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, Defendants.	)	Civil Action No. 10-cv-02053 (RWR)

OPPOSITION OF PLAINTIFF FEDERAL TRADE COMMISSION TO DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE OR FOR FAILURE TO SUE THE ACQUIRER OF ASSETS OR, IN THE ALTERNATIVE, TO TRANSFER VENUE

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I. INTRODUCTION

A. The Essence of This Case is to Protect the Commission's Ability to Conduct a Meaningful Administrative Adjudication By Ensuring that Meaningful Remedies Remain Available.

The Federal Trade Commission ("FTC" or "Commission") has brought this case pursuant to § 13(b) of the FTC Act, 15 U.S.C. § 53(b), *not* to obtain a ruling on the ultimate merits of whether the defendants, Laboratory Corporation of America ("LCA") and Laboratory Corporation of America Holdings ("Holdings") (collectively, "LabCorp"), are in violation of the antitrust laws due to their acquisition of the assets of Westcliff Medical Laboratories, Inc. ("Westcliff"). Rather, the purpose of this case is to obtain interim, injunctive relief to preserve the *status quo pendente lite*, so as to protect the Commission's ability to conduct its administrative adjudicatory proceeding and, if necessary, to order meaningful relief. "[T]he whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of 'unscrambl[ing] merged assets' often precludes 'an effective order of divestiture'" at the conclusion of the administrative adjudicatory proceeding. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008) (Brown, J.). For example, "a hold separate order realistically can be expected (a) to safeguard adequate eventual relief if the merger is ultimately found unlawful, and (b) to check interim anticompetitive harm" during the period of time when the administrative adjudication is underway.[1]

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[1] *FTC v. Weyerhaeser Co.*, 665 F.2d 1072, 1085 (D.C. Cir. 1981); *see also FTC v. Exxon*, 636 F.2d 1336, 1338-39 (D.C. Cir. 1980) ("The 'hold separate' option was suggested to ensure that, in the event that the FTC succeeded in its administrative action, meaningful divestiture could be imposed").

Because this case principally concerns _not_ the merits of LabCorp's alleged violations of § 7 of the Clayton Act and § 5 of the FTC Act, 15 U.S.C. §§ 18, 45, but rather, whether interim relief is proper to protect the integrity of the FTC's administrative proceeding, the key decisional standard to be applied is not "the more stringent, traditional 'equity' standard for injunctive relief," *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980), but rather, whether "the FTC has raised 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 and ultimately by the Court of Appeals."[2]

B. The Pending Proceeding in the U.S. Bankruptcy Court for the Central District of California is Irrelevant to This Case

LabCorp contends that the adversary proceeding it initiated two weeks ago in Bankruptcy Court "concern[s] the same assets and exactly the same matter at issue in this case." LabCorp Motion to Dismiss at 1. To the extent this contention is true, it only illustrates the impropriety of LabCorp's having initiated that proceeding – in an unseemly attempt to "jump the gun" and preempt the § 13(b) case it anticipated the FTC would bring in this Court. Like the plaintiff in *Swish Marketing, Inc. v. FTC*, 669 F. Supp. 2d 72 (D.D.C. 2009), LabCorp initiated its adversarial proceeding in Bankruptcy Court as a means of "forum shopping" or "procedural fencing," in "an attempt to get [its] choice of forum by filing first." *Id.* at 79, *citing AmSouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004). In another case where "the defendant filed [an]

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[2] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) (citations omitted). The FTC "'is not required to prove, nor is the court required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act. . . . Rather, the FTC 'need only show that there is a 'reasonable probability' that the Acquisition may substantially lessen competition.'" *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 115-16 (D.D.C. 2004), quoting *FTC v. Staples, Inc.*, 970 F.Supp. 1066, 1070 (D.D.C.1997).

action [in another forum] with full knowledge of the plaintiffs' intention to file suit, specifically in the United States District Court for the District of Columbia, ... the court conclude[d] that the defendant filed its declaratory judgment action as a preemptive strike in anticipation of the plaintiffs' action." *Int'l Painters & Allied Trades Indus. Pens. Fund v. The Painting Co.*, 569 F.Supp.2d 113, 117 (D.D.C. 2008). Accordingly, in that case the court determined that the equities weighed against deferring to the other proceeding under the usual "first-to-file rule," and declined to dismiss or to transfer venue to the other court. *Id. Accord*, *Fed'n Internationale de Football Ass'n v. Nike, Inc.*, 285 F.Supp.2d 64, 67-68 (D.D.C. 2003). The court should reach the same result here.

Moreover, the FTC has filed a Motion to Dismiss the bankruptcy adversary proceeding commenced by LabCorp (a copy is attached hereto), demonstrating that LabCorp's complaint cannot be adjudicated by the Bankruptcy Court because the issues it raises do not and could not possibly have any impact on the Westcliff bankruptcy estate or its creditors. Accordingly, the matter does not qualify as a "core" proceeding under the Bankruptcy Code. Moreover, in its Motion to Dismiss, the FTC showed that its § 13(b) law enforcement action against LabCorp in D.C. would have no relationship to the Bankruptcy Court's order authorizing the estate's sale of assets to LabCorp. The Bankruptcy Court's sale order never even addressed antitrust or competition issues, and certainly did not immunize LabCorp from liability for Clayton Act violations committed before, during, or after the consummation of the transaction. Now that LabCorp has purchased the Westcliff assets from the estate, the continuing bankruptcy proceeding is of no interest to the FTC – and is irrelevant to the matters at issue here.

II. VENUE AND PERSONAL JURISDICTION ARE PROPER IN THE DISTRICT OF COLUMBIA

A. All of the LabCorp Entities Are Subject to Personal Jurisdiction in D.C.

Under the D.C. long-arm statute, venue and personal jurisdiction are co-extensive and reach to "the fullest extent permissible under the due process clause of the United States Constitution."[3] Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the Commission to bring a suit in any district "where such person, partnership or corporation resides or transacts business, or wherever venue is proper under 28 U.S.C. § 1391."

LabCorp is present and doing business in D.C. – and does not deny this in its motion. The company has several labs physically located in D.C. and provides clinical lab services to doctors and other providers throughout the District. Moreover, all of the LabCorp entities – including defendants LCA and Holdings, as well as LabWest, Inc. ("LabWest") – are subject to personal jurisdiction in the District of Columbia. Section 13(b) of the FTC Act authorizes the FTC to serve process on any "person, partnership, or corporation wherever it may be found," and that provision effectively creates personal jurisdiction over anyone" that has "minimum contacts with the United States" as a whole.[4] Also, § 13(b) provides that a "suit may be brought . . . wherever venue is proper under section 1391 of Title 28;" and since LabWest is subject to service of process, and hence personal jurisdiction, in D.C., it can be deemed to "reside" in the District for purposes of venue under § 1391.

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[3] *Schapiro Lifschitz & Schram, P.C. v. R.E. Hazard, L.P.*, 24 F.Supp.2d 66, 70 (D.D.C. 1998), citing *Schwartz v. CDI Japan, Ltd.*, 938 F.Supp. 1, 4 (D.D.C.1996); *Fisher v. Bander*, 519 A.2d 162, 163 (D.C.1986).

[4] *FTC v. Cleverlink Trading Ltd.*, 2006 WL 1735276, *4 (N.D. Ill. June 19, 2006), quoting *Lisak v. Mercantile Bancorp., Inc.*, 834 F.2d 668, 671-72 (7th Cir. 1987).

B. LabWest is Not a Necessary Party to This Case.

1. LabWest is an *Alter Ego* of LabCorp For Purposes of This Case.

The Court should reject LabCorp's motion to dismiss this because LabWest's name was left out of the caption. It is perfectly obvious that all of the LabCorp entities – LCA, Holdings, and LabWest – are *alter egos* of one another for purposes of this case, and for purposes of liability under the Clayton Act and the FTC Act. First, LabCorp holds itself out as a single company and conducts itself as a single actor. For example, in the transaction in which LabCorp acquired the Westcliff assets, the same corporate officer signed the Asset Purchase Agreement on behalf of both LabCorp parties (LCA and LabWest). The same attorneys represent all of the LabWest entities. Most significantly for purposes of this action, LabCorp has made it clear that, if and when the "hold separate" arrangement is dissolved, the assets, operations, and systems of the former Westcliff (now owned by LabWest) will be merged and integrated together with the rest of the company's business, and will be operated as a single enterprise.

"Considerations of justice and equity justify piercing the corporate veil and finding the corporation's officers or shareholders to be *alter egos* of the corporate entity when there is a unity of ownership and interest."[5] "'Unity of interest and ownership can ... be demonstrated by showing domination and control of a corporation, as in a parent-subsidiary relationship or in a closely held corporation.'" *Id*. "Individuals or other entities may be held liable for the activities of a corporation when it is demonstrated that 'the corporation is not only controlled by those persons [who are alleged alter egos of the corporation], but also that the separateness of the

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[5] *See Schapiro*, *supra*, 24 F.Supp.2d at 70 n.3, citing *Vuitch v. Furr*, 482 A.2d 811, 815-16 (D.C.1984).

persons and the corporation has ceased and ... an adherence to the fiction of the separate existence of the corporation would sanction a fraud or promote injustice.'"[6]

Moreover, even if there were any serious doubt that the LabCorp entities are all *alter egos* of one another, the Court cannot, in the context of a motion to dismiss, excuse the parent corporations from the case on the grounds that they can not be held liable for the actions of their subsidiary. "[B]ecause the issues of successorship and the parent-subsidiary relationship are 'heavily fact-specific,' they should be resolved in a motion for summary judgment" rather than a motion to dismiss.[7] "Only after the parties have performed discovery can the Court fully examine the relationship of the companies and the circumstances surrounding the acquisition and merger."[8] The relevant factors to be considered include whether the companies engage in the same business, and whether the companies have in common individuals who have served in similar capacities, whether there is substantial identity of ownership between the companies. *Id.* The Court cannot dismiss this case in the absence of factual evidence on these issues.

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[6] *Schapiro*, 24 F.Supp.2d at 70, n.3, quoting *Camacho v. 1440 Rhode Island Ave. Corp.*, 620 A.2d 242, 249 (D.C.1993). Numerous courts have held that a wholly owned subsidiary is not a required party under Fed. R. Civ. P. 19, because a subsidiary's interests are identical to those of the parent, and the parent has the ability and incentive to defend the subsidiary's interests. *See, e.g., Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, 361 F.3d 359, 364 (7th Cir. 2004); *Pujol v. Shearson/Am. Express, Inc.*, 877 F.2d 132, 135 (1st Cir. 1989).

[7] *FTC v. Citigroup, Inc.*, 239 F. Supp. 2d 1302, 1306-07 (N.D. Ga. 2001), citing *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 694 (5th Cir.1985)(determining whether a subsidiary is the alter ego of its parent is a "heavily fact-specific" issue); *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 272 (6th Cir.1970) (noting that "[t]he question of successorship is one of fact").

[8] *Citigroup, supra*, 239 F. Supp. 2d at 1307, citing *P.F. Collier*, 427 F.2d at 272.

2. LabCorp's Position That the Case Must Be Dismissed Unless the Correct Corporate Shell Entity Is Named Contravenes the Intent of Congress and Ignores Economic Reality

LabCorp's formalistic interpretation of § 7 of the Clayton Act, which would require dismissal unless the specific corporate shell entity is named as a defendant, runs directly counter to Congress' clearly expressed intent in amending § 7 of the Clayton Act in 1950 so as to reach mergers and asset acquisitions, and thereby remedy the original 1914 version of the Clayton Act, which addressed only stock acquisitions. "Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of §7. . . . Plainly, acquisition of 'assets' as used in amended § 7 was not meant to be a simple equivalent of acquisition by merger, but was intended rather to ensure against the blunting of the antimerger thrust of the section by evasive transactions such as had rendered the original section ineffectual. . . . 'The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition. It forbids not only direct acquisitions but also indirect acquisitions.'"[9]

LabCorp takes the untenable position that, because LabWest was the corporate shell entity that actually purchased the Westcliff assets, this case must be dismissed unless LabWest is named as a defendant. This ignores the economic reality that LabCorp, as a single economic actor, by directly or directly acquiring and continuing to own the former Westcliff business, has caused significant consolidation and eliminated Westcliff as a stand-alone competitor, to the

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9 *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 342 (1963), citing H.R.Rep.No.1191, 81st Cong., 1st Sess. 8-9.

possible detriment of competition and consumers. LabCorp's stance also ignores the last 60 years of antitrust history, and must be rejected.

3. Regardless Whether LabWest is Named as a Defendant, the LabCorp Entities Other Than LabWest Themselves Are Alleged to Have Violated the Clayton Act and the FTC Act

Even if, counterfactually, LabCorp and LabWest were treated as separate entities, LabCorp itself (including Holdings and LCA) – not just LabWest – would be in violation of the Clayton Act if the Commission concludes, at the end of the administrative adjudication, that the combination of the LabCorp and Westcliff businesses "may be substantially to lessen competition," in violation of § 7 of the Clayton Act and § 5 of the FTC Act. LabCorp itself (*i.e.*, LCA) – not just LabWest – actually signed the Asset Purchase Agreement and was a party to the acquisition transaction. The managers in overall control of the corporation as a whole undoubtedly directed and were responsible for consummating the transaction.

Moreover, this case does not just concern LabCorp's or LabWest's <u>initial</u> purchase of the Westcliff assets, but also the company's <u>continuing</u> ownership of the assets, directly or indirectly, and the effective combination of the LabCorp and Westcliff businesses, through whatever corporate form. An acquirer of assets may commit a "continuing violation of the [Clayton] Act" by maintaining its ownership of assets that may substantially limit competition. *California v. Am. Stores Co.*, 495 U.S. 271, 285 n.11 (1990).

Also, as noted above, the District Court is not being asked to rule on the ultimate merits of the case, but merely to protect the Commission's ability to conduct a meaningful administrative adjudicatory proceeding by issuing interim, injunctive relief to preserve the *status quo pendente lite*. LabCorp and LabCorp Holdings are the respondents in that administrative proceeding, so they are proper parties here. If the company believes that LCA and Holdings are free of any liability or that LabWest is an indispensable party, it can raise those arguments in the Part 3 proceeding before the ALJ (and ultimately, before the full Commission and the Court of Appeals). But for purposes of the present case before the District Court, the fact that LCA and Holdings are the respondents in the FTC's administrative adjudication is sufficient to give this Court jurisdiction to consider this case. And in the event the Commission, at the conclusion of the administrative adjudication, were to order divestiture as a remedy, LabCorp (*i.e.*, LCA and/or Holdings), not LabWest, would be the party that would be required to implement that remedy by selling off LabWest to a third party.

Finally, even if LabWest <u>were</u> a necessary party, the remedy to the omission of that entity as a defendant would not be to dismiss this case, but to allow the FTC to amend its § 13(b) complaint to add LabWest as a defendant. As discussed above, LabWest clearly is subject to personal jurisdiction in this district.

III. THE COURT SHOULD DENY LABCORP'S MOTION TO TRANSFER VENUE.

A. Standard of Review

The standard for whether to transfer venue pursuant to § 1404(a) is well established in this District. *See, e.g., New Hope Power Co. v. U.S. Army Corps of Engrs.*, 2010 WL 2838538, *3 (D.D.C., July 20, 2010) (Roberts, J.). As a threshold issue, the proposed transferee district must be one where the action initially could have been brought. Next, the Court "must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to [the] private concerns [of the parties], come under the heading of 'the interest of justice.' " *Demery v. Montg. County, MD*, 602 F. Supp. 2d 206, 210 (D.D.C. 2009), citing *Stewart Org. Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988).

B. As a Threshold Matter, The FTC Could *Not* Have Brought This Case in the Bankruptcy Court In Which LabCorp Has Inappropriately Attempted to Anticipate and Preempt the FTC's Law Enforcement Action

To be sure, the FTC could have brought this § 13(b) case in the District Court for the Central District of California. It must be emphasized, however, that the FTC could *not* have brought this case in the U.S. *Bankruptcy Court* for that district, since § 13(b) of the FTC Act confers exclusive jurisdiction upon District Courts. Yet one of LabCorp's key arguments (at least implicitly) appears to be that this case should be litigated in the same district where the Westcliff bankruptcy proceeding is pending. This argument is completely without merit. *See supra* section I.B.

C. The FTC's Choice of Forum Is Entitled to Substantial Deference.

The "plaintiff's choice of forum is ordinarily a 'paramount consideration' that is entitled to 'great deference' in the transfer inquiry."[10] Moreover, this court has "accept[ed] as a general matter" that "the government's choice of venue in an antitrust case is entitled to heightened respect.'"[11]

In *Cephalon*, the court concluded that the FTC's forum choice was not entitled to deference because, it found, the case had no logical connection to the District of Columbia. The court reasoned that the defendant was located in Pennsylvania, the actions under review occurred outside D.C., and the FTC's case presented factual and legal issues very similar to those raised by private parties' class action cases pending in Pennsylvania. The court apparently was

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[10] *FTC v. Cephalon, Inc.*, 551 F.Supp.2d 21, 26 (D.D.C. 2008), citing *Thayer/Patricof Ed. Funding, LLC v. Pryor Resources, Inc.*, 196 F.Supp.2d 21, 31 (D.D.C. 2002).

[11] *Cephalon*, 551 F.Supp.2d at 26 & n.2, citing *United States v. Brown Univ.*, 772 F.Supp. 241, 242 (E.D. Pa. 1991).

particularly disturbed by its perception that the FTC had brought the case in D.C. "to further its goal of obtaining a circuit split."[12]

The present case, however, is distinguishable from *Cephalon* on every one of these criteria. First, while LabCorp's headquarters are not in the District of Columbia, they're not in California either. LabCorp is domiciled in Delaware and maintains its corporate headquarters in North Carolina. Washington, D.C. is considerably more convenient to LabCorp's executives in North Carolina than is the Central District of California. As noted above, LabCorp (unlike Cephalon) maintains physical facilities in the District and has extensive, direct business dealings here.

Moreover – and critically – the activity out of which this case "arises" is the FTC's administrative adjudication, which is being conducted here in the District of Columbia, not in California. In the *Cephalon* case (and in the *Watson* case case cited by LabCorp),[13] the FTC was seeking a ruling on the *merits* of the defendants' misconduct. By contrast, the present case is merely as an adjunct to the administrative adjudication pending before the FTC. There are two types of FTC civil actions pursuant to § 13(b): (1) cases in which the FTC seeks permanent injunctive relief as a direct remedy to the defendant's unlawful behavior, and (2) cases in which the FTC seeks merely interim relief (such as a temporary restraining order or permanent injunction) to preserve the *status quo* pending the FTC's investigation and administrative adjudication of the merits. *Cephalon*, *Watson*, and cases such as *Mylan Labs.*, 62 F.Supp.2d 25

[12] *Id.* at 30, n.5.

[13] See LabCorp Mem. at 17 n.12, citing *FTC v. Watson Pharms., Inc.*, 611 F.Supp.2d 1081 (C.D. Cal. 2009).

(D.D.C. 1999) are in the first of these categories. The present case – as well as cases such as *Heinz*, *Whole Foods*, *Weyerhaeuser*, and others cited in section I.A. above – are in the second.

Because this case principally concerns the integrity of the FTC's administrative adjudicative process – rather than the merits of the underlying antitrust dispute – the substantive activities occurring in California (*i.e.*, the potentially anticompetitive impact of the LabCorp/Westcliff consolidation on the marketplace for clinical laboratory services provided to certain categories of customers), while relevant, are not the main development from which this case "arises." Rather, the principal issue that the FTC is presenting to the Court for decision in this case is only whether "the FTC has raised 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 and ultimately by the Court of Appeals."[14]

Furthermore, unlike *Cephalon*, there is no related litigation pending in California (apart from the improper matter that LabCorp attempted to raise in bankruptcy court so as to create an artificial forum split, but that must be and will be dismissed). And unlike *Cephalon,* there is no reason to believe (and no allegation in LabCorp's motion) that the FTC is trying to create a circuit split. To the contrary, by trying to beat the FTC in a "race to the courthouse door," it is LabCorp that has improperly attempted to generate a wholly artificial circuit split or risk of inconsistent judgments.

Finally, the deference due to the FTC's choice of forum is heightened by the special venue provisions specified in § 13(b) of the FTC Act. "The presence of . . . a special venue

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[14] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001).

statute is a factor to be considered."[15] Section 13(b) of the FTC Act – like the Securities Exchange Act of 1934 and the Employee Retirement Income Security Act of 1974 ("ERISA") – "contains a special venue provision explicitly authorizing plaintiffs to bring actions" in districts with specified characteristics, and accordingly courts "give special weight to a plaintiff's choice of forum" in such cases.[16] While such deference to the plaintiff's choice of forum "is not absolute,"[17] in general a "defendant requesting a transfer of venue in an ERISA case filed in the pension fund's home district faces an uphill battle[.]"[18] The same should be true in the context of a defendant's motion to transfer venue of a case brought by the Commission under § 13(b) of the FTC Act. Similarly, "the presumption in favor of a plaintiff's choice of forum is stronger in cases arising under the federal securities laws because the specific venue provision" – like the venue provision in § 13(b) – "evinces Congressional intent to allow plaintiffs in securities cases the widest possible choice of forums in which to sue."[19]

D. The Other "Private Interest" Factors Weigh Strongly Against Transfer of Venue.

The other "private interest" factors identified in the caselaw also support rejection of LabCorp's transfer motion and proceeding with consideration of the case in this District:

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[15] *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1155 (1978), citing *Zorn v. Anderson*, 263 F.Supp. 745, 749 (S.D.N.Y. 1966).

[16] *Fanning v. Capco Contractors, Inc.*, 711 F.Supp.2d 65, 69 (D.D.C. 2010), citing 29 U.S.C. § 1132(e)(2), and *Flynn v. Veazey Constr. Corp.*, 310 F.Supp.2d 186, 193 (D.D.C.2004).

[17] *Fanning v. Trotter Site Prep., LLC*, 668 F.Supp.2d 60, 63 (D.D.C. 2009).

[18] *Fanning v. Capco Contractors*, 711 F.Supp.2d at 69.

[19] *SEC v. Roberts*, 2007 WL 2007504, *2 (D.D.C., July 10, 2007).

1. Defendant's preferred forum – As discussed above, the Court should accord no deference to LabCorp's unseemly efforts to beat the FTC in a "race to the courthouse" by filing first in the Bankruptcy Court. Here, as in most other cases, the plaintiff is entitled to have its choice of forum predominate over the defendant's preference. There is "a strong presumption against disturbing plaintiff['s] initial forum choice." *Pain v. United Techs. Corp.*, 637 F.2d 775, 784 (D.C. Cir.1980).

2. *Location where the claim arose* – As discussed above, this case does not seek a ruling on the merits, and does not arise from the substantive acts that occurred in Southern California. Rather, this action merely seeks to protect the integrity of the FTC's administrative adjudicatory proceeding – being conducted here in the District of Columbia. "Here, the designated place of hearing is Washington, D.C., which is thus necessarily a place where the inquiry is carried on." *FTC v. Browning*, 435 F.2d 96, 100 (1970).

3. *Convenience of the parties* – The FTC is headquartered in D.C. and LabCorp is headquartered in North Carolina – so California is not particularly convenient to either party. (The fact that LabWest is headquartered and operates in California is irrelevant because, as discussed above, LabWest has not been accused of violating the Clayton Act or the FTC Act in the pending administrative adjudication, and is not a necessary party here.) The existence of an FTC field office in Los Angeles also "has little relevance to the § 1404(a) analysis in this case" because "[t]he investigation in this case was conducted from the Washington office," not the field office. *SEC v. Ernst & Young*, 775 F.Supp. 411 (D.D.C. 1991); *cf. SEC v. Savoy, Inc.*, 587 F.2d 1149, 1155-56 (D.C. Cir. 1978).

4. *Convenience of the witnesses* – This factor is largely irrelevant here, since this matter will not proceed to a full-scale trial. *Cf. New Hope Power Co., supra*, at *5. Indeed, it is

possible that this case could be resolved on a paper record, without any live witness testimony at all. Moreover, even for purposes of an evidentiary hearing on a preliminary injunction, the "convenience of the witnesses" factor applies "only to the extent that the witnesses may actually be unavailable for trial in one of the fora." *Cephalon*, 551 F.Supp.2d at 25. LabCorp has failed to meet its burden of proof on this point. Although a good number – but by no means all – of the potential witnesses are located in California, many of them have already demonstrated their willingness to travel to the District of Columbia for investigational hearings conducted at earlier phases of the FTC's investigation; and either the FTC or LabCorp will certainly reimburse any travel costs.

5. *Access to sources of proof* – "[T]echnological advances have significantly reduced the weight of the ease-of-access-to-proof factor. . . . The . . . documents likely to be relevant to this case may be easily transmitted electronically." *Nat'l R.R. Passenger Corp. v. R. & R. Visual, Inc.*, 2007 WL 2071652, *6 (D.D.C., July 19, 2007). Indeed, they already have been transmitted electronically. To pretend, as LabCorp does, that the location or origination point of these documents has any practical impact on the parties' access to sources of proof is to ignore the reality of modern electronic data storage and communications, and the reality of modern E-discovery practice.

E. Rejection of LabCorp's Transfer Motion Will Advance The Public Interest.

The FTC respectfully submits that the most important public interest factor that the Court should consider is the interest of the Commission, on behalf of the public whose interests it represents, in protecting the integrity of its administrative adjudication procedures and, if necessary, its ability to adopt meaningful remedies to the anticompetitive conduct of parties found to have violated the Clayton Act or the FTC Act. That interest is served, by design, by the liberal venue provision established by Congress in § 13(b) of the FTC Act.

As for the other public interest factors identified by the courts, none are strongly dispositive one way or the other. The relative congestion of the federal courts in the Central District of California versus the District of Columbia (LabCorp alleges that the former are faster) may be outweighed by the far greater experience and track record that the District Court for this District has with cases brought under § 13(b) of the FTC Act involving injunctions affecting mergers and acquisitions. And there is a strong and meaningful local interest in the efficient and effective conduct of administrative adjudicatory hearings in the District of Columbia – which, as discussed above, is at the core of this case.

IV. CONCLUSION

For the foregoing reasons, LabCorp's motion should be denied.

Respectfully submitted,

/s/______________________________

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December 2, 2010

Certificate of Service

I hereby certify that, on December 2, 2010, I served the foregoing Opposition of Plaintiff Federal Trade Commission to Defendants' Motion to Dismiss for Improper Venue or For Failure to Sue the Acquirer of Assets Or, In the Alternative, to Transfer Venue, via both e-mail and fax, upon the following:

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Exhibit A

to

Opposition of Plaintiff Federal Trade Commission
To Defendants' Motion to Dismiss for Improper Venue or
For Failure to Sue the Acquirer of Assets or,
In the Alternative, to Transfer Venue

Civil Action No. 1:10-cv-2053 (RWR)

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re: WESTCLIFF MEDICAL LABORATORIES, INC., et al., Debtors.	Case No. 8:10-bk-16743-TA Chapter 11 (Jointly Administered) Adversary No. 8:10-ap-01564-TA
LABWEST, INC. and LABORATORY CORPORATION OF AMERICA, Plaintiffs, v. FEDERAL TRADE COMMISSION, Defendant.	**DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS** [Fed. R. Bankr. P. 7012(b)] Hon. Theodor C. Albert <u>Hearing</u>: Date: January 27, 2011 Time: 2:00 pm Place: Courtroom: 5B 411 West Fourth Street Santa Ana, California 92701

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 27, 2011, at 2:00 pm, before the Honorable Theodor C. Albert in Courtroom 5B located at 411 West Fourth Street, Santa Ana, California 92701, Defendant Federal Trade Commission ("Commission" or "FTC") will and hereby does move this Court for dismissal of the above-captioned adversary proceeding.

This Motion is made pursuant to Federal Rule of Bankruptcy Procedure 7012(b), on the grounds that complaint filed by the Laboratory Corporation of America and its wholly-owned subsidiary, LabWest, Inc. (collectively, "LabCorp") should be dismissed for lack of subject-matter jurisdiction (Fed. R. Civ. P. 12(b)(1)) and for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

In particular, the grounds for the Motion are as follows:

1. The Bankruptcy Court lacks subject-matter jurisdiction to enjoin a "non-core" FTC civil law enforcement action that will have no impact on the bankruptcy estate. The FTC action (if and when the FTC initiates it) will not: (i) result in recission of the asset sale to LabCorp, (ii) affect the handling and administration of the bankruptcy estate, or (iii) affect the estate's creditors. Since the FTC action will not bear any relationship to the bankruptcy estate, LabCorp should be prohibited from invoking this Court's jurisdiction.

2. This Court's June 9, 2010 Sale Order does not prohibit the commencement of an FTC enforcement action against the purchaser of assets, LabCorp. The plain language of the Sale Order provides a limited injunction against claims related to the transfer of assets. The Sale Order does not, however, bar federal agencies such as the FTC from seeking equitable relief such as antitrust divestitures or "hold-separate" injunctions.

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This Motion is made based upon this Notice of Motion, the attached Memorandum of Points and Authorities, matters on which the Court may take judicial notice, and on such further evidence and arguments as may be presented to this Court prior to or at the hearing on this Motion.

Dated: November 24, 2010

Respectfully submitted,

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FEDERAL TRADE COMMISSION

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I.

INTRODUCTION

A. Overview of the Case

In their Complaint, Laboratory Corporation of America and its wholly-owned subsidiary, LabWest, Inc. (collectively, "LabCorp") seek a ruling from the Bankruptcy Court to preemptively bar the Federal Trade Commission ("Commission" or "FTC") from exercising its "police and regulatory power" to enforce the nation's antitrust laws, including the Clayton Act (15 U.S.C. §§ 12-27) and the Federal Trade Commission Act ("FTC Act") (15 U.S.C. §§ 41-58).

To support its claims, LabCorp has falsely characterized the possible FTC enforcement action as a "collateral attack" on the June 9, 2010 Sale Order.[1] *E.g.*, Compl. at 2. Contrary to LabCorp's claims, an FTC enforcement action against LabCorp should not implicate the Westcliff Medical Laboratories bankruptcy case at all. Since the FTC's goal is to prevent LabCorp from harming competition *going forward*, the agency has no reason to revisit this Court's June 9, 2010 Sale Order, to reverse the June 16, 2010 asset sale, or to pursue any monetary recovery from the estate. Thus, the injunctive and declaratory relief requested by LabCorp would do *nothing* to protect the interests of the estate and its creditors.

Instead, the relief sought by LabCorp could interfere with the Commission's investigation of LabCorp's potentially unlawful, ongoing conduct; derail a possible law enforcement action to protect the public from such wrongdoing; and impede the FTC from carrying out its statutory mandate of protecting consumers and safeguarding competition. Moreover, the remedy LabCorp seeks would contravene the basic policy of the Bankruptcy Code by sanctioning misuse of the bankruptcy process to shield violations of non-bankruptcy laws and turning bankruptcy into a haven for wrongdoers.

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[1] Although an FTC investigation into LabCorp is pending, as of the date of the filing of this Motion, the FTC has not filed any law enforcement action against LabCorp in District Court or in an administrative adjudicatory proceeding.

B. Issue Presented

This Motion to Dismiss presents the following issue:

Can a purchaser of assets from a bankruptcy estate invoke the power of the Bankruptcy Court to immunize itself from future antitrust liability?

Absolutely not. The FTC has a statutory mandate to challenge transactions that may "substantially lessen competition" in any particular market in District Court or in an administrative adjudicatory proceeding. 15 U.S.C. §§ 21(b), 45(b)-(c), 53(b); 16 C.F.R. Part 3. Even though LabCorp misrepresents the FTC's "imminent" challenge as a collateral attack on the June 9, 2010 Sale Order, it does not – and cannot – cite any part of that Order that shields LabCorp from antitrust liability for harm it inflicts *after* it acquires the assets. In addition, any action brought by the FTC in the exercise of its "police and regulatory" power to enforce federal antitrust laws is a "non-core" matter, which cannot be enjoined by the Bankruptcy Court. Such an enforcement action could not have any effect on the estate or the creditors, and thus would not "arise under" or be "related to" the bankruptcy case.

II.

LEGAL AND FACTUAL BACKGROUND

A. Section 7 of the Clayton Act and the FTC's Process of Reviewing Mergers and Asset Acquisitions

The FTC Act "empower[s] and direct[s]" the Commission to "prevent . . . unfair methods of competition," 15 U.S.C. § 45(a)(2), and the Clayton Act grants the FTC "[a]uthority to enforce," *inter alia*, Section 7 of that Act, which outlaws mergers and acquisitions that may "substantially [ ] lessen competition." 15 U.S.C. §§ 18, 21(a). An acquirer of assets may commit a "continuing violation of the [Clayton] Act" by maintaining its ownership of assets that may substantially limit competition. *California v. American Stores Co.*, 495 U.S. 271, 285 n.11 (1990), citing *FTC v. Western Meat Co.*, 272 U.S. 554, 559 (1926). Accordingly, *after* an acquisition has been consummated, the Clayton Act empowers the FTC to order the acquirer to "divest itself of the . . . assets" at issue. *See* Clayton Act, § 11(b) (15 U.S.C. § 21(b)); FTC Act,

§ 5(b) (15 U.S.C. § 45(b)). Although preventing an unlawful acquisition in advance is the preferred course when it is practicable, *see, e.g., FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1034 (D.C. Cir. 2008); *FTC v. Dean Foods, Inc.*, 384 U.S. 597, 605 (1966), once a transaction has been consummated, "divestiture is the preferred remedy for an illegal merger or acquisition." *California v. American Stores, Co.*, 495 U.S. 280-81 (1990); *see also United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330-331 (1961).

Typically, parties planning a significant merger or acquisition – including an acquisition of assets from a bankruptcy estate – are required to notify the FTC in advance, pursuant to the Hart-Scott-Rodino Act (15 U.S.C. § 18a); *see also* 11 U.S.C. § 363(b)(2), to give the Commission (or the Justice Department) an opportunity to investigate compliance with § 7 of the Clayton Act prior to the closing of the transaction. This advance reporting requirement does not apply to acquisitions valued below a specified threshold, but such unreported transactions remain subject to § 7, and are frequently investigated by the FTC or DOJ even though they are not required to be reported.

If the Commission decides that it has "reason to believe" that the effect of an acquisition may "substantially lessen competition" in a particular market or otherwise constitute an "unfair method of competition," it may challenge the transaction in District Court, in an administrative adjudicatory proceeding, or both. 15 U.S.C. §§ 21(b), 45(b)-(c), 53(b); 16 C.F.R. Part 3. The Commission's final decision in an administrative proceeding is subject to judicial review in an appropriate Court of Appeals. 15 U.S.C. §§ 21(c)-(d), 45(c)-(g).

Before or during the pendency of such an administrative adjudicatory proceeding, the Commission may, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seek a preliminary injunction from a District Court to preserve the status quo, so as to enable the Commission to implement an effective remedy at the conclusion of the proceeding in the event it determines the acquisition will likely have anticompetitive effects. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001); *FTC v. Warner Communications Corp.*, 742 F.2d 1156, 1159-60 (9th Cir. 1984). When the acquisition under review has already been consummated, the

Commission may seek relief under § 13(b) in the form of a "hold-separate" order, which "requires the acquiring company to preserve the acquired company (or certain of the acquired assets) as a separate and independent entity during the course of the antitrust proceedings[,] . . . [in order] to maintain [the] acquired asset as a viable competitor while the litigation unfolds, and to safeguard 'unscrambled' the assets acquired so that they may be divested effectively should the government ultimately prevail." *FTC v. Weyerhaeuser Co.*, 655 F.2d 1072, 1075 n.7, 1084-87 (D.C. Cir. 1981); *see also FTC v. Exxon Corp.*, 636 F.2d 1336, 1342-44 (D.C. Cir. 1980).

B. The FTC's Investigation of LabCorp and LabCorp's Agreement to Hold the LabWest Assets Separate

LabCorp agreed to acquire the assets associated with Westcliff's clinical laboratory business on May 17, 2010, prior to the filing of the "pre-packaged" Chapter 11 petition that initiated this case on May 19, 2010. Although such an acquisition is subject to the Clayton Act, the parties were not required to report it under the Hart-Scott-Rodino Act because the purchase price was below the reporting threshold. Compl., ¶ 38 & n.4. Accordingly, the FTC's staff did not learn of the pending acquisition until June 2, 2010. Staff immediately contacted LabCorp's counsel and informally requested information about the competitive ramifications of the transaction. *Id.*, ¶¶ 39, 43.

The FTC staff's request was premised on the understanding that "Quest [Diagnostics] is the largest participant in the marketplace of the Debtors' business (with significantly more market share than any other party); LabCorp is the second largest participant . . .; and Westcliff is the third . . . ," as noted by a June 11 filing submitted by the Debtors-in-Possession.[2] If this information is correct, LabCorp's acquisition of Westcliff's business might reduce the number of significant competitors in this marketplace from three to two. The FTC, courts, and economists all agree that "mergers to duopoly" – *i.e.*, transactions that reduce the number of significant market participants from three to two – often raise serious competitive concerns. These concerns

[2] Debtors in Possession's Application for Order Setting Expedited Hearing on Debtors' Second Emergency Motion, 8-9, ¶ 15 (Doc. 113) (filed June 11, 2010) ("Debtors' Second Auction Application").

may be particularly acute where new entry into the market is difficult and costly, so that the two remaining competitors could more easily tacitly collude or coordinate their business decisions so as to increase prices, to the detriment of consumers. *See, e.g., FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 30, 46, 61 (D.D.C. 2009); *Heinz, supra*, 246 F.3d at 717. At this point, the Commission has not determined whether it believes the transaction at issue here fits within this rubric.[3]

The FTC staff requested, and the Commission granted, authorization to conduct a formal investigation to obtain more detailed information about the acquisition's potential competitive effects. Compl., ¶ 43. The FTC did not, however, appear or participate in any way in the proceedings before this Court, *id.*, ¶ 41, and did not take any position on the Court's decision, by Order issued June 9, 2010 (Doc. 106) (the "Sale Order"), to allow the transaction to proceed as initially proposed. The Debtors-in-Possession, recognizing the concerns raised informally by the FTC staff, filed a motion on June 11 asking this Court to authorize a second auction, this time with no minimum bid, on June 18. *See* Debtors' Second Auction Application. This Court approved that motion on June 14 (Doc. 117). LabCorp's counsel also represented to the FTC staff that the company would be willing to delay closing until at least the time of the second auction. Compl., ¶ 44.

Notwithstanding the commitments made by its counsel to FTC staff, LabCorp consummated its acquisition of the assets associated with Westcliff's business (hereafter referred to as the "LabWest assets") on June 16, 2010. By doing so, LabCorp, in effect, unilaterally preempted the second auction scheduled for June 18, notwithstanding the Court's order authorizing that auction to proceed.

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[3] LabCorp, with no substantiating evidence, alleges "on information and belief" that the FTC staff "pre-judged the outcome of its investigation." Compl., ¶ 45. While the truth or falsity of this assertion is irrelevant to the outcome of this Motion, it is in fact false. The FTC staff had determined by mid-June only that an investigation was appropriate to determine whether LabCorp's acquisition of the LabWest assets complies with § 7 of the Clayton Act and § 5 of the FTC Act. As of the date of LabCorp's premature filing, the *outcome* of the staff's investigation remained undetermined – and more significantly, the Commission had not made any determination that there was "reason to believe" a violation had occurred.

Once the transaction closed and LabCorp took ownership of the LabWest assets, the bankruptcy proceeding and the disposition of the estate became irrelevant to the FTC's main concerns – preserving competition and determining whether LabCorp's continued ownership of the assets may substantially lessen competition for any identifiable class of customers. In particular, the FTC staff became concerned that LabCorp might commingle the LabWest assets with the rest of its business before the investigation was completed – making it much more difficult to reconstitute the LabWest assets as a viable, stand-alone business, if necessary to restore competition. To address staff's concerns, on June 25, LabCorp voluntarily entered into a Hold Separate Agreement to maintain the LabWest assets separate from, and refrain from integrating them into, the rest of its business until Dec. 3, 2010. Compl., ¶ 46. The FTC investigation remains pending as of the date of this filing. Compl., ¶¶ 48-53.

III.

STANDARD OF REVIEW

This Motion seeks dismissal of LabCorp's complaint both for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). "When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Tosco Corp. v. Communities for a Better Env't*, 236 F.3d 495, 499 (9th Cir.2001); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "If the district court has no jurisdiction over a particular proceeding, then neither does the bankruptcy court." *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988). "Because bankruptcy judges are not Article III judges, the Constitution limits their ability to adjudicate – *i.e.*, to render a final judgment – to . . . . 'core proceedings' that arise under or arise in a case under Title 11." *In re Harris*, 590 F.3d 730, 736-37 (9th Cir. 2009); *see* 28 U.S.C. § 157.

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. . . . [The Court is] not bound to accept as true a legal conclusion couched as a factual allegation."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Dismissal is warranted under Rule 12(b)(6) where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). Bankruptcy courts apply the same standards as district courts when ruling on motions to dismiss under Fed. R. Civ. P. 12(b)(6). *In re Hemmeter*, 242 F.3d 1186, 1189 & n.1 (9th Cir. 2001).

IV.

ARGUMENT

The Bankruptcy Court Cannot Enjoin an FTC Antitrust Law Enforcement Action Against LabCorp

LabCorp's Complaint presents three basic contentions, each of which is meritless:

(1) "Count One – Declaratory Relief (Collateral Attack on Sale Order):" "The FTC now threatens to collaterally attack the Court's Sale Order and the Sale itself in another jurisdiction. This imminent collateral attack has the very real potential of rescinding the sale altogether . . ." Compl. at 2, lines 8-9; *see also id.* at 23, ¶¶ 90-97.

(2) "Count Two – Declaratory Relief (Violation of Sale Order Injunction):" "[T]he FTC has and continues to take actions that violate the injunction [in the Sale Order]. As set forth above, the FTC has and continues to conduct an investigation regarding the transfer of the Purchased Assets and threatened to file legal proceedings attacking the legality of the integration of assets . . . ." *Id.* at 24, ¶ 101; *see generally id.*, ¶¶ 98-102.

(3) "Count Three – Injunctive Relief:" "Absent injunctive relief preventing the FTC from filing a lawsuit in another jurisdiction that may result in rescission or other adverse effects upon the Sale order, . . . the bankruptcy process will be irreparably harmed." *Id.* at 25, ¶ 105; *see generally id.*, ¶¶ 103-08.

As discussed below, the first and third of these Counts are premised on a completely implausible prediction of future FTC action – commencing litigation that could somehow "collaterally" attack this Court's approval of the estate's sale of assets to LabCorp and result in "rescission" of the sale (*i.e.*, requiring LabCorp to transfer the LabWest assets back to the bankrupt estate). There is no realistic possibility that this outcome could occur, since rescission would fail to restore viable competition and thus would run counter to the FTC's interests and its statutory mandate of protecting consumers and safeguarding competition. The argument in the first and second Counts that the injunction contained in this Court's Sale Order somehow precludes an FTC antitrust enforcement action is premised on a far-fetched and erroneous construction of that Order.

The gravamen of LabCorp's complaint is that the FTC "imminently" is about to sue to rescind the estate's sale of the LabWest assets to LabCorp, thus forcing those assets to be returned to the estate, and thereby "collaterally challenging" the Bankruptcy Court's June 9 Sale Order. LabCorp warns over and over[4] that an FTC enforcement action against LabCorp would have "the very real potential of rescinding the sale altogether," and contends that rescission "would have catastrophic effects in these bankruptcy cases." Compl. at 2, lines 9-10; *id.* at 18, ¶ 68. But as discussed below, it is completely implausible that the FTC would "collaterally challenge" the Sale Order, and the Commission has no reason to seek to compel LabCorp to transfer the LabWest assets back to the bankruptcy estate.

A. An FTC Enforcement Action Would Not Constitute a "Collateral Attack" on the Bankruptcy Court's Sale Order

Now that LabCorp has completed the acquisition authorized by the Sale Order and (presumably) has paid the amounts due to the estate, it would be impossible for the FTC to collaterally challenge the Sale Order so as to "block" the acquisition from proceeding. *Id.*, ¶ 46. A transaction that has already been consummated can't be "blocked," regardless of whether the FTC challenged the Sale Order directly or "collaterally."

If, in the future, the FTC challenges LabCorp's continued ownership of the LabWest assets, or seeks a preliminary injunction requiring the company to continue the "hold-separate"

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[4] The words "rescission" or "rescind" appear 29 times in the 26-page Complaint.

arrangement, such an action would not constitute a "collateral attack" on the Bankruptcy Court's Sale Order. The Sale Order does not address what LabCorp can or cannot do with the acquired assets following the acquisition. For example, nothing in the Order prohibits LabCorp from divesting those assets to a third party; no provision in the Order prohibits LabCorp from holding the acquired assets separate from its existing business; and nothing in the Order requires LabCorp to integrate the acquired assets into its existing business. And certainly nothing in the Sale Order immunizes LabCorp from liability for violating the antitrust laws following the acquisition.

To be sure, the Sale Order does includes language enjoining "all persons and entities," including government agencies, from "asserting or holding any *Encumbrance* with respect to the Purchased Assets . . . arising under or out of, in connection with, or in any way relating to the Debtors, the Purchased Assets, the operation of the Debtors' Business prior to the Closing Date or the transfer of the Purchased Assets to Purchaser." Sale Order at 31, ¶ 31 (emphasis added); *see also* Compl., ¶ 99. This provision, however, does not support LabCorp's bald assertion that the "Sale Order Injunction . . . [prohibits the FTC] from asserting any claims that relate to or are in any way connected to the transfer of the assets to Plaintiffs pursuant to the Sale Order." *Id.*, ¶ 100. LabCorp's expansive construction of this provision is inconsistent with other provisions of the Sale Order and is erroneous.

The Sale Order defines the term "encumbrances" to mean "liens, encumbrances, claims and interests." Sale Order at 15, ¶ 33. All of these terms refer to property rights, financial interests, or claims for monetary recovery[5] – not equitable relief such as antitrust divestitures or

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[5] For example, Black's Law Dictionary (9th ed., 2009) defines "encumbrance" as "[a] claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest. An encumbrance cannot defeat the transfer of possession, but it remains after the property or right is transferred." The same dictionary defines "lien" as "[a] legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied. Typically, the creditor does not take possession of the property on which the lien has been obtained." The Bankruptcy Code defines "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation," 11 U.S.C. § 101(37); and defines "claim" as a "right to

"hold-separate" injunctions. The "encumbrances" that the Sale Order enjoins in this paragraph cannot include antitrust law enforcement actions such as those that LabCorp alleges the FTC is contemplating.

Nor does LabCorp contend that the FTC is contemplating an action seeking damages or trying to recover money from the estate. In a Clayton Act enforcement action such as the suit LabCorp alleges the Commission may decide to bring against it, the FTC – like the California Attorney General in *Lockyer v. Mirant Corp.*, 398 F.3d 1098 (9th Cir. 2004) – "does not seek a monetary recovery, and asserts no interest of the state in the [assets] that are the subject of [its] suit. Rather, the [FTC] seeks only an injunction that would require [the defendant] to divest itself of the [assets]." *Id.* at 1109. On this basis, the court held, such a "Clayton Act suit comes within the 'police and regulatory power' exception," *id.*, and such an action, "brought to protect an important governmental interest[,] . . . . does not interfere with" and "is distinct from the bankruptcy proceeding, [so that] it is relatively unlikely that resolution of the bankruptcy proceeding will significantly assist . . . in the decision of the factual and legal issues" raised by the Clayton Act enforcement action. *Id.* at 1112. As in the *Mirant* case, it would be improper in the present case for the Court to issue a discretionary stay, pursuant to 11 U.S.C. § 105(a), of an FTC antitrust action. Moreover, like the defendant in *CFTC v. NRG Energy, Inc.*, LabCorp "has cited no authority permitting bankruptcy courts completely to eliminate an agency's ability to pursue an enforcement action seeking only injunctive relief. Such a reading of the order and plan would be invalid as a matter of law." *CFTC v. NRG Energy, Inc.*, 457 F.3d 776, 781 (8th Cir. 2006) (finding that a confirmation order enjoining the commencement of collateral proceedings that could adversely affect the bankruptcy estate did not preclude an agency's enforcement action for future violations of the Commodity Exchange Act.)

Similarly, in *In re First Alliance Mortgage Co.*, the court reversed a Bankruptcy Court order enjoining an FTC civil enforcement action because, "[w]hen a governmental unit brings a

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payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . . ." 11 U.S.C. 101(5)(A) and (B).

regulatory or police powers action in part to prevent future harm, the court in which that action is brought is the proper forum for deciding whether there is a risk of future harm and the decision should be made on the merits in that action, with reference to the substantive law governing the action, rather than in an abbreviated, preliminary fashion in the bankruptcy proceeding." 264 B.R. 634, 649 (C.D. Cal. 2001). "According to the [Supreme] Court, where the matter has been entrusted by Congress to an administrative agency, the bankruptcy court should normally stay its hand pending an administrative decision because Congress has entrusted to the agency the authority to determine appropriate remedies." *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1250 (9th Cir. 1979), citing *Nathanson v. NLRB*, 344 U.S. 25, 30 (1952).

Consistently, in *In re Financial News Network*, 126 B.R. 157 (S.D.N.Y. 1991), even though the FTC had subjected itself to the jurisdiction of the Bankruptcy Court by participating in the bankruptcy proceeding and "presenting antitrust objections" to the proposed asset sale, *id.* at 161 – which the FTC did *not* do in the present case – the Bankruptcy Court's order authorizing the asset sale would have no effect on "antitrust enforcement agencies' discretion over the forum in which to seek relief, because [even after] the sale is consummated, *the FTC and the States retain the ability to sue in the forum of their choice to bring about divestiture*." *Id.* (emphasis added; punctuation altered). "This result," the court held, "is [also] consistent with the purpose of allowing the Bankruptcy Court broad jurisdiction over matters concerning disposition of the debtor's assets." *Id.* Similarly, in the present case, the FTC retains the ability to sue in the forum of its choice to bring about divestiture – and the FTC's freedom to challenge the consummated acquisition in this manner is entirely consistent with preserving the Bankruptcy Court's authority over the estate.[6]

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[6] *See also Lockyer v. Mirant Corp.*, 398 F.3d at 1107 (to prevent bankruptcy proceedings from becoming "a haven for wrongdoers," Congress adopted 11 U.S.C. § 362(b)(4), which preserves government agencies' authority to pursue police and regulatory enforcement actions notwithstanding the automatic stay of litigation involving bankrupt parties); *Universal Life Church v. United States*, 128 F.3d 1294, 1297 (9th Cir. 1997) (same); *CFTC v. Co Petro Mktg. Group*, 700 F.2d 1279, 1283 (9th Cir. 1983) (same); *City & County of San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1127 (9th Cir. 2006) ("Through various provisions of the

Nor could LabCorp possibly pretend that the injunction in the Sale Order insulates it from liability for violations of law it commits *after* the acquisition. For all these reasons, the injunction in the Sale Order cannot be interpreted to preclude an FTC law enforcement action against LabCorp, and such action would not be a "collateral attack" on the Sale Order.[7]

B. LabCorp's Contention That An FTC Enforcement Action Could Result in "Rescission" of the Asset Sale is Completely Unfounded.

LabCorp's assertion that a future FTC enforcement action could lead to rescission of the transaction is a red herring. Where the FTC or DOJ challenges a merger or acquisition that has already been consummated, "[d]ivestiture is the normal remedy for a violation of § 7, and rescission of the transaction rarely is required." *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 111 (2d Cir. 1984). The purpose of divestiture – or any remedy to consummated mergers or acquisitions found to be unlawful – is "to implement measures effective to restore competition." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. at 326; *see also Ford Motor Co. v.*

Bankruptcy Code, Congress has evidenced its intent that a governmental unit's police or regulatory action not be litigated in federal bankruptcy court.").

[7] LabCorp's contention that the FTC "is estopped or barred by laches" from pursuing an antitrust action against LabCorp (Compl. at 23, ¶ 95; *id.* at 26 (Request for Relief), ¶¶ 6 & 7) is meritless and can readily be dismissed. "As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); *see also New Hampshire v. Maine*, 532 U.S. 742, 755 (2001) ("it is well settled that the Government may not be estopped on the same terms as any other litigant," particularly where "estoppel would compromise a governmental interest in enforcing the law") (internal citations omitted). In the specific context of § 7 of the Clayton Act, the Supreme Court held that "equitable defenses such as laches, or perhaps 'unclean hands,' may protect consummated transactions from belated attacks by *private parties* when it would *not be too late for the Government to vindicate the public interest*." *California v. American Stores, Co.*, 495 U.S. at 296 (emphasis added). In the present case, laches clearly does not apply, because the FTC in no way "slept upon [its] rights." *Cheney v. U.S. District Court for the Dist. of Columbia*, 542 U.S. 367, 379 (2004). Rather, the Commission actively pursued its investigation of LabCorp by issuing a Subpoena Duces Tecum and a Civil Investigative Demand on July 1 – just 15 days after LabCorp consummated its acquisition of the assets. Compl., ¶ 49. "[T]he Government's active litigation posture was far from the neglect or delay that would make the application of laches appropriate." *Cheney*, 542 U.S. at 379.

United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be effective to redress the violations and to restore competition.").

The FTC consistently seeks divestiture remedies that will, to the extent possible, "ensure the viability of the divested entity as [a] producer" that can compete effectively in the relevant markets. *Olin Corp. v. FTC*, 986 F.2d 1295 (9th Cir. 1993); *see also Chicago Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 443 (5th Cir. 2008). Accordingly, in proposing and negotiating divestitures as remedies to anticompetitive mergers and oppositions, the FTC – as well as the U.S. Department of Justice – insist that the purchaser of divested assets "be competitively and financially viable" – *i.e.*, that the purchaser of the assets has "(1) the financial capability and incentives to acquire and operate the package of assets, and (2) the competitive ability to maintain or restore competition in the market."[8]

It would be anathema to force divestiture of a productive asset to an entity – such as a Chapter 11 bankruptcy estate in the process of winding down – that lacks the financial resources needed to operate and compete effectively in the relevant markets. To be sure, in appropriate circumstances, a court of equity theoretically has the authority to order rescission of an acquisition that violates § 7. *United States v. Coca-Cola Bottling Co. of Los Angeles*, 575 F.2d 222, 230 (9th Cir. 1978); *see also FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989); Compl., ¶ 64. Such circumstances are extremely rare, however, and are not present in this case.[9]

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[8] *See Statement of the Federal Trade Commission's Bureau of Competition on Negotiating Merger Remedies* at 8 (Apr. 2, 2003) (available at http://www.ftc.gov/bc/bestpractices/bestpractices030401.pdf). *See also* U.S. Dept. of Justice, *Antitrust Division Policy Guide to Merger Remedies* at 31-32 (Oct. 2004) (available at http://www.justice.gov/atr/public/guidelines/205108.pdf) (buyer must have "sufficient acumen, experience, and financial capability to compete effectively in the market over the long term.")

[9] Indeed, *Elders Grain* is the *only* case in which the Commission has ever sought rescission, and it illustrates how rare the circumstances are in which the Commission would seek that remedy. There, the parties to a proposed transaction that did not involve a bankruptcy proceeding not only evaded the Hart-Scott-Rodino reporting requirements by "splitting" the transaction into two parts, but also – having been alerted that the Commission was investigating the matter as a possible § 7 violation – accelerated the closing of the deal to a Sunday. 868 F.3d at 907. The Commission sued the next day, seeking to rescind the just-closed deal. Under those

In the present case, ordering rescission as a remedy would be contrary to the FTC's public policy interest and its statutory mandate – *i.e.*, restoring and promoting competition – and it is implausible to suppose that the Commission would seek such a remedy. In the event the FTC (or a District Court)[10] were to conclude that LabCorp's continued ownership of the acquired assets violates § 7, divestiture of the assets would be an obvious remedy – but the bankruptcy estate would be the worst possible candidate as the buyer of the assets that LabCorp would have to divest. The estate is manifestly unable to commit the needed financial resources to compete effectively, and has made abundantly clear that it has no interest in doing so.

The possibility of a rescission remedy is thus so remote as to be purely conjectural. *Cf. Borg-Warner*, 746 F.2d at 111 ("Nor is there any reason to think that if the Commission finds a violation, it will be unable to cure the violation by directing [the acquirer] to divest the assets it acquired" to a third party. "The likelihood that the Commission's proceeding against [the acquirer] will result in [rescission] . . . is too conjectural and speculative to justify an injunction . . . . Indeed, this conjectural speculation is the very kind of 'mere possibility' . . . that the Supreme Court stated in *Grant* was not sufficient to justify equitable relief . . . .") (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

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extraordinary circumstances, the Seventh Circuit agreed that § 13(b) must be read to allow a rescission remedy, lest such tactics be rewarded. *Id.* Judge Posner wrote for the court, "To reward these tactics by holding that a district court has no power under section 13(b) to rescind a consummated transaction would go far toward rendering the statute a dead letter. Some statutes are born dead, opponents having succeeded in blocking the enactment of a viable statute. There is no indication that this statute was meant to be a stillbirth." *Id.* at 907-908. *See also Community Publishers, Inc. v. Donrey Corp.*, 892 F.Supp. 1146, 1178-79 (W.D. Ark. 1995), *aff'd on other grounds*, 139 F.3d 1180 (8th Cir. 1998) (rescission was an appropriate remedy where the seller was "obviously quite capable of re-entering the market," "could virtually step in and continue where [it] left off before the sale," and was "eminently more qualified to run the newspaper or to sell it again, if that is its choice, than any [divestiture] trustee who could be found," making divestiture impractical).

[10] LabCorp raises the spectre that a District Court could order rescission *sua sponte* even if the FTC does not ask for it, Compl., ¶¶ 64, 67, but cites no case in which such a bizarre result has occurred. While a *sua sponte* preliminary injunction order mandating rescission might be possible as a theoretical matter, in practice no District Court has ever taken such an extraordinary step.

Apart from rescission, LabCorp identifies no remedy the FTC could seek against LabCorp that could possibly have any effect on the estate or its creditors. LabCorp's Complaint includes an extensive discussion about the purported harms that *LabCorp* is suffering as a result of the FTC's investigation and the "hold-separate" arrangement. Compl., ¶¶ 48-61. But neither the ongoing investigation of LabCorp nor the putative costs of the LabCorp/LabWest "hold-separate" arrangement has any impact on the estate or on the creditors.[11] LabCorp vaguely suggests that an FTC action "attacking the legality of the integration of assets" could "result in rescission of the sale," *id.*, ¶ 101, but does not explain how this supposed chain of causation could possibly work. LabCorp's inability to integrate the assets would not give the company any right to sell them back to the estate. Nor does LabCorp supply any explanation for why its *integration* of the assets with the rest of LabCorp's business (*i.e.*, terminating the "hold-separate" arrangement) at some point in the future has anything to do with the estate's *sale* of the assets to LabCorp back in June.

In sum, LabCorp has failed to "nudge" its contention that an FTC enforcement action would harm the estate and creditors "across the line from conceivable to plausible." *Twombly.*, 550 U.S. at 570. Indeed, LabCorp's contention that an FTC enforcement action would likely result in rescission of the asset sale transaction does not even make it as far as "conceivable." Accordingly, LabCorp's claims premised on these claims must be dismissed.

C. The Bankruptcy Court Lacks Jurisdiction to Enjoin a "Non-Core" Action That Would Affect Neither the Bankruptcy Estate Nor the Creditors.

The Bankruptcy Court may not enjoin prosecution of FTC civil law enforcement actions that will not affect the estate. Section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), does not authorize Bankruptcy Courts to enjoin a federal agency from commencing an action that is not "related to" the pending bankruptcy proceeding in any way. 28 U.S.C. §§ 157(a), 1334(b). A

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[11] LabCorp states that further delay of integration affects the estate by "mak[ing] it difficult to finalize the assumption or rejection of former Westcliff leases, a process that remains under the supervision of the Court." Compl., ¶ 73. The assertion that this could affect the estate is baseless. A delay in assuming or rejecting those contracts might affect Westcliff's former contract partners, as well as LabCorp, but it could not affect the estate itself, which is free of any obligations under those contracts.

civil action in which neither party is the debtor is considered "related to" the bankruptcy only if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy" – that is, if "the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995), citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1994); *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988).

As discussed above, an FTC enforcement proceeding will not result in rescission of the asset sale. Also, none of the other harms alleged by LabCorp, such as the purported costs of the "hold-separate" arrangement, has any effect on the estate. In this case, as in *Boucher v. Shaw*, 572 F.3d 1087 (9th Cir. 2009), the FTC's potential enforcement action would "not be[ ] . . . an alternative route to recoup the property of the estate, and therefore cannot be said to be 'related to' the bankruptcy proceeding, such that it would be swept into the bankruptcy court's jurisdiction under 28 U.S.C. § 1334(b). . . . Neither party has alleged that the estate would be diminished by any judgment in favor of the [FTC], nor is there any indication in the record that the [bankruptcy estate] would be required to indemnify [LabCorp or LabWest] for legal expenses or any judgment against them in this case." *Id.*, 572 F.3d at 1093. Thus, LabCorp cannot invoke the Bankruptcy Court's authority to enjoin an unrelated action that, if brought by the FTC, will not affect the bankruptcy estate.

Moreover, the present case is not a "core" proceeding "arising in" the bankruptcy case, and therefore is not susceptible to final adjudication by this Court.[12] "[T]he bankruptcy court does not have power to render a decision in non-core matters," but at most "may submit proposed findings of fact and conclusions of law, which the district court reviews *de novo*." *In re International Nutronics, Inc.*, 28 F.3d 965, 969 (1994). LabCorp asserts that this is a "core" proceeding on the basis of 28 U.S.C. § 157(b)(2)(A) ("matters concerning the administration of

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[12] *See* 28 U.S.C. § 157(b)(2) (listing examples of categories of "core" proceedings); *In re Harris Pine Mills*, 44 F.3d 1431, 1434-37 (9th Cir. 1995) (explaining distinction between "core" and "non-core" proceedings); *In re Mankin*, 823 F.2d 1296 (9th Cir. 1987) (same).

the estate") and § 157(b)(2)(N) ("orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate"). *See* Compl., ¶ 10. Not so. The prospective FTC action has nothing to do with "the administration of the estate" (§ 157(b)(2)(A)), since it would address the lawfulness of LabCorp's ownership and operation of assets that are no longer part of the estate. Similarly, as discussed above, the FTC has no reason to revisit or "collaterally challenge" the Sale Order, and therefore a potential FTC action (assuming the Commission decides to file it) will have no connection to "orders approving the sale of property" (§ 157(b)(2)(N)).

Most significantly, it would be "an abuse of discretion for the bankruptcy court to enjoin prosecution of the governmental actions outside the bankruptcy proceeding in the circumstances of this case," because "the governmental actions do not 'threaten' the assets of the estate enough to justify enjoining the governmental units from proceeding with their separate actions." *In re First Alliance Mortgage Co.*, 264 B.R. at 652. In that case, the FTC and a number of state attorneys-general brought separate petitions asserting that the debtor, a notorious subprime mortgage lender, had violated various consumer protection and fair lending laws. The court held that the balance of hardships tipped strongly against enjoining the FTC's and state agencies' law enforcement actions, reasoning that "the goals of public policy, punishment, and deterrence . . . are impaired when a governmental unit loses the ability to enforce its laws in its own forum. Considering deterrence in particular, . . . the governmental units were entitled to make the choice that, over time, similarly situated borrowers and consumers benefit more when companies do not violate the law in part because they know that bankruptcy will not provide a way out when their wrongs are discovered." *Id.* at 659. The court held that these public policy priorities outweighed the alleged harms to the debtor, consisting largely of litigation costs, which "do not constitute irreparable injury." *Id.* at 656, citing *EEOC v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir. 1986). Thus, the District Court vacated the injunction imposed by the Bankruptcy Court pursuant to 11 U.S.C. § 105(a) as an abuse of discretion.

In sum, both the legal strictures of the Bankruptcy Code and the public policies underlying the Code preclude this Court from preemptively enjoining an FTC enforcement action against LabCorp.

V.

CONCLUSION

For the foregoing reasons, LabCorp's Complaint and the instant adversary proceeding should be dismissed for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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