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10 **UNITED STATES BANKRUPTCY COURT**  
11 **CENTRAL DISTRICT OF CALIFORNIA**  
12 **SANTA ANA DIVISION**

13  
14 In re:

15 WESTCLIFF MEDICAL LABORATORIES,  
INC., et al.,

16 Debtors.

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18  
19  
20  
21 LABWEST, INC. and LABORATORY  
CORPORATION OF AMERICA,

22 Plaintiffs,

23 v.

24 FEDERAL TRADE COMMISSION,

25 Defendant.  
26  
27

Case No. 8:10-bk-16743-TA

Chapter 11 (Jointly Administered)

Adversary No. 8:10-ap-01564-TA

**DEFENDANT'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND ORDER TO SHOW CAUSE  
REGARDING PRELIMINARY  
INJUNCTION**

Hon. Theodor C. Albert

Hearing:

Date: December 8, 2010

Time: 10:00 am

Place: Courtroom: 5B

411 West Fourth Street

Santa Ana, California 92701

1 Defendant Federal Trade Commission hereby files its Opposition to Plaintiffs' Motion for  
2 Temporary Restraining Order and Order to Show Cause Regarding Preliminary Injunction ("PI  
3 Motion") [Adv. Docket No. 8], filed by Plaintiffs Laboratory Corporation of America and its  
4 wholly-owned subsidiary, LabWest, Inc. (collectively, "LabCorp").<sup>1</sup>

5 **I.**

6 **INTRODUCTION**

7 The Court should exercise its permissive abstention authority under 28 U.S.C.  
8 § 1334(c)(1) to abstain from hearing this adversary proceeding in the "interest of justice." Since  
9 the filing of LabCorp's PI Motion, two significant developments have occurred which militate  
10 for abstention by the Court.

- 11 (1) The FTC has initiated a civil law enforcement action ("FTC Action") under  
12 § 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53(b)) to stop  
13 Laboratory Corporation of America from integrating the recently acquired  
14 Westcliff Medical Laboratories, Inc. assets ("LabWest Assets") into its business.  
15 The FTC Action is currently pending before the U.S. District Court for the Central  
16 District of California.<sup>2</sup>
- 17 (2) On November 24 and December 2, 2010, the FTC filed its Motion to Dismiss and  
18 Emergency Motion, respectively, in which it clearly communicated its intention  
19 not to seek a rescission of the June 16, 2010 sale of the LabWest Assets. Since the  
20 FTC's goal is to prevent LabCorp from harming competition *going forward*, the

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22 <sup>1</sup> This written Opposition specifically responds to the Court's request in its December 3,  
23 2010 Order Granting Application and Setting Hearing on Shortened Notice that the FTC address  
24 the issue of abstention under 28 U.S.C. § 1334(c). [Adv. Docket No. 34]. Defendant intends to  
25 orally address the other bases for denying the PI Motion and dismissing this adversary  
proceeding at the December 8, 2010 hearing.

26 <sup>2</sup> The FTC originally initiated the FTC Action before the U.S. District Court for the  
27 District of Columbia on December 1, 2010. That Court, however, transferred venue of the case  
to the U.S. District Court for this judicial District by order issued on December 3, 2010.

1 agency has no reason to revisit this Court's June 9, 2010 Sale Order, to reverse the  
2 June 16, 2010 asset sale, or to pursue any monetary recovery from the estate.

3 Thus, any concerns that LabCorp has regarding the negative impact of the FTC  
4 Action on the debtors' estates and their creditors are *de minimus* at best.

5 As set forth more fully below, permissive abstention is appropriate because: (i) a parallel  
6 proceeding presenting identical issues is now pending in the U.S. District Court for this District;  
7 (ii) the instant proceeding is "non-core" and the predominant legal issues involve antitrust law,  
8 not bankruptcy law; and (iii) the preponderance of the factors that the Ninth Circuit has identified  
9 as favoring permissive abstention are satisfied. *See, e.g., In re Tucson Estates, Inc.*, 912 F.2d  
10 1162 (9th Cir. 1990); *Security Farms v. Int'l B'hood of Teamsters*, 124 F.3d 999 (9th Cir. 1997).

## 12 II.

### 13 ARGUMENT

#### 14 A. **Permissive Abstention is Warranted Under 28 U.S.C. § 1334(c)(1)**

15 Section 1334(c)(1) provides that "nothing in this section [establishing bankruptcy  
16 jurisdiction] prevents a district court in the interest of justice . . . from abstaining from hearing a  
17 particular proceeding under title 11 or arising in or related to a case under title 11." The Ninth  
18 Circuit has articulated twelve factors to be considered in determining whether permissive  
19 abstention is appropriate:

20 (1) the effect or lack thereof on the efficient administration of the estate if a Court  
21 recommends abstention, (2) the extent to which state law issues predominate over  
22 bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4)  
23 the presence of a related proceeding commenced in state court or other  
24 nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. §  
25 1334, (6) the degree of relatedness or remoteness of the proceeding to the main  
26 bankruptcy case, (7) the substance rather than form of an asserted "core"

1 proceeding, (8) the feasibility of severing state law claims from core bankruptcy  
2 matters to allow judgments to be entered in state court with enforcement left to the  
3 bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the  
4 likelihood that the commencement of the proceeding in bankruptcy court involves  
5 forum shopping by one of the parties, (11) the existence of a right to a jury trial,  
6 and (12) the presence in the proceeding of nondebtor parties.

7  
8 *In re Tucson Estates*, 912 F.2d at 1167; *accord*, *In re Eastport Assocs.*, 935 F.2d 1071, 1075-76  
9 (9th Cir. 1991); *In re Lazar*, 200 B.R. 358, 372-73 (Bankr. C.D. Cal. 1996). In addition to  
10 permitting state courts to deal with claims under state law, the abstention doctrine extends to  
11 cases where federal laws other than bankruptcy law (such as maritime or antitrust law) are at  
12 issue.

13 The plain language of *section 1334(c)(1)* provides for abstention when it would  
14 serve “the interest of justice, *or . . .* the interest of comity with State courts or  
15 respect for State law.” The language of the statute clearly is not limited to  
16 state-law cases, since the possible conditions for abstention are stated in the  
17 disjunctive. We are obliged to take the statute at its word.

18 *See In re Apex Oil Co.*, 980 F.2d 1150, 1152-53 (8th Cir. 1992) (emphasis in original).

19 Here, at least nine of these factors strongly favor abstention and dismissal of this  
20 adversary proceeding. First, under factor **(1)**, abstention would have no effect on the efficient  
21 administration of the estate, because none of the parties to this adversary proceeding are either  
22 debtors or creditors (thus also satisfying factor **(12)**). As explained in the FTC's Motion to  
23 Dismiss, there is no plausible likelihood that anything in the FTC's § 13(b) case could result in  
24 seeking monetary recovery from the estate or its creditors. *Cf. Lockyer v. Mirant Corp.*, 398 F.3d  
25 1098, 1109 (9th Cir. 2004) (the government “does not seek a monetary recovery, and asserts no  
26 interest . . . in the [assets] that are the subject of its suit,” but rather, “seeks only an injunction  
27

1 that would require [the defendant] to divest itself of the [assets]”); *see* FTC Mo. To Dismiss at 8-  
2 12.

3 Second, under factor **(2)**, the antitrust and competition law issues in dispute – regarding  
4 LabCorp’s alleged violations of § 7 of the Clayton Act and the § 5 of the FTC Act, and the FTC’s  
5 entitlement to an “hold-separate” injunction under § 13(b) of the FTC Act – powerfully outweigh  
6 any bankruptcy law questions at issue. Under factor **(3)**, these antitrust questions are difficult  
7 and complex – in other words, they are sufficiently “serious, substantial, difficult and doubtful as  
8 to make them fair ground for thorough investigation, study, deliberation and determination by the  
9 FTC in the first instance.” *FTC v. Warner Communications*, 742 F.2d 1156, 1162 (9<sup>th</sup> Cir. 1984).

10 Furthermore, with respect to factor **(4)**, the FTC’s civil law enforcement action pursuant  
11 to § 13(b) of the FTC Act, now pending before the U.S. District Court for this District, is closely  
12 related to LabCorp’s PI Motion. In order to obtain a preliminary injunction under § 13(b), the  
13 FTC must demonstrate a likelihood of success on the merits of its antitrust case and show that the  
14 equities weigh in favor of granting preliminary relief. *See FTC v. Affordable Media*, 179 F.3d  
15 1228, 1233 (9<sup>th</sup> Cir. 1999). Thus, the FTC’s affirmative case is not only closely related; it is  
16 virtually the “mirror image” of the present adversary proceeding, which LabCorp improperly  
17 brought “with full knowledge of the [FTC’s likely] intention to file suit . . . [,] as a preemptive  
18 strike in anticipation of the [FTC’s] action.” *Int’l Painters & Allied Trades Indus. Pens. Fund v.*  
19 *The Painting Co.*, 569 F. Supp. 2d 113, 117 (D.D.C. 2008). The pendency of the § 13(b) action  
20 in District Court strongly justifies abstention under factor **(4)**. Section 1334 is by no means the  
21 only basis for federal jurisdiction; the FTC’s civil action is grounded in antitrust law and  
22 jurisdiction is conferred by § 13(b) of the FTC Act, § 21 of the Clayton Act (15 U.S.C. § 26), and  
23 28 U.S.C. §§ 1331, 1337, and 1345. These alternative, non-bankruptcy-related sources of  
24 jurisdiction for the other pending case satisfy factor **(5)** and support abstention by this  
25 Bankruptcy Court.

1 Factors (6) and (7) also counsel in favor of abstention, because the present adversary  
2 proceeding has little, if any, relationship to the main bankruptcy case – the FTC does not seek  
3 “rescission” of the sale, does not “collaterally attack” any of this Court’s orders, and does not  
4 seek monetary recovery against the estate or the creditors – and the present case is not a “core”  
5 bankruptcy proceeding. See FTC Mo. To Dismiss at 15-17; see also *In re Tucson Estates*, 912  
6 F.2d at 1168-69 (rejecting bankruptcy court’s bases for characterizing dispute as a “core”  
7 proceeding and holding that abstention would have been proper). Even if the LabWest Assets  
8 were still assets of the estate – which they are not, now that LabCorp has consummated its  
9 acquisition of those assets, the fact that certain assets “are estate property does not require the  
10 bankruptcy court, as opposed to the [District] court, to hear the dispute.” *Id.* at 1169 (finding that  
11 a state court could adjudicate a dispute involving a golf course that was estate property).

12 Finally, under factor (10), LabCorp has transparently engaged in “forum shopping” by  
13 seeking to relief from the Court to preempt the FTC’s § 13(b) action strongly justifies abstention  
14 here. “Avoidance of forum shopping heavily favors abstention.” *In re Compact Disc Minimum*  
15 *Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131, 162 (D. Me. 2006). Moreover, where  
16 “non-core issues predominate,” as in this case, “[i]nasmuch as a bankruptcy court’s  
17 determinations on non-core matters are subject to *de novo* review by the district court,  
18 unnecessary costs could be avoided by a single proceeding in the district court.” *Security Farms*  
19 *v. Int’l B’hood of Teamsters*, 124 F.3d at 1009 (analyzing permissive withdrawal of the  
20 reference), citing *In re Mann*, 907 F.2d 923, 926 (9th Cir. 1990).

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1 **III.**

2 **CONCLUSION**

3 For the foregoing reasons, the FTC respectfully requests that the Court abstain from  
4 hearing the above-captioned adversary proceeding in order to allow the District Court to  
5 adjudicate the FTC's § 13(b) action, which invokes many of the same issues (e.g., likelihood of  
6 success and balance of the equities) raised by LabCorp's PI Motion.

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8 Dated: December 7, 2010

Respectfully submitted,

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