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8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
10

11 **FEDERAL TRADE COMMISSION,** )

**CASE NO. SACV 10-1873 AG (MLGx)**

12 **Plaintiff,** )

**ORDER DENYING PRELIMINARY  
INJUNCTION**

13 **v.** )

14 )  
15 **LABORATORY CORPORATION OF** )  
16 **AMERICA, et al.,** )

17 **Defendants.** )  
18 )  
19 )  
20 )

**REDACTED**

21 Plaintiff Federal Trade Commission ("FTC") seeks a preliminary injunction against  
22 Defendants Laboratory Corporation of America and Laboratory Corporation of America  
23 Holdings ("Defendants" or, collectively, "LabCorp"). After holding a hearing and reviewing all  
24 papers and arguments submitted, the Court DENIES the preliminary injunction.  
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28

1 **FINDINGS OF FACT**

2  
3 After reviewing the evidence, the Court makes the following findings of fact, including  
4 any findings of fact found in the Conclusions of Law.

5  
6 **1. THE PARTIES AND THE TRANSACTION**

7  
8 1. The FTC seeks a preliminary injunction under Section 13(b) of the Federal Trade Commission  
9 Act ("FTC Act"), 15 U.S.C. § 53(b) (2006), against the proposed acquisition of Westcliff  
10 Medical Laboratories ("Westcliff") by LabCorp. Preliminary injunctive relief is sometimes  
11 necessary to allow the FTC to determine, in administrative adjudication, whether the acquisition  
12 would violate Section 5 of the FTC Act, as amended, 15 U.S.C. § 45 (2006), or Section 7 of the  
13 Clayton Act, as amended, 15 U.S.C. § 18 (2006), because it may substantially lessen  
14 competition.

15  
16 2. Defendant LabCorp is a Delaware corporation with its office and principal place of business  
17 located at 358 South Main Street, Burlington, North Carolina. Def.'s Answer ¶ 13 (Dkt. No. 69);  
18 LabCorp, U.S. Securities and Exchange Commission Form 10-K 1 (2009), *available at*  
19 [http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-](http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5MjAxNDgtMTAtMDAwMDIxL3htbA%3d%3d)  
20 [SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5MjAxNDgtMTAtMDAwMDIxL3htbA%3d%3d](http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5MjAxNDgtMTAtMDAwMDIxL3htbA%3d%3d).  
21

22  
23 3. LabCorp is the second-largest independent clinical laboratory company in the United States. It  
24 provides clinical laboratory testing services to clients in all fifty states and the District of  
25 Columbia through a national network of primary, branch, and short turn around time ("STAT")  
26 laboratories, and over 1,500 patient service centers ("PSCs"). LabCorp, U.S. Securities and  
27 Exchange Commission Form 10-K 4 (2009), *available at* [http://phx.corporate-ir.net/](http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0)  
28 [phoenix.zhtml?c=84636&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0](http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-SECText&TEXT=aHR0cDovL2lyLmludC53ZXN0)

bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5MjAxNDgtMTAtMDAwMDIx  
L3htbA%3d%3d.

4. Westcliff, immediately before its acquisition by LabCorp, was the third-largest independent clinical laboratory in California. PX 0154 at ¶ 23 (Flyer Decl.); Pl.'s Presentation to the Court, Prelim. Inj. Hr'g 21 (Feb. 3, 2011).

5. Westcliff was founded in 1964. Until June 2006, Westcliff operated as a clinical laboratory services provider headquartered in and primarily focused on serving Orange County, California. LX-0404 (Vernaglia Decl.) ¶ 4.

6. In June 2006, Parthenon Capital Partners, a private equity firm, acquired and merged Health Line Clinical Laboratories and Westcliff to create Biolabs Inc. with Westcliff becoming a wholly owned subsidiary of Biolabs. LX-0404 (Vernaglia Decl.) ¶ 4; *See The Dark Daily*, "Westcliff Medical Laboratories Files Bankruptcy, Will be Sold to LabCorp," May 24, 2010, <http://www.darkdaily.com/westcliff-medical-laboratories-files-bankruptcy-will-be-sold-to-labcorp-524> (last visited Feb. 9, 2011).

7. Following the merger of Westcliff and HealthLine, Westcliff's management pursued a twofold strategy: (1) acquire several smaller laboratories and (2) increase accession volume in order to increase top-line revenue. *See The Dark Report*, "Did Wrong Strategy Sink Westcliff Medical Labs?," June 1, 2010, at [www.darkreport.com](http://www.darkreport.com).

8. In Southern California, LabCorp handles all of its routine testing at its regional laboratory in San Diego, California, which processes approximately 80,000 tests or 25,000 accessions per night. PX 1139 at 7.

1 9. LabCorp maintains over 200 PSCs in California, over 100 of which are in Southern  
2 California, and 14 STAT labs in California. PX 1139 at 7.

3  
4 10. In 2009, LabCorp had revenues of \$4.69 billion. *See* Laboratory Corporation of America  
5 Holdings Announces 2009 Fourth Quarter and Full Year Results, Feb. 11, 2010,  
6 [http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-newsArticle&ID=1387048&](http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-newsArticle&ID=1387048&highlight=)  
7 [highlight=](http://phx.corporate-ir.net/phoenix.zhtml?c=84636&p=irol-newsArticle&ID=1387048&highlight=)), of which \$174.6 million was derived in Southern California, PX 1149.

8  
9 11. Westcliff's 2006 merger with Health Line allowed Westcliff to reach the scale necessary to  
10 begin competing for and winning capitated physician group business. PX 7013 at 21 (Nicholson  
11 Tr.); PX 7003 at 107 (Aicher Tr.).

12  
13 12. Westcliff's revenues also increased from \$78.6 million in 2007 to \$95.7 million in 2009. PX  
14 1155.

15  
16 13. Westcliff handled all of its routine testing at its main laboratory in Santa Ana, California,  
17 which processed approximately 9,000 accessions per day. PX 1139 at 7. Westcliff's California  
18 operations also included 6 STAT laboratories, an anatomical pathology laboratory in Monrovia,  
19 California, and approximately 170 PSCs, over 100 of which were in Southern California. *Id.*

20  
21 14. At the time of the acquisition, Westcliff was generating profits from its operations and had  
22 nearly \$100 million in annualized revenue. PX 3018 at 2; *see* PX 7010 at 39-40 (McMahan Tr.).

23  
24 15. Westcliff had been saddled with an enormous debt load by Parthenon Capital Partners, and  
25 by late 2009 Westcliff was unable to meet its repayment obligations on that debt, PX 7010 at 51-  
26 54 (McMahan Tr.), and its creditors sought to put the company up for sale.

1 16. LabCorp explored a possible acquisition of Westcliff for more than one year before  
2 intensifying its negotiations with Westcliff in early 2010. PX 1191.

3  
4 17. Bids were solicited for the purchase of Westcliff, and a number of letters of intent were  
5 received from interested purchasers. PX 3001; PX 3002; PX 3003; PX 3004. In the end,  
6 LabCorp entered into an asset purchase agreement on May 17, 2010, to purchase substantially all  
7 of Westcliff's assets for \$57.5 million, in a transaction not reported under the Hart-Scott-  
8 Rodino Antitrust Improvements Act, Revised Jurisdictional Thresholds for Section 7A of the  
9 Clayton Act, 75 Fed. Reg. 3,468 (Jan. 21, 2010) (to be codified at 16 C.F.R. pt. 801-803). PX  
10 0301.

11  
12 18. FTC staff became aware of the transaction on June 2, 2010, and immediately notified  
13 LabCorp of staff's potential antitrust concerns regarding the deal. Def.'s Answer ¶ 16 (Dkt. No.  
14 69).

15  
16 19. LabCorp voluntarily entered into a hold separate agreement on June 25, 2010, to enable FTC  
17 staff to perform a substantial investigation. PX 0006; Def.'s Answer ¶ 17 (Dkt. No. 69).  
18 LabCorp agreed to maintain the hold separate until at least thirty days after it substantially  
19 complied with the Subpoena *Duces Tecum* and Civil Investigative Demand issued to LabCorp  
20 on July 2, 2010. PX 0006.

21  
22 20. LabCorp certified that it had complied with the Subpoena *Duces Tecum* and Civil  
23 Investigative Demand issued by the FTC on November 4, 2010, which set the expiration date of  
24 the hold separate agreement at December 3, 2010.

25  
26 21. On November 30, 2010, the FTC found that it had "reason to believe" that the transaction  
27 violated the antitrust laws and authorized staff to seek both a temporary restraining order  
28 ("TRO") and a preliminary injunction to prevent LabCorp from integrating with Westcliff

1 pending the outcome of an administrative trial under Section 7 of the Clayton Act and Section 5  
2 of the Federal Trade Commission Act. Compl. for TRO & Prelim. Inj. (Dkt. No. 3).

3  
4 22. Simultaneously, the FTC issued an administrative complaint charging that the acquisition  
5 violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and  
6 ordered that the administrative trial commence on May 2, 2011. Compl., *In the Matter of*  
7 *Laboratory Corp. of Am., et al.*, FTC Dkt. No. 9345 (filed Dec. 1, 2010).

8  
9 **2. PRODUCT MARKET**

10  
11 23. The FTC alleges that the relevant product market is “the sale of capitated clinical laboratory  
12 testing service . . . to physician groups.” FTC Mem. 13-14. The FTC alleges an alternative  
13 market of the sale of clinical laboratory testing services to physician groups operating under the  
14 delegated managed care model. FTC Complaint ¶ 20.

15  
16 24. Clinical laboratory tests are used to assist in the diagnosis, evaluation, detection, monitoring,  
17 and treatment of medical conditions by examining human blood, or other bodily fluids. PX 1139  
18 at 6. Clinical laboratory tests are ordered by physicians, who rely on them to diagnose, monitor,  
19 and treat their patients. PX 1139 at 6.

20  
21 25. Clinical laboratory tests are commonly broken down into categories of STAT, routine, and  
22 esoteric. STAT tests are those for which results are needed immediately. Results for STAT tests  
23 are typically reported within four hours of when the specimen is drawn. LX-0406 (Aicher  
24 Decl.).

25  
26 26. In California, healthcare services can be delivered to patients through a fee-for-service  
27 (“FFS”) model or a delegated model. FFS payers include third party payers (such as private  
28 health insurance plans), government payers (such as most Medicare and Medi-Cal plans), and

1 direct cash payers (usually patients who are uninsured). PX 0128 at ¶ 3 (██████████ Decl.);  
2 ██████████ (██████████) Dep. 35-36, Jan. 14, 2011. Under the FFS model, payers, such as health  
3 plans, retain the financial risk of patient care. Thus, the health plans pay physicians and other  
4 healthcare providers directly for each healthcare service provided to its insureds. For ancillary  
5 services, such as clinical laboratory testing services, health plans and clinical laboratory  
6 vendors may enter into a contract establishing a fee schedule for all laboratory testing. *See* PX  
7 0108 at ¶ 3 (██████████ Decl.); ██████████ (██████████) Dep. 35-36. The fee schedule is typically set so  
8 that health plans pay a negotiated discount off of the Medicare fee schedule.

9  
10 27. Clinical laboratory testing services are priced either on an FFS or capitated basis. PX 0128 at  
11 ¶ 3 (██████████ Decl.); ██████████ (██████████) Dep. 35-36; PX 0125 at ¶ 3 (██████████ Decl.).

12  
13 28. Physician groups prefer to and almost always do contract for clinical laboratory services on a  
14 capitated basis. PX 0102 at ¶ 4 (██████████ Decl.); ██████████ (██████████) Dep. 112, 119; ██████████  
15 (██████████) Dep. 55; PX 0104 at ¶ 3 (██████████ Decl.); PX 0108 at ¶ 2 (██████████ Decl.); ██████████  
16 (██████████) Dep. 18-19, Jan. 24, 2011; ██████████ (██████████) Dep. 39, Jan. 11, 2011; ██████████ (██████████)  
17 Dep. 100-02; PX 7003 at 77 (Aicher Tr.); PX 7004 at 73 (Harris Tr.); PX 0129 at ¶ 2 (██████████  
18 Decl.); PX 0146 at ¶ 3 (██████████ Decl.); PX 0119 at ¶ 2 (██████████ Decl.); PX 0120 at ¶ 3 (██████████  
19 Decl.); PX 0121 at ¶ 2 (██████████ Decl.); PX 0131 at ¶ 4 (██████████ Decl.); PX 0132 at ¶ 2  
20 (██████████ Decl.); PX 0160 at ¶ 4 (██████████ Decl.); PX 0161 at ¶ 4 (██████████ Decl.); PX 0159 at ¶  
21 3 (██████████ Decl.).

22  
23 29. Under the delegated managed care model, health maintenance organization ("HMO") health  
24 plans delegate specific healthcare services to be performed by physician groups in return for a  
25 capitated fee – a fixed payment per member, per month. ██████████ Dep. 46, Jan. 20, 2011; PX  
26 0107 at ¶ 3 (██████████ Decl.); PX 0108 at ¶ 2 (██████████ Decl.); PX 0109 at ¶ 2 (██████████ Decl.); PX  
27 0112 at ¶ 3 (██████████ Decl.); PX 0121 at ¶ 2 (██████████ Decl.); PX 0122 at ¶ 2 (██████████ Decl.);  
28 PX 0131 at ¶ 4 (██████████ Decl.); PX 0132 at ¶ 2 (██████████ Decl.); PX 0146 at ¶ 3 (██████████

1 Decl.); PX 0111 at ¶ 2 (██████ Decl.); ████████ (██████) Dep. 112, Jan. 27, 2011; ████████ (██████)  
2 Dep. 100-01, Jan. 13, 2010; ████████ (██████) Dep. 48-50.

3  
4 30. Physician groups are entities that provide, or through which its member physicians contract  
5 to provide, healthcare services to enrollees of HMO health plans (also called capitated lives),  
6 including a group medical practice, independent practice association (sometimes referred to as  
7 independent physician association) ("IPA"), physician service organization, management  
8 service organization, medical foundation, or physician/hospital organization. PX 0119 at ¶ 2  
9 (██████ Decl.); PX 0132 at ¶ 2 (██████ Decl.); PX 0102 at ¶ 4 (██████ Decl.); PX 0108 at ¶ 2  
10 (██████ Decl.); PX 0122 at ¶ 1 (██████ Decl.).

11  
12 31. Under the delegated managed care model, physician groups are responsible for purchasing  
13 ancillary services, including laboratory services, for their HMO patients. PX 0109 at ¶ 2 (██████  
14 Decl.); PX 0115 at ¶ 2 (██████ Decl.); PX 0111 at ¶ 2 (██████ Decl.); PX 0110 at ¶ 2  
15 (██████ Decl.); PX 0120 at ¶ 3 (██████ Decl.); PX 0121 at ¶ 2 (██████ Decl.); PX 0102 at ¶ 4  
16 (██████ Decl.); PX 0159 at ¶ 3 (██████ Decl.); ████████ (██████) Dep. 112. In Southern California,  
17 physician groups purchase clinical laboratory services directly from independent commercial  
18 laboratories for patients covered by HMO plans. PX 0121 at ¶ 2 (██████ Decl.); PX 0122 at ¶ 2  
19 (██████ Decl.); PX 0125 at ¶ 3 (██████ Decl.); ████████ (██████) Dep. 116-17; PX 0110 at ¶ 2  
20 (██████ Decl.); PX 0159 at ¶ 3 (██████ Decl.).

21  
22 32. LabCorp estimates that 90% of HMO enrollees in Southern California are covered under  
23 capitated laboratory contracts. PX 1148 at 1.

24  
25 33. Some physician groups also pay an additional fee for certain laboratory tests that are "carved  
26 out" of the capitation rate. PX 0124 at ¶ 3 (██████ Decl.); PX 0116 at ¶ 4 (██████ Decl.); PX  
27 0159 at ¶ 5 (██████ Decl.); ████████ (██████) Dep. 35-37; ████████ (██████) Dep. 12-13, 117. For  
28 these laboratory tests, the contract between the physician group and the laboratory vendor



1 establishes the price the physician group must pay for each of the carved out tests. The vast  
2 majority of clinical laboratory testing falls within the capitation rate. The number and price of  
3 carved out tests vary for each physician group customer. [REDACTED] ( [REDACTED] ) Dep. 12-13.

4  
5 34. Laboratory vendors offer capitated contracts to physician groups because the contract  
6 guarantees fixed monthly revenue for all of the physician group's HMO patients and provides a  
7 significant advantage in getting referrals from individual physician members of the physician  
8 group to conduct testing for their non-HMO patients. PX 7003 at 61 (Aicher Tr.);  
9 PX 7010 at 34-35 (McMahan Tr.); PX 0140 at ¶ 4 ( [REDACTED] Decl.); PX 0128 at ¶ 3 ( [REDACTED]  
10 Decl.); PX 0104 at ¶ 3 ( [REDACTED] Decl.); PX 0160 at ¶ 5 ( [REDACTED] Decl.); PX 7011 at 52, 63  
11 (Whalen Tr.); PX 7000 at 50 (King Tr.). This business is known as "pull-through" business and  
12 it is paid for by third parties (such as health plans) on a higher cost FFS basis. PX 7003 at 60  
13 (Aicher Tr.); PX 0104 at ¶ 3 ( [REDACTED] Decl.); PX0118 at ¶ 4 ( [REDACTED] Decl.); PX0131 at  
14 ¶ 5 ( [REDACTED] Decl.); PX0132 at ¶ 4 ( [REDACTED] Decl.); PX 0136 at 2 ( [REDACTED] Decl.); PX 0140  
15 at ¶ 4 ( [REDACTED] Decl.); PX 0117 at ¶ 4 ( [REDACTED] Decl.).

16  
17 35. The largest independent clinical laboratory in California is Quest Diagnostics Incorporated  
18 ("Quest"), which acquired Unilab Corporation ("Unilab") for approximately \$877 million in  
19 2003. *In re Quest Diagnostics Incorporated*, FTC Docket No. C-4074, Analysis to Aid Public  
20 Comment.

21  
22 36. There are at least fifteen other laboratories that currently provide lab services to physician  
23 groups in Southern California on a capitated basis. These labs include Consolidated Medical  
24 Bio-Analysis, Advanced Medical Analysis Lab, American Bio-Clinical Laboratories, Sun  
25 Clinical Laboratories, Foundation Laboratory, Physicians Automated laboratory, Unicare,  
26 BioData, ABC Labs, American Clinical Reference Lab, Central Coast Pathology Lab, Memorial  
27 Healthtech, Rady Children's Hospital, UCI Laboratory, and Whitefield Laboratories. LX-0407  
28 (McCarthy/Wu Decl.) Ex. 5; Ex. 5 (Updated 2/2/2011).

1 37. Other laboratories, although they do not currently have capitated contracts with physician  
2 groups, also currently compete to provide clinical laboratory services. For example, Primex, a  
3 clinical laboratory based in Van Nuys, California, previously provided clinical lab services to  
4 Community Medical Group under a capitated arrangement and submitted a proposal to provide  
5 laboratory services to a physician group on a capitated basis as recently as summer 2010.

6 PX0113 (██████ Decl.); LX-0407 (McCarthy/Wu Decl.) Ex. 5; Ex. 5 (Updated 2/2/2011);  
7 PX0139-003.  
8

9 38. The FTC admitted in another proceeding involving the same clinical laboratory services in  
10 California that the relevant product market should include both FFS and capitated business with  
11 IPAs. Compl. ¶ 8, In re Quest Diagnostics Inc. / Unilab Corp., FTC Docket No. C-4074 (Feb.  
12 21, 2003) (Quest / Unilab Compl.).  
13

14 39. Capitated and FFS billing arrangements are merely two different ways of paying for the  
15 same clinical laboratory services. LX-5005 (██████ Dep.) 23:9-15; LX-5003 (██████ Dep.)  
16 18:5-14, 50:20-51:12; LX-5015 (██████ Dep.) 40:5-11.  
17

18 40. The services provided by clinical labs are identical regardless of payment method. Clinical  
19 labs use the same PSCs, same couriers, same equipment, same reagents, same interfaces, same  
20 test menu, same STAT labs, same labs, and same employees to perform the same lab tests on  
21 both capitated and FFS accessions. LX-5006 (██████ Dep.) 20:21-21:10; LX-5005 (██████  
22 Dep.) 22:10-22, 43:6-9; LX-5002 (██████ Dep.) 46:16-47:15; LX-5004 (Flyer Dep.) 69:19-70:7,  
23 162:10-166:2-7; LX-0647 (Stephenson Decl.).  
24

25 41. Clinical laboratories that do not currently contract on a capitated basis are capable of doing  
26 so since they already provide the fundamental service – clinical lab service. LX-5002 (██████  
27 Dep.) 72:17-73:12; 87:4-9.  
28

1 42. Expanding the defined product market here to include FFS contracts with IPAs dramatically  
2 expands the number of competitors in the market and reduces LabCorp's and Westcliff's market  
3 shares significantly because at least 52 of 239 physician groups in California contract on a FFS  
4 basis. LX-0209 (Nov. 15, 2010 Leibenluft Letter).

5  
6 43. Discretionary FFS business from tests billed to physicians, patients, or third-party payers is  
7 "highly inter-related" to capitated business. LX-5015 (██████████ Dep.) 58:1-18.

8  
9 44. A capitated rate offered by a lab to an IPA is linked to the lab's estimate of the potential for  
10 discretionary FFS revenue the clinical lab hopes to realize from the IPA's physicians. PX-0154  
11 (Flyer Decl.) ¶ 9; LX-5002 (██████████ Dep.) 42:17-43:7; LX-5003 (██████████ Dep.) 23:14-24:21,  
12 25:5-25:15, 40:20-45:22; LX-2744 (██████████); LX-1610 (Feb. 23, 2010, Prospect P&L); LX-1611  
13 (May 4, 2009, Promed P&L); see also LX-5011 (Wu Dep.) 56:20-24, 63:2-17, 274:15-275:24.

14  
15 45. FTC Commissioner J. Thomas Rosch dissented from the FTC's decision to issue a complaint  
16 to challenge LabCorp's acquisition of Westcliff in part because the FTC's alleged product  
17 market is "misleading" in that it fails to account for the fact that discretionary FFS business is  
18 "inextricably linked" to an IPA's capitated business. LX-0208 (Rosch Dissent) at p. 2.

19  
20 46. Including discretionary FFS business in the relevant product market dramatically reduces  
21 LabCorp's and Westcliff's market shares because there are many clinical labs actively  
22 competing for this business. LX-5002 (██████████ Dep.) at 66:24-67:14; 80:2-6; 114:12-19.

23  
24 **3. GEOGRAPHIC MARKET**

25  
26 47. The FTC's proposed geographic market spanning all of "Southern California" includes the  
27 counties of Imperial, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San  
28 Luis Obispo, Santa Barbara, and Ventura.

1 48. The FTC has not alleged market share or market concentration data for any area smaller than  
2 "Southern California."

3  
4 49. Some clinical laboratories treat Southern and Northern California as distinct markets for  
5 business purposes. Quest separates its business into Northern and Southern California. Moverley  
6 (Quest) Dep. 130. *Compare* PX 5006 (Quest's Northern California Business Unit), *with* PX 5007  
7 (Quest's Southern California Tarzana Business Unit).

8  
9 50. The entities that the FTC identifies as the relevant customers for clinical laboratory services  
10 – the IPAs – require only PSCs in the handful of individual localities where their physicians  
11 have offices and where their patients reside. They do not require a clinical lab to have a network  
12 of PSCs across all of "Southern California." LX-5003 (██████████ Dep.) 13:2-7; LX-5005  
13 (██████████ Dep.) 46:3-46:11; LX-5001 (██████████ Dep.) 74:11-24; LX-5000 (██████████ Dep.) 25:6-10,  
14 67:4-15; LX-5014 (██████████ Dep.) 46:8-47:5; LX-5008 (██████████ Dep.) 39:7-10; LX-5007  
15 (██████████ Dep.) 44:13-19.

16  
17 51. The FTC has not identified any IPAs that require PSCs covering more than the local  
18 geographic area of their IPA physician/patient membership.

19  
20 52. Dr. Flyer could not identify a single IPA with a geographic coverage larger than two  
21 counties. LX-5004 (Flyer Dep.) 123:17-124:8.

22  
23 53. LabCorp's and/or Westcliff's share of the alleged market is effectively zero in six of the ten  
24 counties in "southern California." LX-0642 (Capitated Accessions by County); LX-0641  
25 (Capitated Lives by County); LX-5016 (██████████ Dep.) 46:1-9 ("I don't believe we're running  
26 into LabCorp much in Kern County"); Id. 51:15-19 (Q: "In Orange County, are you aware as to  
27 whether Westcliff does any capitated business at all in Orange County?" A: I'm not aware of any  
28 contracts that Westcliff have [sic] in Orange County, no."). As a result, LabCorp's acquisition

1 of Westcliff does not (and could not) present any threat of competitive harm to IPAs in any of  
2 those areas.

3  
4 54. Both LabCorp and Westcliff have PSCs and laboratory facilities throughout California.  
5 PX3064-008 (Westcliff Investor Presentation); PX1139-005 (CID Response).

6  
7 55. LabCorp provides clinical lab services throughout California from its lab in San Diego.  
8 PX1139-005 (CID Response).

9  
10 56. Westcliff provides clinical lab services throughout California and to parts of Arizona from its  
11 lab in Santa Ana. PX3064-008 (Westcliff Investor Presentation).

12  
13 57. Both LabCorp and Westcliff are able to provide clinical lab services to customers who are  
14 hundreds of miles away from their labs by utilizing low cost airline carriers. PX1139-005 (CID  
15 Response).

16  
17 58. A geographic market based on the locations of LabCorp's and Westcliff's respective labs in  
18 both Northern and Southern California would reduce the companies' combined market shares  
19 because other prominent competitors exist in "Northern California" such as Sutter Health  
20 Systems, Hunter Laboratories, and MuirLab. PX0134 (██████████ Decl.); PX1139-018 (CID  
21 Response); PX1139-017 (CID Response); LX-5002 (██████████ Dep.) 72:17-73:12.

22  
23 **4. COMPETITIVE EFFECTS**

24  
25 59. By 2007, after years of organic growth and a major consolidation with Health Line  
26 Laboratories, Westcliff began to compete successfully for capitated contracts with physician  
27 groups in Southern California. Westcliff obtained over 20 capitated physician group contracts  
28 since 2007, three of which were subsequently lost (one to LabCorp and two to consolidation

1 among physician group customers). PX 3132.

2  
3 60. Since Westcliff began competing for capitated physician group contracts, Westcliff's volume  
4 grew from approximately 6,600 accessions per day to 10,000 accessions per day. PX 7011 at 21  
5 (Whalen Tr.); PX 7007 at 34 (Vernaglia Tr.).

6  
7 61. By 2009, Westcliff's annual revenues had grown from approximately \$44 million before  
8 beginning to compete for physician group contracts to over \$97 million. PX 3018 at 2; PX 3130  
9 at 5.

10  
11 62. LabCorp's managed care monthly sales reports rarely mention any competitor other than  
12 Quest or Westcliff. *See, e.g.*, PX 1044, PX 1045, PX 1047, PX 1048, PX 1051, PX 1058.

13  
14 63. LabCorp's Regional Manager of Business Development observed that "Westcliff is  
15 [LabCorp's] largest competition besides Quest." PX 1133 at 1.

16  
17 64. The FTC permitted Quest to purchase Unilab with minimal divestiture even though their  
18 combined market share was 70 percent and the next largest competitor in the alleged market had  
19 only a 4 percent market share. Quest/Unilab Compl. ¶ 13.

20  
21 65. Westcliff entered into capitated contracting and expanded into new geographies in a  
22 relatively short period of time. LX-5003 (██████████ Dep.) 31:7-11, 102:25-103:19; LX-5004  
23 (Flyer Dep.) 215:16-216:23; LX-0304 (██████████ Decl.).

24  
25 66. There have been some recent new entrants into the "Southern California" market.

26  
27 67. Recently, Sonic purchased two clinical laboratories in "Southern California" and went from  
28 having no presence in California to operating in at least four of the ten counties that the FTC

1 defines as constituting "Southern California." Through its acquisitions, Sonic is now a  
2 participant in the alleged market because it already offers capitated contracts to IPAs. PX0140;  
3 PX0111. LX-0407 (McCarthy/Wu Decl.) Ex. 5; Ex. 5 (Updated 2/2/2011).

4  
5 68. On December 31, 2010, Sonic acquired Physicians Automated Laboratory ("PAL"), which is  
6 based in Bakersfield, California. Following the acquisition, Sonic characterized PAL as "a  
7 central location from which to build further business in California" and further stated that the  
8 acquisition "was the first step in a long-term growth plan for America's most populous state of  
9 32 million residents. Sonic plans more purchases in California." See LX-0638 (Sonic  
10 Healthcare Buys California Clinical Pathology Laboratory Company, Dark Daily, Jan. 17,  
11 2011); see also LX-0637 (Teresa Ooi, Sonic in \$84M Laboratory Spending Spree, The  
12 Australian, Jan. 18, 2011.).

13  
14 69. PAL currently has two capitated contracts with IPAs. LX-0407 (McCarthy/Wu Decl.) Ex. 5;  
15 Ex. 5 (Updated 2/2/2011).

16  
17 70. On February 7, 2011, Sonic announced the acquisition of Central Coast Pathology  
18 Consultants ("CCPC"), a clinical laboratory with annual revenues of over \$20 million that  
19 provides services in three Southern California counties (San Luis Obispo, Santa Barbara, and  
20 Ventura). See Company Announcement, Sonic Healthcare Acquires Second California  
21 Laboratory, available at <http://www.sonichealthcare.com/media/64859/942441.pdf>.

22  
23 71. On January 24, 2011, Pathology, Inc. announced the acquisition of Central Coast Clinical  
24 Laboratories ("CCCL"), "a leading California provider of clinical laboratory testing" located in  
25 Templeton, California. LX-0639 (██████████ Decl.) Ex. A.

26  
27 72. The minimum viable scale to provide capitated lab services is likely less than or equal to  
28 1,000 accessions per day. LX-5002 (██████████ Dep.) 66:24-67:14, 71:3-73:12, 86:2-13, 87:4-9;

#:1992

(██████ Dep.) 71:3-73:12.

209:19-211:4.

competitor into the alleged relevant market. LX-0407 (McCarthy/Wu Decl.) ¶ 30.

LabCorp's bidding behavior. LX-0407 (McCarthy/Wu Decl.) ¶¶ 30-32; LX-5011 (Wu Dep.)

entry. LX-0407 (McCarthy/Wu Decl.) ¶ 30.

78. Westcliff offered lower capitation rates to physician groups than LabCorp and Quest. PX

1026 at 1 (“[REDACTED]”)

must have sufficient economies of scale and an extensive network of PSCs providing convenient



1 Decl.); PX 0138 at ¶ 6 (██████ Decl.).

2  
3 80. LabCorp's CEO describes the clinical laboratory business as "a high-fixed cost business,  
4 whether [a laboratory is] small or large[.]" PX 7000 at 37 (King Tr.). Consequently, as testing  
5 volume increases, a laboratory's cost structure decreases, which ultimately allows a laboratory to  
6 offer lower capitation rates to physician group customers. PX 0118 at ¶ 6 (██████ Decl.); PX  
7 0117 at ¶ 6 (██████ Decl.); PX 0131 at ¶ 8 (██████ Decl.); PX 7007 at 292 (Vernaglia Tr.); *see*  
8 PX 0145 at ¶ 6 (██████ Decl.) (describing other factors contributing to higher costs).

9  
10 81. Because of the high fixed costs, larger laboratories are able to achieve significant benefits by  
11 driving more volume through their existing laboratory equipment and infrastructure. PX 7000 at  
12 35-39 (King Tr.).

13  
14 82. Reputational barriers can make it difficult for a new laboratory to break into the  
15 market and displace larger established clinical laboratory vendors. *See, e.g.*, PX 0120 at ¶ 4  
16 (██████ Decl.); PX 0121 at ¶ 3 (██████ Decl.); (██████) Dep. 38-41, 43-44.

17  
18 83. Dr. Wu, an expert for Defendants, analyzed efficiencies and found (██████) in annual  
19 efficiencies from both cost and supply savings. LX-0407 (McCarthy/Wu Decl.) 44-45.

20  
21 84. Dr. Wu also analyzed "price compression" and found (██████) in annual savings to  
22 health plan customers. LX-0407 (McCarthy/Wu Decl.) ¶¶ 47-49.

23  
24 85. Dr. Wu calculates that the overall savings to health plan customers will be approximately  
25 (██████) annually. LX-0407 (McCarthy/Wu Decl.).

1 **5. EQUITIES**

2  
3 86. Integration of the two companies would result in a "major benefit" for customers by  
4 "combining Westcliff's service model with the resources and potential economies of scale" of  
5 LabCorp. LX-0301 (Mason Decl.) ¶ 13.

6  
7 87. LabCorp presented evidence that the transaction will result in over \$22 million annually in  
8 merger-specific efficiencies resulting from consolidating redundant facilities and employees and  
9 taking advantage of LabCorp's lower supply costs. LX-0407 (McCarthy/Wu Decl.) ¶¶ 44-45;  
10 LX-5011 (Wu Dep.) 269:11-272:7.

11  
12 88. Under the Hold Separate Agreement and TRO, LabCorp has been subsidizing the significant  
13 inefficiencies of what formerly was Westcliff and is now LabWest. LX-0406 (Aicher Decl.) ¶ 6.

14  
15 89. LabWest has lost money every month since the acquisition.

16  
17 90. LabWest [REDACTED] in September 2010. LX-0405 (Rogge Decl.) ¶¶ 6-8.

18  
19 91. LabWest [REDACTED] in October 2010. LX-0405 (Rogge Decl.) ¶¶ 6-8.

20  
21 92. LabWest [REDACTED] in November 2010. LX-0405 (Rogge Decl.) ¶¶ 6-8.

22  
23 93. LabWest [REDACTED] in December 2010. LX-0652 (Rogge Decl.) ¶ 6

24  
25 94. LabWest's total losses since the acquisition [REDACTED] LX-0652 (Rogge Decl.) ¶ 6;  
26 LX-0405 (Rogge Decl.) ¶¶ 6-8.

1 95. Measuring LabWest accession numbers by month, they have decreased steadily every month  
2 since August 2010 from a total of almost [REDACTED] in August to under [REDACTED] accessions in  
3 December 2010. LX-0652 (Rogge Decl.) ¶ 6.

4  
5 96. Comparing LabWest's accessions on a per revenue day year-over-year – 2009 to 2010 –  
6 accessions are down roughly [REDACTED] percent from June 2010 to December 2010 as compared to  
7 the same time period in 2009. LX-0405 (Rogge Decl.) ¶ 14; LX-0652 (Rogge Decl.) ¶ 10;  
8 PX3120.

9  
10 97. LabCorp has loaned LabWest more than [REDACTED] LX-0405 (Rogge Decl.) ¶ 16;  
11 LX-0653 (Shoemaker Decl.) ¶¶ 11-12.

12  
13 98. The substantial monthly losses are expected to continue until LabCorp is able to integrate the  
14 former Westcliff business. LX-0405 (Rogge Decl.) ¶ 10.

15  
16 99. The extended length of the hold separate has created tremendous uncertainty for the  
17 employees of LabWest resulting in loss of key employees. LX-5009 (Shoemaker Dep.)  
18 39:16-40:5.

19  
20 100. The hold separate prevents LabCorp and LabWest from eliminating duplicative operations  
21 and from realizing other expected efficiencies. LX-0406 (Aicher Decl.) ¶¶ 18-31; LX-0405  
22 (Rogge Decl.) ¶¶ 5-13, LX-0403 (Shoemaker Decl.) ¶¶ 10-16.

23  
24 101. Allowing integration will better preserve the viability and value of those assets if a  
25 divestiture is ordered at some later date. LX-0653 (Shoemaker Decl.)

26  
27 102. Post-integration, LabCorp will be able to reduce staff in the courier department. Many  
28 existing Westcliff PSCs are situated on routes that LabCorp couriers already serve. Ultimately

1 LabCorp believes that between [REDACTED] courier positions can be eliminated, generating a  
2 monthly savings of [REDACTED]. Additionally, LabCorp estimates that by combining with  
3 Westcliff it will be able to reduce outside-courier expenses by about [REDACTED] per month. The  
4 full savings associated with the integration will be realized in month eight. PX1139-0049 (CID  
5 Response).

6  
7 103. Based on the current schedule and the FTC's Rules of Practice, the earliest the FTC would  
8 likely decide the administrative case would be in early 2012. *See* FTC Rules of Practice, §§  
9 3.41 (allowing a hearing of 210 hours, typically lasting between six and nine weeks), 3.46  
10 (post-hearing briefing – 31 total days), 3.51 (initial 70-day decision and 30-day extension), 3.52  
11 (appeal to FTC – minimum of 55 days), and 3.54 (FTC decision – 45 days). However, even  
12 though the FTC has had a rule limiting its own time for decisions since at least 1994 (currently  
13 45 days), it has apparently not followed its own timing constraints in antitrust cases. *See, e.g.,*  
14 <http://ftc.gov/os/adjpro/adjpropreprocedures.pdf>; cf. *In re Rambus*, docket at  
15 <http://ftc.gov/os/adjpro/d9302/index.shtm> (First Opinion issued twenty-three months after oral  
16 argument; Final Opinion issued eight months later); *In re Chicago Bridge*, docket at  
17 <http://ftc.gov/os/adjpro/d9300/index.shtm> (Opinion issued fourteen months after oral argument;  
18 final opinion with divestiture issued five years after oral argument). The FTC's most recent  
19 post-acquisition merger challenge, *In re Polypore*, was filed on September 10, 2008 and a final  
20 Opinion issued on December 10, 2010. Docket found at <http://ftc.gov/os/adjpro/d9327/>  
21 [index.shtm](http://ftc.gov/os/adjpro/d9327/index.shtm). The case is on appeal.

22  
23 104. The FTC has ordered that a hearing begin in this case on May 2, 2011. PX 0010 at 4.

24  
25 105. While the FTC rules were changed about two years ago in part to speed up the  
26 administrative process, 74 Fed. Reg. 20,205 (May 1, 2009), that process remains a long,  
27 drawn-out ordeal. Each of the FTC's post-consummation merger challenges over the past ten  
28 years has lasted at least two years and one lasted over seven years. *See In re Chicago Bridge*,

1 FTC Docket No. 9300, available at <http://www.ftc.gov/os/adjpro/d9300/index.shtm>; *In re*  
2 *Polypore.*, FTC Docket No. 9327, available at <http://www.ftc.gov/os/adjpro/d9327/index.shtm>;  
3 *In re Evanston Northwest Hospital Corp. & ENH Med. Group, Inc.*, FTC Docket No. 9315,  
4 available at <http://www.ftc.gov/os/adjpro/d9315/index.shtm>; *FTC v. Ovation Pharmaceuticals,*  
5 *Inc.*, FTC File No. 0810156, available at <http://www.ftc.gov/os/caselist/0810156/index.shtm>.

6  
7 106. The FTC is seeking to hold-separate products, laboratories, and courier services that it does  
8 not allege are in the relevant product market, including testing reimbursed on a fee-for-service  
9 basis by health plans, physicians, and patients in “Southern California.” Plaintiff’s Proposed  
10 Order.

11  
12 107. The FTC is seeking to hold separate products that are outside of the FTC’s alleged  
13 geographic market, including LabWest’s clinical laboratory services business in “Northern  
14 California” and Arizona. Plaintiff’s Proposed Order.

15  
16 108. The FTC is seeking to hold separate products in parts of “Southern California” in which  
17 LabCorp and Westcliff do not compete against each other for the alleged capitated contracts,  
18 such as in Orange, Kern, San Luis Obispo, Ventura, Imperial, and San Diego Counties.  
19 Plaintiff’s Proposed Order; LX-0641; LX-0642.

20  
21 109. If LabCorp and LabWest were to integrate and a court was later to determine that a  
22 divestiture was required to restore competition, LabCorp likely could divest the integrated assets  
23 in a timely fashion. LX-0406 (Aicher Decl.) ¶ 31.

24  
25 110. The Court finds that there may be extensive delays here between the commencement of the  
26 FTC administrative action and a final disposition on the merits.

27  
28 111. The Court finds that there is a real possibility that a preliminary injunction here would

1 financially devastate or destroy LabWest.

2  
3 **CONCLUSIONS OF LAW**

4  
5 The Court makes these conclusions of law, including any conclusions of law found in the  
6 Findings of Fact.

7  
8 **1. LEGAL STANDARD AND BURDEN-SHIFTING**

9  
10 112. This is an action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), by which the FTC  
11 seeks a preliminary injunction ordering LabCorp to preserve and hold separate the Westcliff  
12 assets that LabCorp acquired pending administrative adjudication of the underlying merits of  
13 whether the acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, or Section 5 of the  
14 FTC Act, 15 U.S.C. § 45. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC  
15 to seek a preliminary injunction to aid its enforcement of, inter alia, Section 7 of the Clayton  
16 Act, 15 U.S.C. § 18.

17  
18 113. The FTC is vested with authority and responsibility for enforcing, inter alia, Section 7 of  
19 the Clayton Act. Clayton Act § 11(a), 15 U.S.C. § 21(a). The FTC has jurisdiction to issue an  
20 order of divestiture, after an administrative hearing on the merits, against LabCorp, if the FTC  
21 determines that the acquisition violates Section 7 of the Clayton Act. *FTC v. Cardinal Health,*  
22 *Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

23  
24 114. The acquisition is a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, and  
25 Section 5 of the FTC Act, 15 U.S.C. § 45.

26  
27 115. At all relevant times, LabCorp and its relevant operating subsidiaries were engaged in  
28 "commerce," as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the

1 Clayton Act, 15 U.S.C. § 12.

2

3 116. This Court has jurisdiction over the subject matter of this action under 15 U.S.C. §§ 26 and  
4 53(b), and under 28 U.S.C. §§ 1331, 1337, and 1345.

5

6 117. This Court has jurisdiction over the persons of the defendants as they transact business in  
7 this district. 15 U.S.C. § 53(b).

8

9 118. Venue is proper in this district under 28 U.S.C. § 1391 (b) and (c). Venue is also proper  
10 under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and under Section 12 of the Clayton Act,  
11 15 U.S.C. § 22.

12

13 119. This Court has jurisdiction to issue a preliminary injunction ordering LabCorp to preserve  
14 and hold separate the Westcliff assets that LabCorp acquired pending adjudication of the legality  
15 of the acquisition by the FTC. 15 U.S.C. § 53(b).

16

17 120. The FTC's ongoing administrative action will determine whether the acquisition violates  
18 Section 7 of the Clayton Act, as amended.

19

20 121. Section 7 of the Clayton Act is concerned with preventing the creation or enhancement of  
21 market power. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577, 87 S. Ct. 1224, 1229, 18 L.  
22 Ed. 2d 303, 309 (1967); *see United States v. Archer-Daniels Midland Corp.*, 866 F.2d 242, 246  
23 (8th Cir. 1988) (The lawfulness of an acquisition turns on the purchaser's "potential for creating,  
24 enhancing, or facilitating the exercise of market power – the ability of one or more firms to raise  
25 prices above competitive levels for a significant period of time."). Because Section 7 "creates a  
26 relatively expansive definition of antitrust liability," a "plaintiff need only prove that [the  
27 acquisition's] effect 'may be substantially to lessen competition.'" *Cal. v. Am. Stores Co.*, 495  
28 U.S. 271, 284, 110 S. Ct. 1853, 1860, 109 L. Ed. 2d 240, 254 (1990); *see also FTC v. Warner*

1 *Commc'ns, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984) (per curiam) ("The 'core question [in a  
2 Section 7 case] is whether a merger may substantially lessen competition.'") (quoting *Procter &*  
3 *Gamble*, 386 U.S. 568, 577, 87 S. Ct. 1224, 1229, 18 L. Ed. 2d 303, 309 (1967)).

4  
5 122. The focus of Section 7 is on arresting anticompetitive mergers "in their incipiency," *Brown*  
6 *Shoe Co. v. U.S.*, 370 U.S. 294, 317, 82 S. Ct. 1502, 1520, 8 L. Ed. 2d 510, 531 (1962), and thus  
7 requires a prediction as to the merger's impact on future competition. *United States v. Phila.*  
8 *Nat'l Bank*, 374 U.S. 321, 362, 83 S. Ct. 1715, 1741, 10 L. Ed. 2d 915, 944 (1963). The Clayton  
9 Act was "intended to reach incipient monopolies and trade restraints outside the scope of the  
10 Sherman Act." *Brown Shoe*, 370 U.S. at 318 n.32. The object of the Clayton Act was to prevent  
11 acquisitions or mergers *before* they created competitive harm. "The intent . . . [was] to cope with  
12 monopolistic tendencies in their incipiency and well before they have attained such effects as  
13 would justify a Sherman Act proceeding." *Brown Shoe*, 370 U.S. at 318 n.32 (quoting S. Rep.  
14 No. 1775, 81st Cong., 2d Sess. 4-5); *see* 15 U.S.C. § 18.

15  
16 123. The traditional analysis of the likely anticompetitive effects of an acquisition begins with  
17 determinations of (1) the "line of commerce" or product market in which to assess the  
18 transaction; (2) the "section of the country" or geographic market in which to assess the  
19 transaction; and (3) the transaction's probable effect on concentration in the product and  
20 geographic markets. *U.S. v. Marine Bancorp.*, 418 U.S. 602, 618-23, 94 S. Ct. 2856, 2868-71, 41  
21 L. Ed. 2d 978, 993-97 (1974); *Warner Commc'ns*, 742 F.2d at 1160; *FTC v. H.J. Heinz Co.*, 246  
22 F.3d 708, 713 (D.D.C. 2001); *Chi. Bridge & Iron Co.N.V. v. FTC*, 534 F.3d 410, 422-23 (5th  
23 Cir. 2008); *FTC v. Univ. Health Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991).

24  
25 124. However, "this analytical structure does not exhaust the possible ways to prove a § 7  
26 violation on the merits, much less the ways to demonstrate a likelihood of success on the merits  
27 in a preliminary proceeding." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir.  
28 2008) (Brown, J.) (internal citations omitted); *see also* Fed. Trade Comm'n and U.S. Dep't of



Justice, *Horizontal Merger Guidelines* § 4.0 (2010) (“*Merger Guidelines*”) (PX0002) (“The Agencies’ analysis need not start with market definition.”).

125. Evidence establishing undue concentration in the relevant market makes out the government’s prima facie case and gives rise to a presumption of unlawfulness. *Phila. Nat’l Bank*, 374 U.S. at 363 ( “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in the market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”); *see also U.S. v. Gen. Dynamics Corp.*, 415 U.S. 486, 497, 94 S. Ct. 1186, 1194, 39 L. Ed. 2d 530, 542 (1974) (quoting *U.S. v. Aluminum Co. of Am.*, 377 U.S. 271, 279, 84 S. Ct. 1283, 1288, 12 L. Ed. 2d 314, 319 (1964) (“if concentration is already great, the importance of preventing even slight increases in concentration is correspondingly great.”)).

126. Once the government has established a prima facie violation of Section 7 based on the market share statistics, it is “incumbent upon [the defendant] to show that the market-share statistics gave an inaccurate account of the acquisition’s probable effects on competition.” *U.S. v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120, 95 S. Ct. 2099, 2118, 45 L. Ed. 2d 41, 66 (1975); *see Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993); *Heinz*, 246 F.3d at 715; *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

127. “[T]he more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully.” *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991). If the defendant comes forward with evidence sufficient to rebut the presumption, the burden of producing further evidence of anticompetitive effect shifts to the government, which retains the ultimate burden of proof at all times. *Baker Hughes*, 908 F.2d at 982-83.

128. The FTC may establish a rebuttable presumption that a merger has “an appreciable danger”

1 of anticompetitive consequences by showing “that the merger would produce a firm controlling  
2 an undue share of the relevant market and would result in a significant increase in the  
3 concentration of the market.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004)  
4 (citing *Heinz*, 246 F.3d at 715).

5  
6 129. If the FTC establishes such a presumption, a defendant may rebut that presumption by  
7 producing evidence that the “market-share statistics produce an inaccurate account of the  
8 merger’s probable effects on competition in the relevant market.” *Arch Coal*, 329 F. Supp. 2d  
9 109, 116 (D.D.C. 2004) (citation omitted).

10  
11 130. Section 13(b) of the FTC Act provides that a preliminary injunction may be granted “[u]pon  
12 a proper showing that, weighing the equities and considering the Commission’s likelihood of  
13 ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b)(2).

14  
15 131. Section 13(b) of the FTC Act imposes a two-part “public interest” standard for a court to  
16 use to determine whether a preliminary injunction should be granted. Under that standard, this  
17 Court should: “1) determine the likelihood that the Commission will ultimately succeed on the  
18 merits and 2) balance the equities.” *Warner Commc’ns*, 742 F.2d at 1159-60 (citing *FTC v.*  
19 *Weyerhaeuser Co.*, 665 F.2d 1072, 1082 (D.C. Cir. 1981) (Ginsburg, R., J.)); *Heinz*, 246 F.3d at  
20 714. These two factors are assessed on a sliding scale – that is, the greater the showing that the  
21 public equities favor a preliminary injunction, the lower the FTC’s burden on the likelihood of  
22 success on the merits (and vice versa). *Whole Foods*, 548 F.3d at 1035; see *Heinz*, 246 F.3d at  
23 726; *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 903 (7th Cir. 1989) (Posner, J.); *FTC v. CCC*  
24 *Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009). The equities will often weigh in favor of  
25 the FTC, since “‘the public interest in effective enforcement of the antitrust laws’ was  
26 Congress’s specific ‘public equity consideration’ in enacting” Section 13(b). *Whole Foods*, 548  
27 F.3d at 1035 (Brown, J.) (citing *Heinz*, 246 F.3d at 726); *Univ. Health*, 938 F.2d at 1225.

1 132. But this “sliding scale” approach does not eliminate the FTC’s need to demonstrate a  
2 likelihood of success on the merits. *See, e.g., Sifre v. Wells Fargo Bank*, No.  
3 3:10-cv-00572-RCJ-VPC, 2010 WL 5476788, at \*2 (D. Nev. Dec. 30, 2010); *see also CCC*  
4 *Holdings*, 605 F. Supp. 2d at 76 (applying “serious question” standard and devoting almost 40  
5 pages to evaluating the FTC’s likelihood of success on the merits); *Whole Foods*, 548 F.3d at  
6 1035 (finding that a court may not “simply rubber-stamp an injunction whenever the FTC  
7 provides some threshold evidence” and “must evaluate the FTC’s chance of success on the basis  
8 of all the evidence before it”); *FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995) (“[W]e  
9 rejected the Commission’s argument that it need only show a ‘fair or tenable chance of ultimate  
10 success on the merits’ in order to qualify for injunctive relief.”).

11  
12 133. The unique “public interest” standard for the injunctive relief sought by the FTC under  
13 Section 13(b) differs from the more stringent, traditional four part test for preliminary injunctive  
14 relief that applies to suits brought by private parties. *Warner Commc’ns*, 742 F.2d at 1159-60  
15 (“Section 13(b) places a lighter burden on the Commission than that imposed on private litigants  
16 by the traditional equity standard; the Commission need not show irreparable harm to obtain a  
17 preliminary injunction.”); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980). In  
18 enacting section 13(b), Congress explicitly intended “to maintain the statutory or ‘public  
19 interest’ standard which is now applicable, and not to impose the traditional ‘equity’ standard of  
20 irreparable damage, probability of success on the merits, and that the balance of hardships favors  
21 the petitioner.” *Weyerhaeuser*, 665 F.2d at 1081 (quoting H.R. Rep. No. 73-624, at 31 (1973)  
22 (Conf. Rep.), reprinted in 1973 U.S.C.C.A.N. 2523).

23  
24 134. Section 13(b) was enacted explicitly to preserve the FTC’s ability to order effective,  
25 ultimate relief upon completion of its administrative proceedings. H.R. Rep. No. 73-624, at 31;  
26 *see Whole Foods*, 548 F.3d at 1042 (Tatel, J., concurring) (“[T]he FTC – an expert agency acting  
27 on the public’s behalf – should be able to obtain injunctive relief more readily than private  
28 parties . . . .”); *Heinz*, 246 F.3d at 714. The “only purpose of a proceeding under [Section 13(b)]

1 is to preserve the status quo until [the] FTC can perform its function.” *FTC v. Food Town Stores,*  
2 *Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976); *accord Whole Foods*, 548 F.3d at 1035 (Brown, J.).

3  
4 135. Thus, the Court’s “task is not to make a final determination on whether the proposed  
5 [acquisition] violates section 7, but rather to make only a preliminary assessment of the  
6 [acquisition]’s impact on competition.” *Heinz*, 246 F.3d at 714 (citing *Univ. Health*, 938 F.2d at  
7 1217-18); *Warner Commc’ns*, 742 F.2d at 1162; *see also FTC v. Swedish Match N. Am., Inc.*,  
8 131 F. Supp. 2d 151, 156 (D.D.C. 2000); *Cardinal Health*, 12 F. Supp. 2d at 45; *FTC v. Staples,*  
9 *Inc.*, 970 F. Supp. 1066, 1070-71 (D.D.C. 1997).

10  
11 136. The FTC “need not prove that the proposed merger would in fact violate Section 7 of the  
12 Clayton Act. ‘The determination of whether the acquisition actually violates the antitrust laws is  
13 reserved for the Commission and is, therefore, not before this Court.’” *Cardinal Health*, 12 F.  
14 Supp. 2d at 45 (quoting *Staples*, 970 F. Supp. at 1070).

15  
16 137. The FTC satisfies its burden to show likelihood of success “if it raise[s] questions going to  
17 the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough  
18 investigation, study, deliberation and determination by the FTC in the first instance and  
19 ultimately by the Court of Appeals.” *Warner Commc’ns*, 742 F.2d at 1162 (quotation and  
20 citation omitted); *Whole Foods*, 548 F.3d at 1035 (Brown, J.); *Heinz*, 246 F.3d at 714-15; *FTC v.*  
21 *Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999); *Univ. Health*, 938 F.2d at 1218.  
22 In deciding whether the FTC has made such a showing, the Court should “bear in mind the FTC  
23 will be entitled to a presumption against the merger on the merits, *see Elders Grain*, 868 F.2d at  
24 906, and therefore does not need detailed evidence of anticompetitive effect at this preliminary  
25 phase.” *Whole Foods*, 548 F.3d at 1035 (Brown, J.).

26  
27 138. In all cases, “the judge remains obligated to exercise independent judgment on the propriety  
28 of issuance of a temporary restraining order or a preliminary injunction. Independent judgment

1 is not exercised when a court responds automatically to the agency's threshold showings."

2 *Weyerhaeuser*, 665 F.2d at 1082 (quotation omitted).

3  
4 139. The Court need not resolve conflicts of evidence or analyze extensively all antitrust issues;  
5 that is the role of the administrative proceeding. *Warner Commc'ns*, 742 F.2d at 1164 ("the issue  
6 in this action for preliminary relief is a narrow one, we do not resolve the conflicts in the  
7 evidence, compare concentration ratios and effects on competition in other cases, or undertake  
8 an extensive analysis of the antitrust issues."); *Whole Foods* 548 F.3d at 1042, 1048 (Tatel, J.,  
9 concurring) (the district court's job is not to pick between two expert theories, for when it does  
10 so, it "trench[es] on the FTC's role when [the court] choose[s] between plausible, well-supported  
11 expert studies."); *FTC v. Lancaster Colony Corp.*, 434 F. Supp. 1088, 1094, 1096 (S.D.N.Y.  
12 1977) ("Surely, we are not required, on a Section 13(b) application, to examine the economic  
13 characteristics of the entire [market] or to try the case. As a practical matter, a district court can  
14 hardly do more at so early a stage of antitrust litigation than to make a considered estimate of the  
15 FTC's apparent chances of success based upon what must necessarily be an imperfect,  
16 incomplete and fragile factual basis.").

17  
18 140. This Court is particularly concerned about granting provisional relief that would have huge  
19 economic consequences including the possible destruction of LabWest. In the administrative  
20 trial now set for May 2, 2011, there will be procedural and due process protections not fully  
21 available in the present proceedings.

## 22 23 **2. LIKELIHOOD OF SUCCESS ON THE MERITS**

24  
25 141. "The FTC bears the burden of proof and persuasion in defining the relevant market." *Arch*  
26 *Coal*, 329 F. Supp. 2d at 119 (citing *United States, v. Sungard Data Sys.*, 172 F. Supp. 2d 172,  
27 182-83 (D.D.C. 2001); *United States v. Engelhard Corp.*, 970 F. Supp. 1463, 1466 (M.D. Ga.  
28 1997) ("In order to prevail, the Plaintiff must carry the burdens of proof and persuasion

1 regarding market definition.”), aff’d, 126 F.3d 1302 (11th Cir. 1997).

2  
3 142. The failure to properly define a relevant market may lead to the dismissal of a Section 7  
4 claim. *See, e.g., Freeman Hosp.*, 69 F.3d at 268 (“Without a well-defined relevant market, an  
5 examination of a transaction’s competitive effects is without context or meaning.”); *Engelhard*  
6 *Corp.*, 970 F. Supp. at 1485 (“If the market is incorrectly defined, the market shares will have no  
7 meaning.”).

8  
9 143. “Not only is the proper definition of the relevant . . . market the first step in [a] case, it is  
10 also the key to the ultimate resolution of this type of case, since the scope of the market will  
11 necessarily impact any analysis of the anti-competitive effects of the transaction.” *Sungard Data*  
12 *Sys.*, 172 F. Supp. 2d at 181; *Marine Bancorp.*, 418 U.S. at 618-623 (Market definition is the  
13 first step in the analysis.); *Arch Coal*, 329 F. Supp. 2d at 116-17 (“[A]ntitrust theory and  
14 speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of  
15 the record evidence relating to the market and its probable future.”).

16  
17 144. Courts place products in the same product market where there is either effective  
18 demand-side substitution or effective supply-side substitution. *Compare Brown Shoe*, 370 U.S.  
19 294 (demand substitution) with *Twin City SportService, Inc. v. Charles O. Finley & Co.*, 512  
20 F.2d 1264 (9th Cir. 1975) (supply substitution).

21  
22 145. Demand-side substitution refers to customers’ decisions to purchase Product B rather than  
23 A because B is an adequate substitute for A.

24  
25 146. Supply-side substitution refers to the ability of producers of Product B to switch to  
26 producing Product A.

1 147. Courts also generally find that a cluster of related products are in the same relevant product  
2 market when they are sold by the merging parties or when the prices of the products are  
3 interdependent, or both. *See, e.g., U.S. v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350  
4 (1970); *Cal. v. Sutter Health System, et al.*, 130 F. Supp. 2d 1109, 1119 (N.D. Cal. 2001)  
5 (“[A]cute inpatient care” is the relevant market, even though “one cannot substitute a  
6 tonsillectomy for heart bypass surgery.”); *Reazin v. Blue Cross and Blue Shield of Kan., Inc.*,  
7 899 F.2d 951, 959 n. 10 (10th Cir.1990) (holding that “self-insurance” is part of market for  
8 private health care financing).

9  
10 148. A relevant product market defines the product boundaries within which competition  
11 meaningfully exists. *U.S. v. Continental Can Co.*, 378 U.S. 441, 449, 84 S. Ct. 1738, 1743, 12  
12 L. Ed. 2d 953, 959 (1964). “The outer boundaries of a product market are determined by the  
13 reasonable interchangeability of use [by consumers] or the cross-elasticity of demand between  
14 the product itself and substitutes for it.” *Brown Shoe*, 370 U.S. at 325.

15  
16 149. “The proper point of departure in any discussion of the relevant product market” is the “rule  
17 of reasonable interchangeability.” *Twin Cities SportsService, Inc.*, 512 F.2d at 1271. Thus,  
18 product market definition hinges “on a determination of those products to which consumers will  
19 turn, given reasonable variations in price.” *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone,*  
20 *Inc.*, 275 F.3d 762, 767 (9th Cir. 2001); *see also Olin*, 986 F.2d at 1298-99.

21  
22 150. Courts routinely recognize that otherwise identical products are not in separate markets  
23 simply because consumers pay for those products in different ways. *See, e.g., Little Rock*  
24 *Cardiology Clinic P.A. v. Baptist Health*, 591 F.3d 591, 597 (8th Cir. 2009) (finding that  
25 defining a market based on “how consumers pay . . . lacks support in both logic and law”); *HTI*  
26 *Health Servs. Inc. v. Quorum Health Group, Inc.*, 960 F. Supp. 1104, 1120 (S.D. Miss. 1997)  
27 (rejecting managed care provider market “based on the distinct discount pricing that is  
28 associated with managed care purchases . . . as myopic”).



1 151. Similarly, courts also have explicitly rejected the notion that various methods of paying for  
2 healthcare (HMO, PPO, etc.) are in separate product markets even though these payment  
3 methods have “consequences . . . for the allocation of the risk of medical expenses.” *See, e.g.,*  
4 *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1409-11 (7th Cir.  
5 1995) (Posner, J.) (HMOs do not constitute a separate market because they compete “not only  
6 with each other but also with the various types of fee-for-service provider[s]”).

7  
8 152. The mere fact that there are price differences between products does not preclude placing  
9 the products in the same relevant market because “price differentials . . . are relevant . . . but not  
10 determinative of the product market issue.” *Continental Can*, 378 U.S. at 455; *see also U.S. v.*  
11 *E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (finding products reasonably  
12 interchangeable despite substantial price difference); *AD/SAT, Div. of Skylight, Inc. v.*  
13 *Associated Press*, 181 F.3d 216 (2d Cir. 1999); *Tarrant Serv. Agency, Inc. v. Am. Standard, Inc.*,  
14 12 F.3d 609 (6th Cir. 1993); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832 (2d  
15 Cir. 1980); *Liggett & Myers, Inc. v. FTC*, 567 F.2d 1273 (4th Cir. 1977); *Twin City Sportservice,*  
16 *Inc.*, 512 F.2d 1264; *Engelhard Corp.*, 970 F. Supp. at 1484 (“The Merger Guidelines 5%-10%  
17 test is an inaccurate barometer of cross-elasticity of demand as to the facts presented in this  
18 case.”).

19  
20 153. Just as the product market analysis identifies the products that might plausibly be used by  
21 consumers to constrain a price increase, geographic market analysis defines the region “in which  
22 the seller operates, and to which the purchaser can practicably turn for suppliers.” *Tampa Elec.*  
23 *Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d. 580, 587 (1961);  
24 *see Merger Guidelines* § 4.2.

25  
26 154. In merger cases, the starting point for defining the relevant geographic market is the  
27 identification of “the area in which the goods or services at issue are marketed to a significant  
28 degree by the acquired firm.” *Marine Bancorp.*, 418 U.S. at 621.



1 155. The boundaries of a relevant geographic market need not be defined with “scientific  
2 precision,” *U.S. v. Conn. Nat’l Bank*, 418 U.S. 656, 669, 94 S. Ct. 2788, 2796, 41 L. Ed. 2d  
3 1016, 1028 (1974), or “by metes and bounds as a surveyor would lay off a plot of ground.” *U.S.*  
4 *v. Pabst Brewing Co.*, 384 U.S. 546, 549, 86 S. Ct. 1665, 1669, 16 L. Ed. 2d 765, 769 (1966).  
5 Rather, the relevant geographic market should “correspond to the commercial realities of the  
6 industry,” *Brown Shoe*, 370 U.S. at 336, and be “sufficiently defined so that the Court  
7 understands in which part of the country competition is threatened.” *Cardinal Health*, 12 F.  
8 Supp. 2d at 49.

9  
10 156. As the *Oracle* Court explained, “[a] presumption of anticompetitive effects from a  
11 combined share of 35% in a differentiated products market is unwarranted,” and “essentially a  
12 monopoly or dominant position” is required “[t]o prevail on a differentiated products unilateral  
13 effects claim.” *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1123 (N.D. Cal. 2004); *see also*  
14 *Commentary on the Horizontal Merger Guidelines* at 26 (“As an empirical matter, the unilateral  
15 effects challenges made by the Agencies nearly always have involved combined shares greater  
16 than 35%.”).

17  
18 157. Market shares must be measured in a proper relevant product and geographic market;  
19 alleging market shares in some other market is inadequate. *Marine Bancorp., Inc.*, 418 U.S. at  
20 618 (“Determination of the relevant product and geographic markets is a necessary predicate to  
21 deciding whether a merger contravenes the Clayton Act.”) (citation and quotation omitted); *see*  
22 *also E. I. du Pont de Nemours*, 353 U.S. at 593 (“Determination of the relevant market is a  
23 necessary predicate to a finding of a violation of the Clayton Act because the threatened  
24 monopoly must be one which will substantially lessen competition ‘within the area of effective  
25 competition.’ Substantiality can be determined only in terms of the market affected.”).

26  
27 158. If entry into the alleged relevant market is easy, then competitive effects are unlikely even  
28 in a highly-concentrated market. *Am. Stores.*, 872 F.2d at 842-43 (“An absence of entry barriers

1 into a market constrains anticompetitive conduct, irrespective of the market's degree of  
2 concentration."), rev'd on other grounds, 495 U.S. 271 (1990); *see also U.S. v. Syufy Enters.*,  
3 903 F.2d 659, 664-65 (9th Cir. 1990), aff'd, 903 F.2d 659 (9th Cir. 1990); *U.S. v. Waste Mgmt.*,  
4 *Inc.*, 743 F.2d 976, 981-83 (2d Cir. 1984) (finding a 48.8% market share insufficient because of  
5 easy entry).

6  
7 159. If entry is not costly and can be accomplished quickly, entry barriers are generally found to  
8 be low. *See, e.g., Baker Hughes*, 908 F.2d at 989 (noting that the sales and service network  
9 required for entry is not costly); *Waste Mgmt.*, 743 F.2d at 982 (assets required for entry are  
10 easily obtained); *U.S. v. Calmar Inc.*, 612 F. Supp. 1298, 1305-07 (D.N.J. 1985) (technology  
11 required for entry is simple).

12  
13 160. "In the absence of significant [entry] barriers, a company probably cannot maintain  
14 supracompetitive pricing for any length of time." *Baker Hughes*, 908 F.2d at 987.

15  
16 161. Defendants are not required to prove that entry will be "quick and effective" because  
17 "[s]uch evidence is rarely available." *Id.*, 908 F.2d at 988. Although defendants may present  
18 actual examples of firms that are "poised for future expansion," such examples are not required  
19 as "a firm that never enters a given market can nevertheless exert competitive pressure on that  
20 market. If barriers to entry are insignificant, the threat of entry can stimulate competition in a  
21 concentrated market, regardless of whether entry ever occurs." *Id.* at 988-89; *see also Falstaff*  
22 *Brewing*, 410 U.S. at 532-33; *Procter & Gamble.*, 386 U.S. at 581.

23  
24 162. "[A]lthough significant, statistics concerning market share and concentration are 'not  
25 conclusive indicators of anticompetitive effects.'" *Arch Coal*, 329 F. Supp. 2d at 130 (quoting  
26 *Gen. Dynamics Corp.*, 415 U.S. at 498. Indeed, "relying too heavily on a statistical case of  
27 market concentration alone" is inappropriate, and "instead a broad analysis of the market to  
28 determine any effects on competition is required." *Id.*

1 163. A merger or acquisition is likely to have unilateral effects if it will permit the combined  
2 firm to raise prices unilaterally post-merger. *Merger Guidelines* at § 6.1; *Oracle*, 331 F. Supp.  
3 2d at 1113.

4  
5 164. In evaluating the legality of a merger or acquisition under section 7, courts consider the  
6 procompetitive benefit of efficiencies related to the transaction. *Tenet Health Care Corp.*, 186  
7 F.3d at 1054-55.

8  
9 165. Mergers may enhance competition by combining complementary assets, eliminating  
10 duplicative assets, or achieving scale economies. *See, e.g., Cardinal Health*, 12 F. Supp. 2d at  
11 63; *FTC v. Alliant Techsystems*, 808 F. Supp. 9, 21 (D.D.C. 1992); *U.S. v. Carilion Health Sys.*,  
12 707 F. Supp. 840, 849 (W.D. Va. 1989), *aff'd mem.*, 892 F.2d 1042 (4th Cir. 1989); *FTC v.*  
13 *Owens-Illinois, Inc.*, 681 F. Supp. 27, 53 (D.D.C. 1988), vacated as moot, 850 F.2d 694 (D.C.  
14 Cir. 1988). These efficiencies may directly benefit consumers by, for example, improving  
15 quality, increasing innovation, and lowering prices.

16  
17 166. The Merger Guidelines recognize that “a primary benefit of mergers to the economy is their  
18 potential to generate significant efficiencies and thus enhance the merged firm’s ability and  
19 incentive to compete, which may result in lower prices, improved quality, enhanced service, or  
20 new products.” *Merger Guidelines* § 10. “The Agencies will not challenge a merger if  
21 cognizable efficiencies are of a character and magnitude such that the merger is not likely to be  
22 anticompetitive in any relevant market.” *Id.*

23  
24 167. The Court cannot conclude at this time that the FTC has demonstrated likelihood of success  
25 on the merits. The FTC fails to establish its prima facie case. Even assuming a prima facie case,  
26 Defendants have presented sufficient rebuttal evidence, particularly about new entrants.

1     **3.     BALANCING THE EQUITIES**

2  
3     168. In addition to considering likelihood of success on the merits, the Court also weighs the  
4     equities. *FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999).

5  
6     169. “[T]he ‘likelihood of success’ analysis and the ‘public equities’ analysis are legally  
7     different points and the latter should be analyzed separately, no matter how strong the agency’s  
8     case on the former.” *See CCC Holdings*, 605 F. Supp. 2d at 75; *see also Elders Grain*, 868 F.2d  
9     at 903-04 (noting the impropriety of the district judge’s collapse of the equities and merits  
10    inquiries into one inquiry).

11  
12    170. The FTC must prove that “the harm to the parties and to the public that would flow from a  
13    preliminary injunction is outweighed by the harm to competition, if any, that would occur in the  
14    period between denial of a preliminary injunction and the final adjudication of the merits of the  
15    Section 7 claim.” *FTC v. Occidental Petroleum Corp.*, No. 86-900, 1986 WL 952, at \*12  
16    (D.D.C. 1986) (quoting *FTC v. Great Lakes Chem. Corp.*, 528 F. Supp. 84, 86 (N.D. Ill. 1981)).

17  
18    171. Indeed, in order to sustain its burden, the FTC must present evidence and make an actual  
19    showing that the equities favor enjoining the transaction. *See, e.g., Whole Foods*, 548 F.3d  
20    at 1049-50 (Tatel, J., concurring) (remanding to the District Court for the parties to provide  
21    evidence on the equities); *Arch Coal*, 329 F. Supp. 2d at 160 (finding that the evidence presented  
22    by the FTC on equities was insufficient); *FTC v. Illinois Cereal Mills, Inc.*, 691 F. Supp. 1131,  
23    1140 (N.D. Ill. 1988) (The FTC “must show that the equities favor issuing the relief sought.”);  
24    *Great Lakes*, 528 F. Supp. at 86-87 (“[T]he FTC must show that ‘the equities’ favor enjoining the  
25    transaction.”).

26  
27    172. Even if the Court finds that the FTC has demonstrated a likelihood of success on the merits,  
28    “particularly strong equities [that] favor the merging parties” will bar a preliminary injunction.

1 See *Whole Foods*, 548 F.3d at 1035; see also *Great Lakes*, 528 F. Supp. at 87 (“Courts have  
2 recognized that public equities such as increased exports and benefits to local communities are  
3 ‘important equities’ that can lead to denial of preliminary relief even where the FTC shows the  
4 requisite likelihood of success.”).

5  
6 173. Conversely, “[a]bsent a likelihood of success on the merits, equities alone will not justify an  
7 injunction.” *Arch Coal*, 329 F. Supp. 2d 109, 159.

8  
9 174. A district court “may properly consider both public and private equities in undertaking the  
10 weighing mandated by Section 13(b).” *Freeman Hosp.*, 69 F.3d at 272 (quoting *FTC v. Nat’l*  
11 *Tea Co.*, 603 F.2d 694, 697 (8th Cir. 1979); see also *Warner Commc’ns*, 742 F.2d at 1165 (ruling  
12 that private interests “are entitled to serious consideration”).

13  
14 175. “[P]ublic and private interests are not altogether distinct, since in many situations the public  
15 interest is merely the aggregation of private interests.” *Elders Grain*, 868 F.2d at 904.

16  
17 176. Public equities include improved quality, lower prices, increased efficiency, realization of  
18 economies of scale, consolidation of operations, and elimination of duplication. *Owens-Illinois*,  
19 681 F. Supp. at 52; see also *Great Lakes*, 528 F. Supp. at 98 (noting that the public and private  
20 equities include benefits to shareholders, increased exports, improved R&D, preservation of  
21 local business, and alleviation of acquired company’s poor financial condition).

22  
23 177. “The principal public equity weighing in favor of issuance of preliminary injunctive relief  
24 is the public interest in effective enforcement of the antitrust laws.” *Heinz*, 246 F.3d at 726  
25 (citing *Univ. Health*, 938 F.2d at 1225); accord, *Exxon*, 636 F.2d at 1343. Effective enforcement  
26 “is made difficult when the FTC must undo a merger after it has been consummated,” *Freeman*  
27 *Hosp.*, 69 F.3d at 272, and the Court must take into account – as a “public equity” – the  
28 possibility that “denial of a preliminary injunction would preclude effective relief if the

1 Commission ultimately prevails and divestiture is ordered.” *Warner Commc’ns*, 742 F.2d at  
2 1165.

3  
4 178. While courts can take account of any relevant “private equities,” the “public equities  
5 receive far greater weight” in the balancing analysis. “[T]he pecuniary interests of the defendants  
6 should not be given controlling weight in deciding whether a preliminary injunction should be  
7 issued.” *Elders Grain*, 868 F.2d at 904. Thus, the Court may not “rank as a private equity  
8 meriting weight a mere expectation of private gain from a transaction the FTC has shown is  
9 likely to violate the antitrust laws.” *Weyerhaeuser*, 665 F.2d at 1083.

10  
11 179. Courts must also carefully consider whether preliminary injunctive relief is appropriate in  
12 light of the long time period between preliminary proceedings and a final decision on the merits.  
13 *Occidental*, 1986 WL 952, at \*13 (Because of the “glacial pace of an FTC administrative  
14 proceeding,” the FTC’s burden is a heavy one as “[e]xperience seems to demonstrate that . . .  
15 the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of  
16 an agreed merger.”) (quotation omitted); *FTC v. Freeman Hosp.*, 911 F. Supp. at 1227 n. 8  
17 (W.D. Mo. 1995) (denying preliminary injunction because the acquired company would no  
18 longer be in business by the time the FTC determined the merits of the dispute given that the  
19 “average time from the issuance of a complaint by the FTC to an initial decision by an  
20 administrative law judge averaged nearly three years in 1988”).

21  
22 180. This is particularly true when the government is the plaintiff as the merging parties will not  
23 be compensated for their harm during the pendency of the injunction, which renders such harm  
24 irreparable. *See, e.g., Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th  
25 Cir. 2010) (“Imposition of monetary damages that cannot later be recovered for reasons such as  
26 sovereign immunity constitutes irreparable injury.”); *see also United States v. FMC Corp.*, 218  
27 F. Supp. 817, 823 (D.C. Cal. 1963) (denying preliminary injunction because “the benefits to be  
28 lost by Avisco if the government is granted the relief which it seeks cannot be recouped should

1 defendants ultimately prevail”).

2

3 181. Whether a company is financially distressed or failing is also an important equitable  
4 consideration. *See, e.g., Freeman Hosp.*, 911 F. Supp. at 1227-28 (denying preliminary  
5 injunction because hospital would “no longer be in business by the time the FTC gets around to  
6 conducting a hearing on the merits of this dispute” despite the FTC’s desire to avoid “having to  
7 unscramble the eggs later”); *Great Lakes*, 528 F. Supp. at 87 (“[T]he debilitated condition of  
8 Velsicol’s bromine operations is an important equity to be considered because a preliminary  
9 injunction would exacerbate Velsicol’s problems . . . .”); *U.S. v. G. Heileman Brewing Co., Inc.*,  
10 345 F. Supp. 117, 124 (E.D. Mich. 1972) (finding that the acquired company was “in such a  
11 financially weakened condition that a preliminary injunction could . . . remove it as a  
12 competitive economic unit [and that] interlocutory relief is, under these circumstances,  
13 inequitable”).

14

15 182. Because of courts’ preferences for narrow rather than broad remedies, a preliminary  
16 injunction is particularly inappropriate where divestiture is a viable remedy. *See Great Lakes*,  
17 528 F. Supp. at 87 (“When weighing these equities, the court must consider whether divestiture  
18 would be an adequate remedy if, in fact, the FTC eventually prevails on the merits, since the  
19 purpose of Section 13(b) is to preserve the ability to ‘order effective, ultimate relief,’ not to bar  
20 all mergers that the FTC staff preliminarily views as suspicious.”); *Owens-Illinois*, 681 F. Supp.  
21 at 54 (“[I]n determining to deny preliminary relief, this avenue of relief [divestiture] must also be  
22 examined for later vindication of the public interest in the event the FTC ultimately is able to  
23 prove its case.”).

24

25 183. Courts have routinely permitted integration of certain assets where such integration would  
26 preserve the potential for divestiture in the future. *See, e.g., U.S. v. WorldCom, Inc.*, No.  
27 100-CV-02789 (RWR), 2001 WL 1057877, at \*2 (D.D.C. Aug. 29, 2001) (modifying hold  
28 separate “to improve the chances for accomplishing the divestiture”); *United States v. Newel*,



1 Inc., Civil No. N-82-305, 1985 WL 6262, at \*3 (D. Conn. July 16, 1985) (modifying hold  
2 separate order due to "irreparable losses"); *Occidental*, No. 86-900, 1986 WL 952, at \*11-12  
3 (D.D.C. April 29, 1986) (allowing acquisition where it would improve acquired assets making  
4 divestiture easier); *Great Lakes*, 528 F. Supp. at 98 ("If the acquisition were permitted to go  
5 forward and Great Lakes was ultimately required to divest [the acquired company], competition  
6 would be improved, not lessened, because Great Lakes would be selling a more viable operation  
7 than presently exists.").

8  
9 184. The Court concludes that the balancing of the equities strongly favors Defendants.

10  
11 **DISPOSITION**

12  
13 Based on the applicable facts and law concerning the relevant markets and other issues,  
14 the Court cannot conclude that the FTC is likely to succeed on the merits. Even if the FTC had  
15 demonstrated likelihood of success on the merits, such likelihood is minimal and heavily  
16 outweighed by the equities favoring denial of the injunction. Accordingly, the Court DENIES  
17 the preliminary injunction. The temporary restraining order issued by the Court in this matter is  
18 now dissolved.

19  
20  
21 IT IS SO ORDERED.

22  
23 DATED: February 22, 2011

24  
25 

26 Andrew J. Guilford

27 United States District Judge  
28