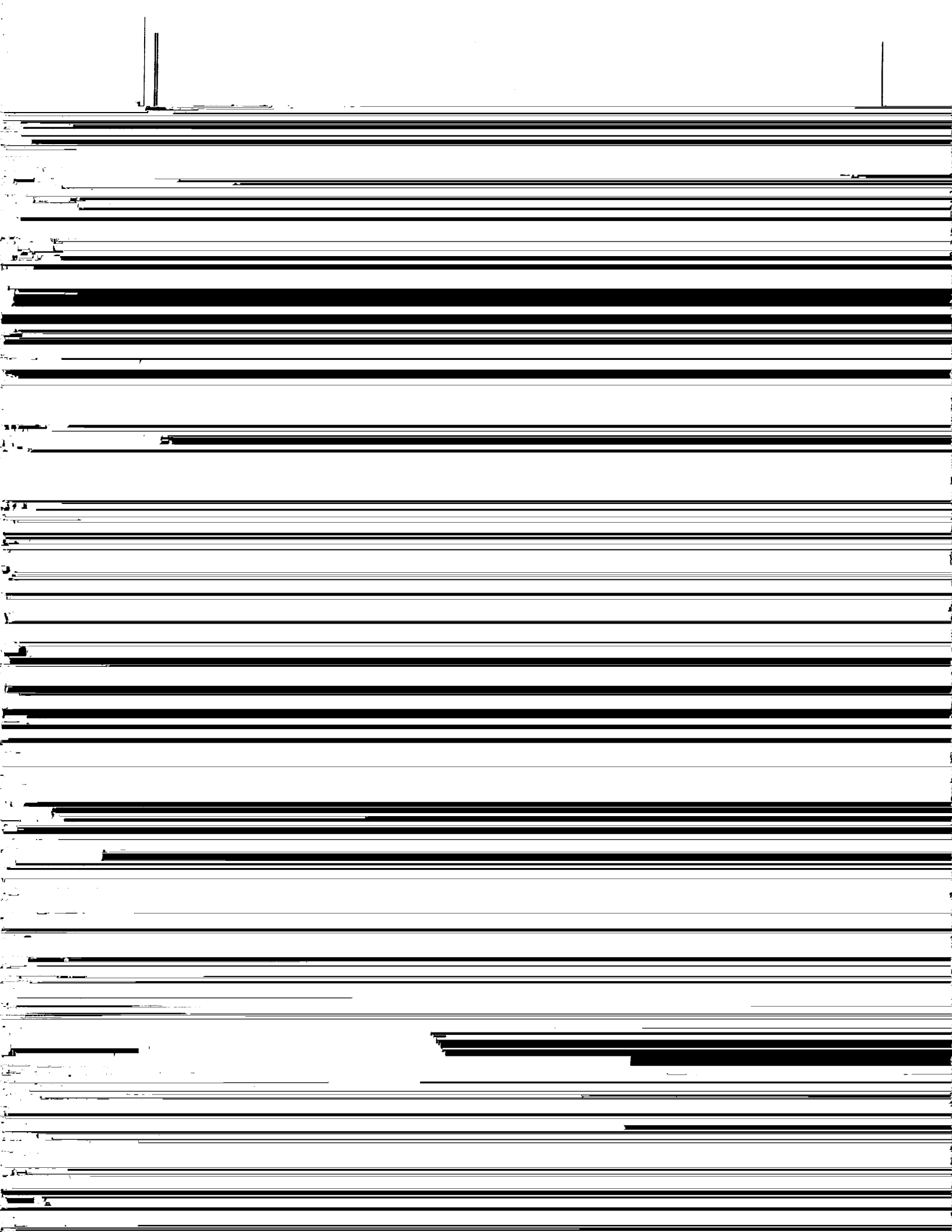


Richard A. Feinstein
Director, Federal Trade Commission, Bureau of
Competition

Signed this 15th day of February, 2011,
in Washington, D.C.

PATRICIA L. NAGLER DECLARATION

[REDACTED]



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8. If LabCorp is successful in obtaining confidential materials shared between the CAAG and the FTC in this matter, it could greatly hamper coordinated or cooperative investigations between law enforcement agencies. It could make it difficult to share information generated in our respective investigations and inadvisable to exchange analyses, assessments of the evidence