**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FEDERAL TRADE COMMISSION, Plaintiff, v. LABORATORY CORPORATION OF AMERICA, and LABORATORY CORPORATION OF AMERICA HOLDINGS, Defendant.	)))))))))))))	Civil Action No. ______________ **FILED UNDER SEAL**

**MEMORANDUM IN SUPPORT OF FEDERAL TRADE COMMISSION'S
MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

RICHARD A. FEINSTEIN
Director (D.C. Bar No. 324848)
PETER J. LEVITAS
Deputy Director
Bureau of Competition

WILLARD K. TOM
General Counsel (D.C. Bar No. 297564)
Federal Trade Commission

MICHAEL R. MOISEYEV
Assistant Director (D.C. Bar No. 431722)
JONATHAN S. KLARFELD
Deputy Assistant Director
Bureau of Competition
Mergers I Division

THOMAS GREENE
Special Litigation Counsel

STEPHANIE A. WILKINSON
STEPHANIE C. BOVEE
LISA DEMARCHI SLEIGH
(D.C. Bar No. 485853)
CATHERINE M. SANCHEZ
AMY S. POSNER
(D.C. Bar No. 494979)
STEPHEN A. MOHR
(D.C. Bar No. 982570)
ERIN L. CRAIG

Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., NW
Washington, DC 20580
Telephone: (202) 326-2531
Facsimile: (202) 326-2655
Email: tgreene2@ftc.gov

Attorneys for Plaintiff

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PRELIMINARY STATEMENT

The Federal Trade Commission ("the Commission" or "FTC"), "having reason to believe that Respondent Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively "LabCorp") acquired substantially all the business assets of Westcliff Medical Laboratories, Inc. ("Westcliff"), in violation of Section 5 of the Federal Trade Commission Act, as amended, [("FTC Act")] 15 U.S.C. § 45 [(2006)], and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 [(2006)], and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest," issued an administrative complaint against LabCorp on November 30, 2010. *Lab. Corp. of Am. Holdings*, Docket No. 9345. The action to adjudicate the legality of the Westcliff acquisition is now ongoing, and the administrative trial is set to commence on May 2, 2011.

The competitive concerns raised by this acquisition are significant. Three firms dominate the supply of clinical laboratory services to physician groups in Southern California. The two largest are Quest Diagnostics, Inc. ("Quest"), a national firm with a [redacted] share in this market, and the Defendant, LabCorp, another national firm, with an [redacted] market share. Westcliff, a California firm with nearly $100 million in revenue in 2009, is third with an [redacted] share of the relevant market. Fringe firms, none with a market share that reaches [redacted], comprise the remainder of the market. The acquisition therefore effectively represents a merger to duopoly.

The Commission comes before this Court with an ancillary action under the specific authority of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seeking temporary and preliminary relief to preserve the *status quo* while the FTC performs its statutorily-prescribed adjudicative function. Section 13(b) was enacted explicitly to preserve the Commission's ability to order effective, ultimate relief upon completion of its administrative proceedings. H.R. Rep. No. 93-624, at 31 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2523; *see FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (Tatel, J., concurring in judgment) ("[T]he FTC – an expert agency acting on the public's behalf – should be able to obtain injunctive relief more readily than private parties . . . ."); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 (D.C. Cir. 2001). The "only purpose of a proceeding under [Section 13(b)] is to preserve the status quo until FTC can perform its function." *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976); *accord Whole Foods*, 548 F.3d at 1035 (Brown, J.); *id.* at 1050 (Tatel, J., concurring in judgment).

Under Section 13(b), preliminary relief is available to the Commission under "a unique 'public interest' standard . . . rather than the more stringent, traditional 'equity' standard for injunctive relief." *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (quoting 15 U.S.C. § 53(b)). Specifically, Section 13(b) authorizes preliminary relief "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action shall be in the public interest." 15 U.S.C. § 53(b). As the Court of Appeals for this Circuit has emphasized, a strong presumption in favor of the issuance of a preliminary injunction arises when the Commission raises "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance." *Heinz*, 246 F.3d at 714-15. On the facts of this case, the Commission clearly meets this standard.

This transaction raises many "serious, substantial" questions appropriate for determination in a FTC administrative trial. Post-merger market shares in the range produced by the acquisition are sufficient to create a presumption that the transaction will substantially lessen competition.[1]

[1] The law dictates that a transaction will be presumed to lessen competition where the FTC can show that the acquisition will lead to undue concentration in the market for a particular product in a particular geographic area. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

Here, however, the shares actually understate the competitive concerns raised by the elimination of an independent Westcliff, as Westcliff has been far more successful winning in contracts than its market share implies. According to LabCorp's own analysis, "Over the past three years *Westcliff has become very aggressive in the marketplace under bidding many of the Quest and LabCorp contracts which has in turn held California capitation rates to low levels.*"[2] Once the deal is completed, LabCorp's plans are clear: "[P]erhaps in 2011 we could go back and renegotiate rates . . . *as that would only leave us and Quest as viable options.*"[3] Nor will new entrants provide additional competition that might protect consumers from higher prices. Notably, LabCorp's and Westcliff's documents, created in the ordinary course of business, are devoid of concern that new entry would frustrate the merged firm's ability to negotiate higher prices. To the contrary, they discuss the high barriers to entry and the scale advantages LabCorp and Westcliff have over smaller, local laboratories. These admissions in contemporaneous business documents, together with the wealth of other evidence available in this case, clearly establish that the acquisition may substantially lessen competition for Southern California physician groups, the vast majority of which would be left with, as LabCorp admits, only two "viable options."

LabCorp can offer no defenses that would justify the deal. LabCorp has argued to the Commission that cost savings it anticipates from the transaction amount to efficiencies that outweigh any competitive harm. These savings are not cognizable efficiencies, however, because they are overstated, speculative, not uniquely a product of the merger, and, ultimately, unlikely to benefit consumers. LabCorp has also asserted that Westcliff is a "failing firm" within the meaning of the antitrust laws, and therefore its acquisition is exempt from scrutiny, but the facts do not support this

[2] PX 1030 at 2 (emphasis added).

[3] PX 1040 (emphasis added).

assertion because LabCorp was not, as it would have to be, the "only available purchaser" for Westcliff.

Because LabCorp's acquisition of Westcliff raises "serious, substantial" questions concerning its competitive impact, the Commission asks the Court to issue an order to preserve Westcliff as an independent business, so that effective relief can be ordered, if appropriate, at the end of the FTC's administrative trial on the merits.

RELIEF REQUESTED

The Commission's ability to obtain effective relief should it prevail in the plenary trial has been preserved for the past five months by a hold separate agreement LabCorp entered into with the Commission.[4] Under this agreement, a monitor oversees Westcliff's day-to-day operations to assure its continued independence and competitive viability. This agreement expires on December 3, 2010, at which time LabCorp intends to integrate Westcliff into its network, destroying forever Westcliff's independent competitive presence. The FTC requests that this Court issue an order that would keep this agreement in place so that effective relief will be available if the Commission ultimately concludes, after the administrative trial on the merits, that the transaction violates Section 5 of the FTC Act and Section 7 of the Clayton Act. A proposed order based on the current hold separate agreement accompanies this motion and is the preliminary relief sought in this ancillary action.

STATEMENT OF THE CASE

A. Clinical Laboratory Services and the Delegated Managed Care Model

Clinical laboratory tests are used to detect and evaluate the presence, concentrations, or composition of chemical, biological, or cellular components in specimens of human blood, tissue, or other fluids. These tests are ordered by physicians, who rely on them to diagnose, monitor, and

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[4] PX 0006.

treat their patients and are critical to the delivery of quality healthcare. There is no functional substitute for clinical laboratory testing services. Under the traditional U.S. health insurance system, clinical laboratory testing is paid for by the patient's insurance company. In Southern California, however, where LabCorp and Westcliff primarily compete, physician groups,[5] rather than the insurance companies, purchase clinical laboratory services directly from independent commercial laboratories for patients covered by health maintenance organization ("HMO") plans. This delegated managed care model is common in California,[6] where physicians group together into organizations to accept "capitation" – a fixed payment per member, per month – from HMO health plans as prospective reimbursement for caring for the HMOs' enrollees. In other words, HMOs delegate the financial responsibility (and risk of profit or loss) for providing patient healthcare to the physician groups.

In order to mitigate the risk associated with uncertain patient utilization of ancillary services, physician groups almost always subcontract clinical laboratory services on a capitated basis. Capitated contracts permit the physician groups to re-assign the delegated risk to laboratory service vendors, streamline their administrative processes and minimize their laboratory expenditures because the contracts are universally offered at deeply discounted prices in exchange for exclusivity. Because capitation is the predominant form of contracting for physician group business, the ability to offer capitated contracts is a critical attribute for clinical laboratories attempting to serve

[5] The term "physician group" as used herein refers to any entity that provides, or through which its member physicians contract to provide, healthcare services to enrollees of health maintenance organization ("HMO") health plans, including a group medical practice, independent practice association (sometimes referred to as independent physician association) ("IPA"), physician service organization, management service organization, medical foundation, or physician/hospital organization.

[6] Managed care is a common model for delivering healthcare in California. PX 0004 at 6 (stating that as of 2009, 45% of lives in California are covered by HMO health plans and of those, 95% are delegated to physician groups); *see* [redacted]

physician groups.[7]

B. Westcliff's Emergence as a Maverick Competitor

In June 2006, Parthenon Capital Partners ("Parthenon"), a private equity company, purchased Westcliff, which had a reputation for providing high-quality fee-for-service testing for forty years, primarily in Orange County, California. As part of the deal, Parthenon combined Westcliff with Health Line Clinical Laboratories ("Health Line"), known as an aggressive price-cutter, primarily in Los Angeles County. With the merger, Westcliff reached the scale necessary to begin competing for and winning capitated physician group business. Over the next eighteen months, it cemented its position as an effective alternative to the two national laboratories by expanding sales and acquiring several smaller clinical laboratories, including Clinical Pathology Laboratories, through which it added pathology testing capabilities. The merger and subsequent acquisitions gave Westcliff the scale that it needed to compete aggressively, in particular for capitated contracts with physician groups, which was a major part of its growth strategy. In addition to the work generated by these capitated contracts, this business gave Westcliff the opportunity to secure referrals to conduct testing for the non-HMO patients of the IPA's physicians. This business is known as "pull-through" business, and it is more lucrative because it is paid for by third parties on a fee-for-service basis, not a capitated basis.[8] This combination of pull-through and capitated revenues is a proven

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[7] In addition, physician groups require laboratory services vendors to offer: (1) convenient patient service centers ("PSCs") where blood and other samples can be provided by patients for testing; (2) data associated with the provision of laboratory services, including test results, provided electronically; (3) accurate, high quality tests; and (4) rapid turn around times for tests, which typically require accessible testing facilities and couriers to get samples to these facilities promptly.

[8] The tests that constitute "pull-through" are ordered by independent physicians belonging to the physician group with which the laboratory services vendor has a capitated contract, and are not paid for by the physician group, but by the individual patient's health plan (e.g., Blue Shield). Thus, pull-through does not originate with the physician group itself but rather with an individual physician.

business model that has been the basis for the success of LabCorp and Quest.[9] The strategy was successful for Westcliff as well, and its testing volume grew from approximately 6,600 accessions per day in 2007 to over 10,000 accessions per day in 2009.[10] Revenues also increased from $78 million in 2007 to $97.7 million in 2009.[11]

Westcliff's growth came almost entirely from the market leaders, LabCorp and Quest. To wrest business from these entrenched competitors, Westcliff cut prices on capitated contracts while offering superior service. In this pursuit, it was extremely successful. According to LabCorp's own estimates, Westcliff and LabCorp were solicited to bid, or bid on, approximately 43 capitated physician group contracts in Southern California that were awarded between May 2007 and October 2010; Westcliff bid on 23 of these and won 21.[12]

C. The Acquisition of Westcliff by LabCorp

While Westcliff's growth was impressive by any measure, it also had been saddled with an enormous debt load by Parthenon. By late 2009, Westcliff was unable to meet its repayment obligations on that debt, and its creditors sought to put the company up for sale. Bids were solicited for the purchase of Westcliff, and a number of letters of intent were received from interested

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[9] While LabCorp dismisses capitated contracts as representing only a small portion of its revenue, the reality is that it represents approximately 40% of its volume, PX 1149, and the attendant pull-through fee-for-service business that these contracts generate represents a substantial percentage of LabCorp's revenue. [redacted]

[10] An accession is roughly equivalent to a patient encounter or to a requisition of testing to be performed. An accession can include multiple tests arising from a single encounter with a patient.
PX 1008 at 12 ("Westcliff has built strong relationships with IPAs and has demonstrated the ability to drive profitability . . . . The Company continues to expand its presence with IPAs and expects to drive continued growth and profitability . . . . This strategy has allowed Westcliff to add 350,000 capitated lives from September 2007 - January 2009."). [redacted]

[11] [redacted]

[12] [redacted]

purchasers. LabCorp, which had evaluated Westcliff as a strategic acquisition target months before, stepped in with a preemptive bid of $57.5 million. One of the key conditions of LabCorp's proposal to acquire Westcliff was that the acquisition be conducted through the bankruptcy reorganization process to "manage" the claims of unsecured creditors, with LabCorp as the "stalking horse" bidder. As required by the asset purchase agreement, Westcliff filed for bankruptcy within two days of signing the agreement, and a hearing was held in the Bankruptcy Court on June 3 in which the assets were awarded to LabCorp.

FTC staff became aware of this transaction just one day before the bankruptcy hearing and immediately notified LabCorp of staff's potential antitrust concerns regarding the deal. The following day, LabCorp solicited a letter from FTC staff that it claimed would assist LabCorp in securing a delay in closing the transaction[13] and committed to FTC staff that it would not close before June 18, 2010, and would cooperate with a preliminary investigation. At the outset, LabCorp and Westcliff sought to shield the transaction from antitrust review by invoking the "failing company" defense, a critical element of which is that good faith efforts be made to seek reasonable, alternative purchasers. As it became evident that the sale process had foreclosed competitively preferable purchasers from submitting lower, but reasonable, alternative offers, Westcliff petitioned the bankruptcy court to conduct a new auction, this time with no minimum price, at the suggestion of FTC staff. The bankruptcy court set the new auction for June 18, and several firms were prepared to submit proposals. LabCorp, however, closed its acquisition of Westcliff on June 16, 2010, in violation of its agreement with the FTC, cutting short the new auction process and jeopardizing the Commission's ability to obtain effective relief.

[13] *See* PX 1150.

ARGUMENT

The sole question before the Court is whether it is in the public interest to order LabCorp to preserve and maintain Westcliff separately until the FTC has concluded its ongoing administrative trial to determine the lawfulness of LabCorp's acquisition of Westcliff. The answer is plainly yes.

I. UNDER SECTION 13(b) OF THE FTC ACT, PRELIMINARY RELIEF IS WARRANTED WHENEVER IT IS IN "THE PUBLIC INTEREST"

Section 13(b) authorizes this Court to issue a preliminary injunction if it is in the public interest. *Heinz*, 246 F.3d at 714. The determination of whether a preliminary injunction is in the public interest requires an assessment of two independent factors: (1) the FTC's likelihood of success on the merits and (2) the public equities. The two factors are assessed on a sliding scale – that is, the greater the showing that the public equities favor a preliminary injunction, the lower the FTC's burden on the likelihood of success on the merits (and vice versa). *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *see Heinz*, 246 F.3d at 726; *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989) (Posner, J.). The equities will often weigh in favor of the FTC, however, since "'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting" Section 13(b). *Whole Foods*, 548 F.3d at 1035 (Brown, J.) (citing *Heinz*, 246 F.3d at 726); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1225 (11th Cir. 1991).

In applying the 13(b) standard, the Court of Appeals for this Circuit has found that the Commission "will usually be able to obtain a preliminary injunction blocking a merger by 'rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.'" *Whole Foods*, 548 F.3d at 1035 (Brown, J.) (quoting *Heinz*, 246 F.3d at 714-15). Where there are such questions, the FTC is "entitled to a presumption against the merger on the merits," and therefore "does not need detailed evidence of anticompetitive effect at th[e] preliminary phase." *Id.* (citing *Elders Grain*, 868 F.2d at 906). The FTC is *not* required to prove the merits, i.e., that the challenged merger would in fact lessen competition in violation of Section 7 of the Clayton Act at this stage, as that determination is reserved for the plenary administrative trial. *Id.* (citing *Food Town*, 539 F.2d at 1342); *Heinz*, 246 F.3d at 714 (citing *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1071 (D.D.C. 1997)).

Once the FTC has established "a presumption in favor of preliminary injunctive relief," the presumption can only be overcome if the defendant shows that the equities weigh in favor of the merger. *Whole Foods*, 548 F.3d at 1035 (Brown, J.). The key public equity is that consumers can best be protected by an immediate injunction. A failure to hold the assets separate during the administrative proceedings would deprive customers of the benefits of current competition, and even worse, would make it difficult to revive competition later because, once LabCorp and Westcliff are merged, the "difficulty of 'unscrambl[ing] the merged assets' often precludes 'an effective order of divestiture[.]'" *Id.* at 1034 (quoting *FTC v. Dean Foods*, 384 U.S. 597, 607 n.5 (1966)); *see Elders Grain*, 868 F.2d at 904. As will be shown, the evidence here demonstrates that the Commission's requested relief is squarely "in the public interest."

II. THE COMMISSION IS LIKELY TO SUCCEED ON THE MERITS OF ITS ANTITRUST CHALLENGE TO LABCORP'S ACQUISITION OF WESTCLIFF

LabCorp's integration of Westcliff will destroy what was, prior to the acquisition, direct and substantial head-to-head competition and significantly increase concentration in the already highly concentrated market for the sale of capitated clinical laboratory testing services to physician groups in Southern California. Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits any merger or acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." Its intent is to arrest the creation of market power in its "incipiency," and accordingly, certainty is not possible or required; rather, Section 7 requires a prediction of the future competitive consequences of a merger. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). A merger violates Section 7 if it "create[s] an appreciable danger of [anticompetitive consequences] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable is called for." *Heinz*, 246 F.3d at 719 (quoting *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986)); *see Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008). But "[a] certainty, even a high probability, need not be shown," and "doubts are to be resolved against the transaction." *Elders Grain*, 868 F.2d at 906.

Here, there is sufficient direct evidence, detailed in Section II.B.1.c., *infra*, of the likely anticompetitive consequences of LabCorp's acquisition of Westcliff to raise the substantial doubts about the transaction required to justify the preliminary relief sought by the FTC. *Whole Foods*, 548 F.3d at 1036-37 (Brown, J.) (holding "the FTC's chances will not depend, in every case, on a threshold matter of market definition"). In the absence of direct evidence of anticompetitive effects, courts have usually assessed whether a merger violates Section 7 of the Clayton Act by determining: (1) the "line of commerce," or relevant product market; (2) the "section of the country," or relevant geographic market; and (3) the transaction's probable effect on competition in the relevant product and geographic markets.[14] *See United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974); *Chi. Bridge*, 534 F.3d at 422-23. Under the traditional analytical framework, the FTC can establish a

[14] Although the traditional framework "for a *prima facie* § 7 case rests on defining a market and showing undue concentration in that market, this analytical structure does not exhaust the possible ways to prove a § 7 violation on the merits, much less the ways to demonstrate a likelihood of success on the merits in a preliminary proceeding." *Whole Foods*, 548 F.3d at 1036 (Brown, J.) (internal citations omitted); *see generally* PX 0002 at § 4.0 (Fed. Trade Comm'n and U.S. Dep't of Justice, *Horizontal Merger Guidelines* (2010)) ("The Agencies' analysis need not start with market definition."). The FTC can demonstrate a likelihood of success under either analytical framework.

prima facie Section 7 case by demonstrating that the merger would lead to "undue concentration" in the market. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). "By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition." *Id.* (citing *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120-22 (1975); *Phila. Nat'l Bank*, 374 U.S. at 363)). The burden then shifts to the Defendant to rebut the presumption of illegality arising from the prima facie case. *Whole Foods*, 548 F.3d at 1035 (Brown, J.). This Court need not resolve the ultimate merits of the Defendant's rebuttal case; it need only assess whether the Commission has raised "serious, substantial" questions that merit preservation of the *status quo* while the Commission adjudicates the ultimate legality of the transaction. *Id.* (internal quotation omitted).

A. LabCorp's Acquisition of Westcliff is Presumptively Unlawful

1. The Relevant Product Market is the Sale of Capitated Clinical Laboratory Testing Services to Physician Groups

The essence of the determination of product market is to assess which products are reasonable substitutes for each other. The Supreme Court has explained that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). This cross-elasticity of demand test compels the "exclu[sion of] any . . . product to which, within reasonable variations in price, only a limited number of buyers will turn." *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 38 (D.D.C. 2009) (quoting *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 612 (1953)). The product market analysis "'focuses solely on demand substitution factors,' i.e., that consumers regard the products as substitutes." *Heinz*, 246 F.3d at 719 (quoting 1992 Fed. Trade Comm'n and U.S. Dep't of Justiçe, *Horizontal Merger*

Guidelines § 1.0 (Rev. 1997)); *see also* PX 0002 at § 4.2 (Fed. Trade Comm'n and U.S. Dep't of Justice, *Horizontal Merger Guidelines* (2010)) (hereinafter "*Merger Guidelines*") (same). "Accordingly, the Court must determine whether . . . there is reason to find that if the [d]efendant[] were to raise prices after the proposed merger[], [its] customers would switch to alternative sources of supply to defeat the price increase." *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998).

The most comprehensive analytical framework for determining relevant product markets is set forth in the *Merger Guidelines*, which courts have frequently relied upon to inform the inquiry regarding the reasonable interchangeability of use or cross-elasticity of demand. Under the *Merger Guidelines*, the proper product market test is whether a profit-maximizing "hypothetical monopolist" that was "the only present and future seller" of the candidate product "likely would impose at least a small but significant and non-transitory increase in price ("SSNIP")." *Merger Guidelines* § 4.1.1; *see Whole Foods*, 548 F.3d at 1038 (Brown, J.); *Heinz*, 246 F.3d at 718. By asking what customers would do in the face of a price increase, the hypothetical monopolist test informs the cross-elasticity of demand and, ultimately, whether customers are vulnerable to a post-merger price increase. Thus, if a SSNIP would not drive consumers to purchase an alternative product (or service), then that product (or service) should be excluded from the properly defined relevant market. *See Whole Foods*, 548 F.3d at 1038 (Brown, J.). The *Merger Guidelines* specify that a 5% SSNIP usually should be used for the hypothetical monopolist test. *Merger Guidelines* § 4.1.2.

a. Physician Groups Have Distinct Requirements for Capitated Clinical Laboratory Services

Here the relevant product market is the sale of capitated clinical laboratory testing services ("laboratory services") to physician groups.[15] Laboratory services are basic healthcare services upon which physicians rely to diagnose, monitor, and treat their patients. Physician groups in Southern California require a vendor of laboratory services that offers, among other things, capitated contracts, a comprehensive menu of clinical diagnostic tests, STAT testing capabilities, a network of PSCs that provides convenient access for their patients, a courier network to collect and transport specimens, and comprehensive IT capabilities for processing and reporting patient encounter data and test results.[16] Quest, LabCorp, and Westcliff are the only vendors of clinical laboratory testing services that are able to satisfy *all* of these requirements for most physician groups in Southern California.[17]

Under the California delegated model of managed care, physician groups are responsible for purchasing ancillary services, including clinical laboratory services, for their HMO patients. Physician groups almost universally prefer to purchase clinical laboratory services through capitated

[15] For simplicity of exposition, it is also appropriate to define the market as the sale of clinical laboratory services to physician groups. The competitive analysis, however, does not change, since physician groups prefer purchasing laboratory services on a capitated basis, and the overwhelming majority do so. A very small number have to purchase laboratory services on a fee-for-service basis, as the laboratory vendors deem them too small or unattractive to extend capitated terms. In addition, some are affiliated with hospitals that require, or strongly encourage, them to purchase services from the hospitals' laboratories at significantly higher fee-for-service prices. In order to compete effectively for physician group business, a laboratory must be able to offer competitive capitated rates. Competition for the limited physician group business that is contracted on a fee-for-service basis does not affect capitated rates or the attractiveness of capitated contracting.

[16] [redacted]

[17] [redacted]

contracts because they offer several compelling advantages.[18] First, capitation allows the physician group customer to delegate the financial risk associated with an unforeseen increase in utilization of laboratory services to the vendor, by paying a fixed per member, per month rate.[19] Second, shifting the risk helps to align the financial incentives of the laboratory services vendor with the physician group's interest in controlling costs and minimizing medically unnecessary testing.[20] Third, capitation allows physician groups to better predict their monthly expenditures for laboratory services and, therefore, to more effectively manage their budgets.[21] Fourth, capitation reduces administrative costs for physician groups compared to a fee-for-service model because it eliminates the need to verify and pay invoices for individually ordered, differently priced tests.[22] Finally, the price that physician group customers pay under capitation is significantly lower than fee-for-service prices.[23]

Clinical laboratory vendors offer capitated contracts to physician groups at steep discounts

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[18] In a submission to the FTC, the Defendant estimates that 90% of HMO enrollees (and 0% of PPO enrollees) in Southern California are covered under capitated laboratory contracts. PX 1148 at 1.

[19] *See, e.g.*, [redacted]

[20] [redacted]

[21] [redacted] *see* PX 7003 at 39 (Aicher Tr.) (explaining that an IPA might prefer a capitated contract to help with "predicting costs, budgeting purposes").

[22] [redacted]

[23] [redacted] PX 7003 at 60 (Aicher Tr.) [redacted]

because they guarantee a fixed monthly revenue stream for all of a physician group's HMO patients and provide a significant advantage in securing the more profitable non-HMO referrals from individual physicians in the physician group.[24] This pull-through business is not paid for by the physician group, but by a third-party payer, e.g., a health plan, on a higher-priced fee-for-service basis. Although physicians generally are free to refer their non-HMO patients to any laboratory they wish, the exclusive capitated laboratory vendor expects, and usually receives, the bulk of the physicians' non-HMO referrals, as physicians are often inclined to use a single laboratory out of administrative convenience.[25]

b. Contracting on a Fee-for-Service Basis Is Not a Substitute

Southern California physician groups, almost without exception, choose to contract with laboratory service vendors on a capitated basis. Fee-for-service contracts, with their substantially higher prices, greater risk, and other disadvantages, simply are not an economic alternative for these customers, and, as a result, physician group customers likely would not substitute fee-for-service arrangements for capitated arrangements in response to a 5% SSNIP in their capitation rates.[26] Indeed LabCorp and Westcliff officials could not identify a single physician group customer that has ever switched from contracting on a capitated basis to a fee-for-service basis in response to

[24] PX 7003 at 61 (Aicher Tr.) (explaining why LabCorp may seek capitated business); *see also* PX 7010 at 34-35 (McMahan Tr.) (stating that Westcliff would agree to capitated rates in an attempt to obtain the pull-through fee-for-service business associated with the physicians in the group); [redacted] Regarding the profitability of non-HMO referrals, see, e.g., PX 7003 at 60 (Aicher Tr.) (stating that LabCorp's fee-for-service business is more lucrative than its capitated business); [redacted]

[25] *See, e.g.*, [redacted]

[26] [redacted]

capitated rate increases.[27] Accordingly, fee-for-service arrangements do not fall within this relevant product market and the sale of capitated laboratory services to physician groups is a separate and distinct relevant market in which to assess the effects of the acquisition. *See Whole Foods*, 548 F.3d at 1039 (Brown, J.) ("After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by settled consumer preference.") (internal citation omitted).

c. Hospital Laboratories, Local Laboratories, and Physician In-Office Testing Are Not Viable Alternatives

For the vast majority of physician groups, hospital outreach laboratories and small local laboratories are not viable alternatives because they do not offer the necessary broad array of laboratory services, extensive PSC network, or competitive capitation rates.[28] Indeed, the few physician groups that use hospital laboratories do so because they are required to pursuant to a broader affiliation agreement with the hospital. Further, physicians cannot bring laboratory services in-house. While some physicians perform a very limited number of relatively simple diagnostic tests in their own office laboratories, e.g., a pregnancy test, they cannot perform the range of tests performed by an independent commercial laboratory. Nor would it be a cost-effective or competitively viable substitute for a physician group that does not have its own laboratory to develop such capabilities, even in the event of a SSNIP in the price of laboratory services.[29]

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[27] PX 7004 at 72-73 (Harris Tr.); PX 7003 at 61-62 (Aicher Tr.); [redacted]

[28] [redacted]

[29] [redacted]

d. Physician Groups Are Vulnerable to a Targeted Price Increase

While laboratory testing services are sold to various groups of customers, including individual physicians, hospitals, and health plans, physician groups are a large and easily identifiable category of customers that would likely be targeted for price increases if Westcliff is eliminated from the market. *See Merger Guidelines* § 3 ("For price discrimination to be feasible, two conditions typically must be met: differential pricing and limited arbitrage."). As such, physician groups comprise a class of customers worthy of antitrust protection. *See Whole Foods*, 548 F.3d at 1039 (Brown, J.) (holding that "a core group of particularly dedicated, 'distinct customers,' paying 'distinct prices,' may constitute a recognizable submarket") (quotation omitted). Physician groups are vulnerable to a targeted price increase because they need capitated contracts, and very few vendors can offer those. Physician groups individually negotiate contracts with laboratory vendors, which can easily identify the customers' competitive options based on the groups' characteristics and location. This class of customers purchases laboratory services at prices that are distinct from those paid by other categories of customers. Nor can a physician group defeat a price increase by turning to other purchasers to resell laboratory services, because each test must be individually ordered by, and the results reported back to, the treating physician.

2. The Relevant Geographic Market is Southern California

The relevant geographic market or "section of the country" in which to analyze the effects of the proposed acquisition is Southern California.[30] Just as the product market analysis identifies

[redacted]

[30] LabCorp and Quest provide clinical laboratory services nationwide, while Westcliff primarily provides these services in Southern California (Westcliff also has smaller operations in Northern California and Arizona). Southern California is the relevant geographic market in which to assess the deal's impact on competition as it is the locus of the competitive overlap between LabCorp and Westcliff and is insulated from competition by suppliers located outside the region.

the products that might plausibly be used by consumers to constrain a price increase, geographic market analysis defines the region in which "'consumers can practically turn for alternative sources of the [relevant] product and in which the antitrust defendant faces competition.'" *Staples*, 970 F. Supp. at 1073 (quoting *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994)); *see Merger Guidelines* § 4.2. The relevant geographic market should "correspond to the commercial realities of the industry." *Brown Shoe*, 370 U.S. at 336.

The relevant geographic market in this case is Southern California, defined as the ten counties south of and including San Luis Obispo, Kern, and San Bernardino counties.[31] Physician groups require local services for their patients, including phlebotomy and STAT testing services; therefore, a clinical laboratory vendor must have a sufficient number of PSCs conveniently located throughout a physician group's coverage area for it to be an economically viable option. Similarly, because physician groups require rapid turn-around on STAT testing, a clinical laboratory must also have a local STAT laboratory, or contract with a local laboratory, to perform expedited collection and testing of STAT requisitions. Clinical laboratories located outside the region do not have the requisite local infrastructure and therefore do not compete to supply physician groups located in Southern California.[32] As a result, LabCorp does not consider Northern California laboratories when analyzing competition in Southern California and has never lost a Southern California physician

[31] LabCorp, Westcliff, and Quest treat Southern California and Northern California separately for business purposes. PX 7003 at 246-47 (Aicher Tr.) (LabCorp): [redacted] Furthermore, a Westcliff document [redacted]

[32] [redacted]

group contract to a laboratory located outside of Southern California.[33]

3. The Acquisition Significantly Increased Concentration in the Relevant Market

LabCorp's acquisition of Westcliff significantly increased concentration in an already highly concentrated market. LabCorp, Quest, and Westcliff are the three major providers of capitated laboratory services to physician groups in Southern California. If this acquisition is allowed to proceed, the market would be left with only two significant, entrenched competitors: a duopoly of Quest and LabCorp.

In this case, the best available indicator of the market participants' competitive significance is the number of HMO enrollees or "capitated lives" represented by the firms' capitated contracts with physician groups in Southern California.[34] Based on their current contracts with physician groups, LabCorp and Westcliff account for approximately [redacted] and [redacted] respectively, of capitated lives in the relevant market. Thus, the acquisition would result in a combined entity with a market share of [redacted] Quest accounts for [redacted] of the market. Thus, post-acquisition the two largest market participants would account for [redacted] of the relevant market with the next largest firm having a share of less than [redacted][35]

For purposes of merger analysis, market concentration typically is measured by the

[33] PX 7004 at 196-97 (Harris Tr.). In 2002, LabCorp described in detail the obstacles that prevented it from effectively competing for physician group contracts in Northern California, despite having an extensive presence in Southern California. PX 0300 at ¶¶ 7-10, 16 (Traub Decl.). LabCorp was able to enter Northern California only by acquiring assets through a FTC-ordered divestiture in connection with Quest's acquisition of Unilab Corporation in 2003. *See generally* PX 0008 (Decision and Order).

[34] Because very few physician groups purchase laboratory services on a fee-for-service basis, rather than on a capitated basis, the market shares accounted for by Quest, LabCorp, and Westcliff would not change materially if the lives delegated to physician groups that purchase laboratory services on a fee-for-service basis were included in the relevant market.

[35] [redacted]

Herfindahl-Hirschman Index ("HHI"), which equals the sum of the squares of the individual market shares of each firm in the market. *Heinz*, 246 F.3d at 716 n.9; *Merger Guidelines* § 5.3. This calculation accounts for the greater competitive significance of companies with larger market shares. A merger is presumptively anti-competitive if it increases the HHI in a market by more than 200 points and results in a post-merger HHI that exceeds 2500. *Merger Guidelines* § 5.3; *see Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anticompetitive." (citing *Baker Hughes*, 908 F.2d at 982-83 n.3)); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986).

LabCorp's acquisition of Westcliff yields HHI figures that far exceed the threshold required to establish the FTC's prima facie case and, therefore, establish a presumption that the acquisition will substantially lessen competition. *Heinz*, 246 F. 3d at 716. The acquisition will increase the HHI by [redacted] points to [redacted], which is well within the range found to be presumptively illegal by the Court of Appeals. See *id.* (finding increase of 510 points to 5285 to "create[], by a wide margin, a presumption that the merger will lessen competition"); *PPG*, 798 F.2d at 1506 (finding increases ranging from 175 points to 1795 points resulting in post merger HHIs between 3184 points and 5213 points to be "overwhelming"); *see also Univ. Health*, 938 F.2d at 1211 n.12 (post-merger HHI of 3200); *Hosp. Corp. of Am.*, 807 F.2d at 1384 (affirming Commission's decision that Section 7 of Clayton Act was violated by acquisitions that increased market share of second-largest firm from 14% to 26%); *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (reversing denial of preliminary injunction of acquisition increasing market share of second largest firm from 19% to 26%; top four firms accounted for 75% of market); *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 167 (D.D.C. 2002) (finding post-merger HHI level of 4733 did "not present a close call"); *Cardinal Health*, 12 F. Supp. 2d at 53 (post-merger HHIs of 2450 and 2277, respectively);

FTC v. Illinois Cereal Mills, Inc., 691 F. Supp. 1131, 1138 (N.D. Ill. 1988) (post-merger HHI of 2606), *aff'd sub nom.*, *Elders Grain*, 868 F.2d 901 (Posner, J.).

Here, the HHI levels far exceed the threshold necessary to support a presumption of illegality, and even more, they *understate* Westcliff's competitive significance in the relevant market. The market shares measure each firm's accumulated business (either through competition or acquisition) and thus tend to overemphasize the market position of Quest and LabCorp relative to Westcliff, which did not enter the market until May 2007. Even though physician groups request bids for their business relatively infrequently, LabCorp admits that Westcliff has been able to secure over [redacted] physician group contracts in Southern California in just over three years and that in the same time frame, LabCorp has won 11.[36] Westcliff's impressive success rate demonstrates that it has a much greater chance of winning upcoming business than would be implied by its current market share.[37] Thus, the merger of Westcliff with LabCorp will diminish competition even more than is suggested by the high market concentration figures.

B. LabCorp's Likely Rebuttal Arguments Raise Only More "Serious, Substantial" Questions

The strength of the FTC's structural case, and the resulting presumption of illegality, creates a formidable burden for LabCorp in this ancillary proceeding in which the FTC does not have to prove that the acquisition is anticompetitive to obtain preliminary relief. *See Whole Foods*, 548 F.3d at 1035 (Brown, J.). Once the FTC has established its prima facie case, the burden is on the Defendant to demonstrate that coordinated or unilateral anticompetitive effects are, in fact, unlikely to result from the transaction. LabCorp cannot meet its heavy burden at this preliminary stage to

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[36] [redacted] PX 1153

[37] *Merger Guidelines* § 5.2 ("In cases where customers sign long-term contracts, face switching costs, or tend to re-evaluate their suppliers only occasionally, revenues earned from recently acquired customers may better reflect the competitive significance of suppliers than do total revenues.").

show that "'the market-share statistics [give] an inaccurate account of the [merger's] probable effects on competition' in the relevant market." *Heinz*, 246 F.3d at 715 (quoting *Citizens & S. Nat'l Bank*, 422 U.S. at 120); *Baker Hughes*, 908 F.2d at 991 ("The more compelling the prima facie case, the more evidence the defendant must present . . . .").

The Court should grant a preliminary injunction based on the strength of the structural indicia in this case. Nevertheless, the FTC will fully engage each and every element of the defendants' rebuttal case. *Cf. FTC v. Olin Corp.*, 986 F.2d 1295, 1305 (9th Cir. 1993) ("The clearest reason why *Baker Hughes* does not control here is that the Commission responded to the Company's rebuttal, whereas in *Baker Hughes* the government did not.").

1. The Acquisition Will Likely Result in Significant Anticompetitive Effects

LabCorp's acquisition of Westcliff is likely to result in anticompetitive effects because it enhances LabCorp's ability to increase prices unilaterally or because it may find it easier to increase prices in coordination with its few remaining competitors. As the Court of Appeals for this circuit observed, merger law "rests upon the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels." *Heinz*, 246 F.3d at 715 (quoting *PPG Indus.*, 798 F.2d at 1503 (Bork, J.)). Thus, a merger that increases concentration above certain levels "raise[s] a likelihood of 'interdependent anticompetitive conduct.'" *Id.* at 715-16 (quoting *PPG Indus.*, 798 F.2d at 1503 (Bork, J.)). Where a merger removes one of the three major competitors in the relevant market, it enhances the opportunity for the remaining firms to coordinate their activities and exercise market power. *See id.* at 725 ("The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices."). Not only is it easier for two firms to collude than for three firms to do so, *see Am. Hosp. Supply Corp. v. Hosp.*

Prods. Ltd., 780 F.2d 589, 602 (7th Cir. 1986), but tacit coordination is facilitated when a merger leaves only two dominant firms in the market. *CCC Holdings*, 605 F. Supp. 2d at 67 (noting that, in such a situation, "the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom").

a. The Acquisition Eliminates Substantial Competition Between LabCorp and Westcliff

Westcliff is only one of three significant suppliers that physician groups in Southern California can turn to for capitated laboratory services. As Westcliff wrote in an email to a potential physician group customer: [redacted][38] Internally, LabCorp described Westcliff as a "ferocious"[39] competitor and one that had "really whupped up on [LabCorp] as you know, in some areas."[40] LabCorp tracked Westcliff's success in recent years as Westcliff pursued LabCorp's physician group customers with aggressive pricing.[41] LabCorp's managed care monthly sales reports from 2008 to 2010 are replete with comments expressing concern over Westcliff's competitive activity (and scant mention of any competitor other than Quest or Westcliff).[42] When

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[38] [redacted]

[39] PX 1145 at 11.

[40] PX 1100.

[41] PX 1127 at 1 ("Unfortunately, Westcliff has recently become very price competitive with a number of IPA deals in play, with the ultimate goal of driving top line revenues.").

[42] *See, e.g.*, PX 1044 at 2 ("Westcliff Labs-local regional lab meeting with many current LabCorp IPA's offering lower cap rates."); PX 1045 at 2 ("Westcliff Labs met with two current LabCorp accounts (Empire Physicians, Sharp IPA) offering lower capitated rates in an attempt to take our business."); PX 1047 at 3 ("Westcliff Laboratory was awarded the contract for IEHP in the San Bernadino/Riverside Counites [sic]. They have opened several new patient service centers in this area

analyzing potential acquisition targets, LabCorp's Regional Manager of Business Development observed that "Westcliff is [LabCorp's] largest competition besides Quest."[43] Indeed, LabCorp identified "the elimination of a strong competitor in key strategic markets" to be a potential benefit of acquiring Westcliff.[44]

b. Westcliff Has Been a Disruptive Force in the Market

The acquisition will eliminate a price-cutting maverick. Following Quest's acquisition of Unilab in 2003, physician groups in Southern California were left with only two firms (Quest and LabCorp) controlling the vast majority of capitated contracts, allowing both firms to establish strong incumbency positions. Like other small firms, Westcliff for years provided laboratory services exclusively on a fee-for-service basis and was unsuccessful in competing for capitated business.[45] But by 2007, after years of organic growth and a major consolidation with Health Line, Westcliff had achieved sufficient scale to compete successfully for capitated contracts with physician groups, which would not only bring it additional capitated accessions, but also lucrative pull-through fee-for-service accessions. The strategy was largely successful. Westcliff captured over [redacted] physician group

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and are promoting their services to our existing LabCorp clients."); PX 1048 at 1 ("Client [Sharp IPA] currently on Jeopardy due to recent negotiations with Westcliff labs due to proposal of lower cap rates."); PX 1051 at 2 ("Client [BFMC] is rumored to be meeting with Westcliff Labs for new cap contract and is expected to term their LCA contract.").

[43] PX 1133 at 1. That LabCorp viewed Westcliff to be its most significant competitor besides Quest is also evidenced by its actions with respect to Blue Shield of California ("Blue Shield") earlier this year. LabCorp negotiated for the right to terminate "a single non-national laboratory," and it chose Westcliff, which was terminated by Blue Shield in February 2010. PX 1026 at 1; PX 7003 at 177-83, 189, 195 (Aicher Tr.); *see* PX 1068 at 2.

[44] PX 1126 at 3.

[45] [redacted]

contracts,[46] its business grew from approximately [redacted] to [redacted] accessions per day, and its annual revenues increased to almos [redacted][47] In the process, Westcliff began making inroads on the dominance of Quest and LabCorp as the primary vendors of capitated laboratory services to physician groups.

At a time when Quest and LabCorp were both trying to boost profits by raising capitation rates to physician groups in Southern California,[48] Westcliff's entry into the market had a disruptive impact on pricing.[49] As the firm with the smallest market share of the three major competitors, Westcliff had the greatest incentive to price aggressively to gain share. When LabCorp and Quest routinely sought price increases from physician groups and terminated those that refused, Westcliff instead stepped in to offer lower capitation rates to these long-time customers of LabCorp and Quest.[50]

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[46] [redacted]

[47] [redacted]

[48] LabCorp launched an effort to raise capitation rates for its physician group customers. PX 1143 at 3 ("Several groups will be contacted to negotiate higher cap rates and sales to drive an increase in pull through for every IPA plan."); *see also* PX 1058 at 2 ("The client feedback is that [Quest is] raising cap rates; cutting services and increasing carve out testing for all IPA contract renewals."). [redacted]

[49] PX 1130 ("In the past, Westcliff made the decision not to contract with IPA's focusing on only [fee-for-service] business. However, over the past two years they have become very aggressive in the marketplace contracting with several IPA plans.").

[50] PX 7004 at 183-84 (Harris Tr.) (stating that Westcliff has not instituted similar strategies of raising capitation rates for their client physician groups); *see also* PX 1026 at 1 ("I was able to estimate that [Westcliff's] average cap rate is likely in the range of $0.75 PMPM. (The range was calculated at a low of $0.55 and high of $0.94 PMPM). The average is lower than what LabCorp typically accepts for IPA cap rates, but appears to be consistent with the rates Westcliff has reportedly accepted based on local

Westcliff's competitive presence constrained LabCorp's and Quest's ability to raise capitation rates, resulting in cost savings for physician group customers in Southern California.[51] LabCorp's Managed Care Executive for Southern California provided the following frank assessment of Westcliff's impact in an internal memorandum to her superiors: "Over the past three years Westcliff has become aggressive in the marketplace under bidding many of the Quest and LabCorp contracts, *which has in turn held the California capitation rates to low levels.*"[52] [redacted][53] Physician groups recognize the healthy competition that Westcliff has brought to the market that has benefitted them in the form of lower capitation rates

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intelligence.").

[51] *See* PX 7004 at 148 (Harris Tr.) (stating that "in order [for LabCorp] to continue to service their [HDMG's] business, [LabCorp] had to increase their cap rates. [The HDMG administrator] said 'Forget it, I'm going to Westcliff.' And that was what happened."); [redacted] PX 1142 at 6 ("We were too slow to respond, and Westcliff came in and agreed to open three PSCs, while we couldn't open one . . . There is no way we can match the rates offered by Westcliff.").

[52] PX 1030 at 2 (emphasis added).

[53] [redacted]

and better service.[54] Westcliff also extended capitated contracts to physician groups that LabCorp and/or Quest would only service on significantly higher-priced fee-for-service terms.[55] Even when Westcliff did not win the physician group's business, its bid or mere presence frequently forced one of the other firms to respond with lower prices to win the contract.[56] That competition would be extinguished with the acquisition, with a predictable impact on physician groups.

c. The Acquisition Will Result in Higher Prices

Anticompetitive effects can be inferred from market concentration data or the elimination of robust direct competition, but this is the rare case where this Court need not rely on that inference. The evidence shows LabCorp intends to seek price increases if it is allowed to integrate the Westcliff assets. In at least three separate due diligence reports, LabCorp's management noted Westcliff's low-priced physician group contracts and their belief that LabCorp should and would raise these prices following the acquisition.[57] After reviewing LabCorp's estimates of Westcliff's existing capitation rates for its physician group customers, LabCorp's Managed Care Executive for

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54 [redacted]

[redacted]

56 [redacted]

57 *See, e.g.*, PX 1130 ("Based upon information obtained in the field their current contracted IPA's may have unsustainable rates. Once the cap rates are provided, LabCorp may want to review for possible termination post acquisition."); PX 1132 (evaluating Westcliff's pricing against LabCorp's); PX 1026 at 1 ("Post Closing Activities. Review the IPA business and evaluate whether there is room to improve on any of those rates in the near future.").

Southern California concluded "it looks like I will be very busy negotiating new rates."[58] Indeed, the expectation of price increases was so ubiquitous that LabCorp's CFO and Treasurer observed that the due diligence reports "sa[y] a lot about the low price point of the [physician groups] and what is going to be done post acquisition to raise prices."[59] LabCorp's Associate Vice President of Finance for Managed Care observed why such a plan would work: "[P]erhaps in 2011 we could go back and renegotiate rates as that *would only leave us and Quest as viable options.*"[60] This blunt admission of LabCorp's post-merger plans is precisely what antitrust law strives to prevent – the ability of a firm to extract higher prices from customers by virtue of the elimination of competition. Not surprisingly, many customers have also expressed concerns that their capitation rates will increase as a result of this transaction.[61]

d. The Acquisition is Likely to Result in Coordinated Anticompetitive Effects

The acquisition will enhance the likelihood of collusion or coordinated interaction between Quest and LabCorp, which would be the only two remaining significant vendors of laboratory

[58] PX 1144 at 1.

[59] PX 1135. LabCorp has demonstrated its willingness and ability to extract higher prices from customers following previous acquisitions. Most recently, LabCorp acquired Diamond Reference Laboratory in Southern California and immediately raised capitation rates by more than 50% to Diamond's only physician group customer. PX 7004 at 113-16 (Harris Tr.); *see* PX 1137 at 2. A similar result is likely if LabCorp is permitted to complete its acquisition of Westcliff. *See* [redacted]

[60] PX 1040 (emphasis added).

[61] [redacted]

services to physician groups in Southern California. Indeed, as previously discussed, a merger like this that results in a highly concentrated market with few competitors is presumed to lead to coordinated anticompetitive effects. *Heinz*, 246 F.3d at 725. Here the prospect of coordinated effects is heightened by the evidence that Westcliff is a particularly aggressive competitor, or a "maverick" firm,[62] which, according to the Defendant's own documents, has had a disruptive role in the market, constraining the ability of LabCorp and Quest to increase capitation rates. *See FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47 (D.D.C. 2002); *see also Staples*, 970 F. Supp. at 1083 (describing the elimination of "a particularly aggressive competitor in a highly concentrated market" as "an important consideration when analyzing possible anti-competitive effects"); *Merger Guidelines* § 7.1 (noting "eliminating of a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects").

e. The Acquisition is Also Likely to Result in Unilateral Anticompetitive Effects

The acquisition is also likely to lead to adverse competitive effects if viewed through a unilateral effects analytical framework, i.e., the anticompetitive effects can result from the actions of just one market participant, in this case LabCorp. Unilateral anticompetitive effects are a danger where the merging firms are likely to be considered first and second choices by a significant number of customers.[63] The evidence demonstrates that Westcliff frequently bid against LabCorp to secure capitated contracts with physician groups – often by significantly underbidding LabCorp. As the *Merger Guidelines* specify, the elimination of substantial head-to-head competition can be especially relevant for evaluating adverse unilateral effects. *Merger Guidelines* § 2.1.4. The

[62] "[A] firm that plays a disruptive role in the market to the benefit of customers in antitrust terms is considered a 'maverick' supplier." *Merger Guidelines* § 2.1.5.

[63] *Id. at* § 6.2.

acquisition would eliminate one of only three significant bidders for most physician groups in the relevant market. Physician groups would then no longer be able to leverage Westcliff against LabCorp in negotiations, and LabCorp would then be in a position to raise prices unilaterally. "This alone can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it, and less favorable to the [customer], than the merging firms would have offered separately absent the merger." *Id.* at § 6.2. Such unilateral anticompetitive effects are all the more likely because Westcliff was frequently the lowest-price bidder in its competitions against LabCorp and Quest, so in its absence, the remaining competitors will be able to win physician group contracts with higher prices.

2. New Entry or Expansion Will Not Replace the Competition Eliminated by the Transaction

Entry or expansion is not likely to avert the anticompetitive effects of LabCorp's acquisition of Westcliff. Analysis of the barriers to entry to the relevant market is important because "[e]ven in highly concentrated markets, if there is sufficient ease of entry, others might enter to compete and undercut the likely anti-competitive effects of a merger." *CCC Holdings*, 605 F. Supp. 2d at 47 (citing *Cardinal Health*, 12 F. Supp. 2d at 54-55). In the context of the FTC's 13(b) motion, entry or expansion would have to be so likely to reverse the acquisition's anticompetitive effect that it extinguishes all "serious, substantial" questions. Entry in this case is not so likely that it can reverse the questions raised by this deal. To the contrary, entry is *unlikely*. Indeed, the existence of high barriers to entry only creates more "serious, substantial" questions. *See Heinz*, 246 F.3d at 724 ("The combination of a concentrated market and barriers to entry is a recipe for price coordination.").

Determining whether entry is sufficiently easy to undercut a merger's likely anticompetitive effects "hinges upon an analysis of barriers to new firms entering the market or existing firms expanding into new regions of the market." *Cardinal Health*, 12 F. Supp. 2d at 55. Entry must be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" otherwise presumed to result from the merger. *CCC Holdings*, 605 F. Supp. 2d at 47 (quoting 1992 U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 3.0 (Rev. 1997)); *accord Chi. Bridge*, 534 F.3d at 427-29; *Merger Guidelines* § 9. In other words, a defendant must show not only that entry *could* happen – despite the various barriers to entry – but also that it likely *would* happen soon enough, *and* at a sufficient scale, to make a post-acquisition price increase unprofitable. *See Cardinal Health*, 12 F. Supp. 2d at 55. LabCorp cannot make the required showing.

a. Entry Barriers Are High

A new entrant, or smaller fee-for-service provider, cannot have a significant impact on the relevant market unless it can offer capitated contracts to physician groups on competitive terms. To do so, a clinical laboratory must have sufficient economies of scale and an extensive network of PSCs providing convenient access for the physician group's entire patient membership. Only Quest, LabCorp, and Westcliff have the scale necessary to compete for most physician group contracts in Southern California.[64] Small firms and new entrants would have to expand significantly, or new firms would have to enter on a large scale, to replicate the competition that will be lost with Westcliff's elimination, but the series of events required for that to happen is highly unlikely.

LabCorp recognizes that economies of scale create significant advantages for large laboratories and limit the entry and expansion of small laboratories. In a strategic document, LabCorp describes the "high" barriers to entry and notes that the clinical laboratory market is

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[64] [redacted]

"difficult to enter" due to (1) "economies of scale through large [automated testing] equipment and experience," (2) "logistics network," (3) "PSC network," and (4) "managed care contracts."[65] LabCorp acknowledges that such barriers to entry "allow LabCorp to sustain high profit margins with limited competition."[66] [redacted][68]

The clinical laboratory testing business is, as LabCorp's CEO put it, "a high-fixed cost business, whether [a laboratory is] small or large,"[69] so as testing volume increases, a laboratory's cost structure decreases, which ultimately allows a laboratory to offer lower capitation rates to physician group customers.[70] Because of the high fixed costs, larger laboratories are able to achieve significant benefits by driving more volume through their existing laboratory equipment and infrastructure.[71] Larger laboratories can also negotiate better volume discounts on supplies used to perform clinical laboratory testing.[72] Finally, additional volume allows a laboratory to increase the

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[65] PX1124 at 1.

[66] *Id.*

[67] PX 1008 at 14.

[68] *Id.* at 16.

[69] PX 7000 at 37 (King Tr.).

[70] [redacted]

[71] PX 7000 at 35-38 (King Tr.).

[72] [redacted]

number of tests that it performs in-house, which typically lowers the laboratory's cost structure and improves turn-around times.[73] These economies of scale allow Quest, LabCorp, and Westcliff to offer lower capitated rates and enhanced services that small clinical laboratories cannot match.[74]

In addition to being at a severe scale disadvantage, small laboratories face additional obstacles to entry or expansion. Reputational barriers make it difficult for a new laboratory to break into the market and displace larger established clinical laboratory vendors.[75] Also, many smaller laboratories would have to significantly enhance their electronic reporting and interfacing technologies in order to compete more broadly for many physician group customers, a capital-intensive endeavor that is relatively difficult for small laboratories to undertake.[76] Prevailing capitation rates would have to increase dramatically before it would be economically feasible for small laboratories to make the investments necessary to become competitively significant in the relevant market.[77]

Moreover, new entry (and expansion by out-of-state laboratories) into the clinical laboratory testing business is effectively blocked by a moratorium issued by the state of California on the issuance of new Medi-Cal provider numbers.[78] A laboratory is required to have a provider number in order to bill Medi-Cal, which is California's Medicaid program, for laboratory services provided to Medi-Cal patients. An inability to bill Medi-Cal limits the market opportunity for a clinical

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73 [redacted]

74 [redacted]

75 [redacted]

76 [redacted]

77 [redacted]

78 PX 0005.

laboratory, especially in areas of Southern California where Medi-Cal covers a large portion of the population.[79] The current moratorium is scheduled to expire on January 26, 2011, but has been regularly renewed since at least 2007. Even if the moratorium were lifted, the same difficulties limiting expansion by existing firms in the market for sales to physician groups would be faced to an even greater degree by new entrants.

b. Small Fringe Laboratories Are Not Likely to Replace the Competition Lost by This Acquisition

The most convincing evidence regarding the considerable challenges facing smaller laboratories in competing for capitated physician group contracts comes from the testimony of the very firms that the Defendant claims are poised for expansion and can easily replace the competition eliminated by the merger. In fact, *all* of these firms testified that they would not expand their presence in the market unless prevailing capitation rates increased dramatically – far more than a hypothesized SSNIP – and, even then, such expansion would take years to accomplish.[80] Uniformly, small market participants identify economies of scale as the most difficult obstacle they must overcome to successfully compete for capitated physician group business.[81]

Smaller, fringe clinical laboratories, even those that already have some capitated business,

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79 [redacted]

80 [redacted]

Additionally, numerous other laboratories have stated that they do not have plans to expand their presence in the capitated market. [redacted]

81 [redacted]

have not grown significantly in the last ten years.[82] Clinical laboratories assume substantial financial risk when contracting with physician groups on a capitated basis. Larger laboratories have experience predicting patient utilization with sufficient accuracy to determine the appropriate capitated rate, the volume and cost structure to absorb any mistakes made in those predictions, and a large pool of capitated contracts over which to spread the risk. Smaller laboratories generally have experience in a limited geographic area, and consequently they lack sufficient information about the patient populations in areas outside their traditional vicinities to accurately predict utilization rates for a capitated contract. Smaller laboratories do not have the cost structure or capital resources to absorb mistakes, nor the volume of capitated contracts over which to spread the risk of error.[83] A mistake in estimating the proper rate or a significant variance in utilization can be financially catastrophic for a small laboratory.[84]

Expansion into new localities is risky even for larger firms that already have a presence in adjacent areas and a low cost, high volume testing infrastructure. As LabCorp's Chief Executive Officer testified: "[T]he lab business is not a field of dreams business where if you build it, people

[82] Although the parties argue that Westcliff's expansion since 2007 illustrates the ease of entry, the evidence suggests otherwise. Westcliff spent several years building up its volume of business and infrastructure of PSCs in the fee-for-service market before competing for capitated contracts to physician groups. Through a mix of organic growth and acquisition, by 2007 Westcliff had grown to become the third-largest independent clinical laboratory in California, with 120 PSCs and processing over 6,600 accessions per day. *See* PX 1008 at 12 (Westcliff added 350,000 capitated lives since 2007). The Defendant cannot point to any candidate for potential expansion whose scale remotely approaches the scale of Westcliff's operations in 2007, when it successfully began to compete for physician group contracts. The largest of the other laboratories is only one-third the size that Westcliff was at that time. [redacted]

[83] [redacted]

[84] [redacted]

will come."[85] For smaller firms, the risk is enhanced because they have far fewer patient service centers to meet the needs of any given physician group, and therefore are faced with the added cost of building out their patient service center network when competing for capitated sales to physician groups. The risks associated with such a build-out are substantial, as it can take a significant amount of time for a new patient service center to become profitable and opening new patient service centers can rarely be justified on physician group business alone.[86] The more patient service centers a laboratory is required to open to service a particular physician group contract, the more likely it is that the laboratory will not be able to offer a competitive capitated rate.[87] Accordingly, smaller, more local laboratories rarely compete for capitated physician group business beyond their immediate vicinities, and would not be able to do so successfully even in the face of a significant increase in capitation rates.

3. Defendant's Efficiency Claims Are Insufficient to Rebut the Presumption of Competitive Harm

The presumption of competitive harm is very strong here, and LabCorp confronts a tremendous burden if it urges this Court to ignore the loss of competition and deny injunctive relief on the grounds that the acquisition will result in significant efficiencies. Such an argument is difficult even when a court's task is to evaluate the merits of a Section 7 claim. *See United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991) (rejecting efficiencies defense because no guarantee that cost savings will be passed on to consumers). That argument becomes

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[85] PX 7000 at 35 (King Tr.). Mr. King went on to testify: "You need to have relationships with physicians. You need to have relationships with managed care plans that will create a flow of specimens. And so generally, although not always, generally acquisition is a desirable way either to enter a new market or to gain additional presence in – – in existing markets." *Id.*

[86] [redacted]

[87] [redacted]

nearly impossible in the current procedural posture; no court has ever denied a preliminary injunction based on asserted efficiencies and courts have expressly required "proof of extraordinary efficiencies" when the merger results in a highly concentrated market. *Heinz*, 246 F.3d at 720; *see CCC Holdings*, 605 F. Supp. 2d at 72-73; *Swedish Match*, 131 F. Supp. 2d at 171-72; *Staples*, 970 F. Supp. at 1088-89.

LabCorp's anticipated efficiency claims fall well short of what is necessary to outweigh the substantial anticompetitive effects of the proposed transaction. LabCorp will undoubtedly contend that the acquisition will result in some cost savings. However, a defendant who "seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." *Univ. Health*, 938 F.2d at 1223; *accord Heinz*, 246 F.3d at 720-21. LabCorp has not demonstrated that any of its purported cost savings would flow to consumers. Indeed the opposite is true; it has already professed an intention to seek higher capitation rates from its physician group customers post-acquisition.

In addition, it is the Defendant's burden to show that the alleged efficiencies are (1) verifiable, *see Univ. Health*, 938 F.2d at 1223; *Staples*, 970 F. Supp. at 1089; (2) not attributable to reduced output or quality, *see Heinz*, 246 F.3d at 721-22 & n.20; (3) merger-specific, *see Cardinal Health*, 12 F. Supp. 2d at 62-63; and (4) greater than the transaction's substantial anticompetitive effects, *id.* LabCorp's anticipated cost savings, by its own admission, however, are unverified and highly speculative. LabCorp conceded in its submission to the FTC that its estimates are based on "high level" projections and "LabCorp's benchmarks," rather than "detailed assessments of Westcliff's operations," and that it is "uncertain of the exact causes of Westcliff's perceived [staffing] inefficiencies."[88] Morever, for each category of efficiency, the Defendant further undermines its own estimates by asserting that "some of the efficiencies it previously calculated could be in jeopardy due to the length of the hold-separate period."[89] Nor has the Defendant shown that its purported cost savings are merger-specific, i.e., that they could not have been accomplished by Westcliff independently or by another, less anticompetitive purchaser of its assets. Finally, LabCorp has not established how any of its claimed efficiencies would materially affect the merged entity's operating costs, which is the relevant figure. *See Heinz*, 246 F.3d at 721 ("[T]o determine whether the merged entity will be a significantly more efficient competitor, cost reductions must be measured across the new entity's combined production - not just across the pre-merger output of [the acquired firm].").

While not a cognizable efficiency, LabCorp has argued that contracting anomalies with national insurers will, in the aggregate, result in lower payments to insurance companies for fee-for-service business. The reality is that some insurers will be harmed because their contracts with Westcliff are more favorable than those with LabCorp, while others will benefit because their contracts with LabCorp are more favorable. LabCorp's estimates of the net effect have changed dramatically over the last two months. More importantly, LabCorp has anticipated that insurers may gain a windfall due to these contracting anomalies, and specifically contracted for "acquisition credits" to mitigate that benefit. In any event, whatever price differentials may exist are ephemeral as the contracts are subject to renegotiation, and Westcliff even now is free to meet competitive prices where they are offered by LabCorp or any other competitor.

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[88] PX 1139 at 48.

[89] *Id.*

4. Westcliff's Financial Condition Does Not Justify This Anticompetitive Acquisition

The Defendant cannot avail itself of a failing company defense to excuse its otherwise anticompetitive acquisition. A firm's financial weakness is "probably the weakest ground of all for justifying a merger," *Univ. Health*, 938 F.2d at 1221 (quoting *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1339 (7th Cir. 1981); *Warner Commc'ns*, 742 F.2d at 1164-65, and taken alone it "does not in itself justify a merger," *Warner Commc'ns*, 742 F.2d at 1165. Instead, the effect of a firm's financial condition on the antitrust analysis of a transaction is properly viewed through the strict limits of the failing company doctrine. *Id.* at 1164-65. In order for the transaction to be immunized under the "narrow scope" of the failing company doctrine, the Defendant must demonstrate that: (1) the company to be acquired is in imminent danger of failure, meaning that it would be unable to meet its financial obligations in the near future; (2) it has no realistic prospect for a successful reorganization under bankruptcy laws; and (3) there is no viable alternative purchaser that poses a less severe danger to competition. *See Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138-39 (1969); *Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859, 864-65 (D.C. Cir. 1993); *Merger Guidelines* § 11. The Defendant cannot meet these strict criteria.

At the time of the acquisition, Westcliff was generating profits from its operations and had nearly $100 million in annualized revenue.[90] Its financial difficulties stemmed primarily from substantial debt generated by its 2006 private equity buyout. Despite that debt, Westcliff was an attractive business. It was the third-largest clinical laboratory in Southern California, and its

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90 [redacted]

revenues had increased 22% over the preceding two calendar years.[91] As a result, a number of firms recognized that it had a significant enterprise value and were willing to acquire Westcliff throughout the time that the LabCorp deal was being negotiated.[92] Indeed, LabCorp's CEO pressed his officers to acquire the company quickly, lest it be acquired by another firm: "Please get a sense of urgency about this NOW. Do not wait for me to ask you whether we are progressing. $100 million dollar deals do not become available every day."[93] The expression of interest was such that Westcliff's then CEO testified flatly that it could have been purchased by others instead of LabCorp. "Q: So if the Labcorp [sic] offer had not been on the table, there were offers out there for Westcliff? A: Yes."[94] Likewise, the Chief Restructuring Officer installed by Westcliff's secured creditors for the express purpose of selling the company reached the same conclusion: [redacted][95] In these circumstances, Westcliff cannot be said to have made "unsuccessful good-faith efforts to elicit reasonable offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger." *Merger Guidelines* § 11.[96]

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[91] [redacted]

[92] [redacted] When assessing its opportunity to purchase Westcliff, LabCorp's Regional Manager of Business Development remarked that "Westcliff is the only other competitor in Orange Co besides Quest. Their infrastructure is so strong that in order for us to compete [to acquire Westcliff] we would need to put a lot of money on the table." PX 1125 at 1.

[93] PX 1110 at 1.

[94] [redacted]

[95] [redacted]

[96] As the Court of Appeals for this circuit has stated, "the proponent must demonstrate that there is no other viable alternative purchaser." *Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859, 865 (D.C. Cir.

The fact that Westcliff was in Chapter 11 reorganization at the time the deal closed does not affect the failing company analysis. The reorganization was a specific condition imposed by LabCorp as part of the acquisition.[97] Further, the fact that an auction was conducted after LabCorp was installed as the "stalking horse" bidder, and that no bids were received shows only that there were no bidders willing to pay $60 million for the Westcliff assets. The failing company defense does not apply if alternative bidders existed who were willing to pay more than liquidation value, and here, a number of firms were willing to do so.[98] *See Calnetics Corp. v. Volkswagen of Am., Inc.*, 348 F. Supp. 606, 622 (C.D. Cal. 1972) (finding failing company defense did not apply when defendant attempted to "obtain the best possible price" for the company and ignored other available purchasers); *see also Merger Guidelines* § 11 n.16 ("Any offer to purchase the assets of the failing firm for a price above the liquidation value of those assets will be regarded as a reasonable alternative offer.").

Under these circumstances, it is unreasonable to assume that Westcliff would have been liquidated. Westcliff had "minimal" liquidation value, and virtually all of its value was as a going concern.[99] The secured creditors realized that they would barely receive any recovery on their investments if Westcliff had been liquidated, let alone any return, and therefore believed that even if LabCorp did not purchase the company, Westcliff would have been sold to an alternative

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1993) (citing *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138 (1969)).

97 [redacted]

98 [redacted]

99 [redacted]

purchaser, albeit at a lower price.[100]

III. THE EQUITIES WEIGH HEAVILY IN FAVOR OF PRELIMINARY RELIEF

As the Court of Appeals for this circuit has clearly stated, "The equities will often weigh in favor of the FTC, since 'the public interest in effective enforcement of the antitrust laws' was Congress's specific 'public equity consideration' in enacting [Section 13(b)]." *Whole Foods*, 548 F.3d at 1035 (Brown, J.) (quoting *Heinz*, 246 F.3d at 726). Where, as here, the Commission has shown a strong likelihood of success on the merits, the public equities strongly favor a preliminary injunction, unless particularly strong equities favor the merging parties." *Id.* (citing *Heinz*, 246 F.3d at 727); *Elders Grain*, 868 F.2d at 903 (Posner, J.). As there are no strong equities favoring the Defendant, effective enforcement of the antitrust laws and the ability to remedy the violation, if one is found in the administrative trial, would be severely compromised without injunctive relief.

This Court should require LabCorp to continue to hold separate and cease any integration of Westcliff pending the resolution of the ongoing administrative proceedings. The requested relief is necessary to preserve the *status quo* pending the Commission's administrative proceeding and protect customers from the acquisition's likely anticompetitive effects. *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1085 (D.C. Cir. 1981); *see Heinz*, 246 F.3d at 726. Without such relief, LabCorp will likely immediately begin to integrate the two firms' operations, including shutting down laboratories and PSCs and terminating employees, thereby frustrating the Commission's ability to provide effective relief if it ultimately determines, after the administrative trial on the merits, that

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100 [redacted]

the transaction violated Section 7. Indeed, Congress enacted Section 13(b) precisely because it recognized that post-merger divestiture is an inadequate and unsatisfactory remedy in a merger case, 119 Cong. Rec. 36,612 (1973), a point that has been emphasized by the United States Supreme Court. *See, e.g., Dean Foods*, 384 U.S. at 607 ("Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture.").

In considering the equities, private equities, such as whether a hold separate denies LabCorp of benefits it had hoped for or that it must pay a hold-separate administrator's fees, "are not proper considerations for granting or withholding injunctive relief under [Section] 13(b)." *Food Town*, 539 F.2d at 1346. Instead, it is the public equities that are paramount. *See Warner Commc'ns*, 742 F.2d at 1165. In weighing the equities, it is therefore entirely appropriate that the *acquiring* company bear the costs of any decline in value from the acquired assets under a hold separate order. *See Weyerhaeuser*, 665 F.2d at 1087. As the D.C. Circuit Court of Appeals has observed, "[i]f the transaction is consummated but divestiture is later ordered, any costs resulting from divestiture will be borne by the acquiring company, which, as generally the instigator of the transaction, is often viewed as the more appropriate party to bear any loss resulting from an antitrust violation." *Exxon*, 636 F.2d at 1344 n.26. Thus, in weighing the equities, it is entirely appropriate that LabCorp should bear the risk of loss as well as the benefit of having acquired ownership of Westcliff. It is especially appropriate under the circumstances here. The Defendant accelerated the closing date for its deal to prevent the Commission from seeking a temporary restraining order and subsequently entered into a hold separate agreement on a voluntary basis, and thus should not be allowed to claim that its private costs of maintaining the hold separate agreement outweigh the public interest in effective enforcement of the antitrust laws.

Because all of the public equities weigh in favor of Plaintiff's requested relief, the Commission requests this Court to issue a hold separate order to preserve and maintain the purchased assets during the pendency of the Commission's administrative trial.

CONCLUSION

The Commission asks the Court to grant the Commission's requests for a temporary restraining order maintaining the existing hold separate agreement until the preliminary injunction motion can be heard, and for a preliminary injunction ordering LabCorp to continue to hold the Westcliff assets separate.

Respectfully submitted,

By: ______________________

Thomas Greene
Special Litigation Counsel

Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

In re: WESTCLIFF MEDICAL LABORATORIES, INC. Debtor(s).	CHAPTER: 11 CASE NUMBER: Adv 8:10-ap-01564-TA

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Jeffrey Garfinkle = jgarfinkle@buchalter.com
Michael Heyman = michael.heyman@klgates.com
Michael Lubic = michael.lubic@klgates.com
Richard Park = richard.park@usdoj.gov

UST = ustpregion16.sa.ecf@usdoj.gov

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

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Date	*Type Name*	*Signature*

In re: WESTCLIFF MEDICAL LABORATORIES, INC. Debtor(s).	CHAPTER: 11 CASE NUMBER: Adv 8:10-ap-01564-TA

ADDITIONAL SERVICE INFORMATION (if needed):

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Michael Moiseyev
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Ave., NW
Washington, DC 20001

Western Region
Federal Trade Commission
10877 Wilshire Blvd., Suite 700
Los Angeles, CA 90024

Richard Park
Assistant United States Attorney
300 North Los Angeles Street, Suite 7516
Los Angeles, CA 90012

Civil Process Clerk
United States Attorney's Office
Federal Building, Room 7516
Los Angeles, CA 90012

United States Trustee
Office of the United States Trustee
411 West Fourth Street, Suite 9041
Santa Ana, CA 92701

Attorney General
United States Department of Justice
Ben Franklin Station
P.O. Box 683
Washington, D.C. 20044