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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

FEDERAL TRADE COMMISSION,)

CASE NO. SACV 10-1873 AG (MLGx)

Plaintiff,)

**ORDER DENYING PRELIMINARY
INJUNCTION**

v.)

**LABORATORY CORPORATION OF
AMERICA, et al.,**)

Defendants.)

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

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 LapCorp, 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)

1 bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5MjAxNDgtMTAtMDAwMDIx
2 L3htbA%3d%3d.

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

7
8 5. Westcliff was founded in 1964. Until June 2006, Westcliff operated as a clinical laboratory
9 services provider headquartered in and primarily focused on serving Orange County, California.
10 LX-0404 (Vernaglia Decl.) ¶ 4.

11
12 6. In June 2006, Parthenon Capital Partners, a private equity firm, acquired and merged Health
13 Line Clinical Laboratories and Westcliff to create Biolabs Inc. with Westcliff becoming a wholly
14 owned subsidiary of Biolabs. LX-0404 (Vernaglia Decl.) ¶ 4; *See* The Dark Daily, “Westcliff
15 Medical Laboratories Files Bankruptcy, Will be Sold to LabCorp,” May 24, 2010,
16 <http://www.darkdaily.com/westcliff-medical-laboratories-files-bankruptcy-will-be-sold-to-labor>
17 [p-524](http://www.darkdaily.com/westcliff-medical-laboratories-files-bankruptcy-will-be-sold-to-labor) (last visited Feb. 9, 2011).

18
19 7. Following the merger of Westcliff and HealthLine, Westcliff’s management pursued a
20 twofold strategy: (1) acquire several smaller laboratories and (2) increase accession volume in
21 order to increase top-line revenue. *See* The Dark Report, “Did Wrong Strategy Sink Westcliff
22 Medical Labs?,” June 1, 2010, at www.darkreport.com.

23
24 8. In Southern California, LabCorp handles all of its routine testing at its regional laboratory in
25 San Diego, California, which processes approximately 80,000 tests or 25,000 accessions per
26 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 (Path Logic Decl.);
2 Glenn (Path Logic) 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 (LaSalle Decl.); Glenn (Path Logic) 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 (Path Logic Decl.); Glenn (Path Logic) Dep. 35-36; PX 0125 at ¶ 3 (CS Lab. 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 (Quest Decl.); Moverly (Quest) Dep. 112, 119; Swanson
15 (CAPG) Dep. 55; PX 0104 at ¶ 3 (Foundation Decl.); PX 0108 at ¶ 2 (LaSalle Decl.); Dempsey
16 (Hemet) Dep. 18-19, Jan. 24, 2011; Ananthan (Hispanic) Dep. 39, Jan. 11, 2011; Baroi (LaSalle)
17 Dep. 100-02; PX 7003 at 77 (Aicher Tr.); PX 7004 at 73 (Harris Tr.); PX 0129 at ¶ 2 (IEHP
18 Decl.); PX 0146 at ¶ 3 (BioPath Decl.); PX 0119 at ¶ 2 (Choice Decl.); PX 0120 at ¶ 3 (Excel
19 Decl.); PX 0121 at ¶ 2 (Prospect Decl.); PX 0131 at ¶ 4 (Path. Inc. Decl.); PX 0132 at ¶ 2
20 (SynerMed Decl.); PX 0160 at ¶ 4 (Vantage Decl.); PX 0161 at ¶ 4 (SMBP Decl.); PX 0159 at ¶
21 3 (HP 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. Swanson Dep. 46, Jan. 20, 2011; PX
26 0107 at ¶ 3 (Monarch Decl.); PX 0108 at ¶ 2 (LaSalle Decl.); PX 0109 at ¶ 2 (Sharp Decl.); PX
27 0112 at ¶ 3 (St. John’s Decl.); PX 0121 at ¶ 2 (Prospect Decl.); PX 0122 at ¶ 2 (CAPG Decl.);
28 PX 0131 at ¶ 4 (Path. Inc. Decl.); PX 0132 at ¶ 2 (SynerMed Decl.); PX 0146 at ¶ 3 (BioPath

1 Decl.); PX 0111 at ¶ 2 (CCP Decl.); Moverley (Quest) Dep. 112, Jan. 27, 2011; Baroi (LaSalle)
2 Dep. 100-01, Jan. 13, 2010; Swanson (CAPG) 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 (Choice Decl.); PX 0132 at ¶ 2 (SynerMed Decl.); PX 0102 at ¶ 4 (Quest Decl.); PX 0108 at ¶ 2
10 (LaSalle Decl.); PX 0122 at ¶ 1 (CAPG 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 (Sharp
14 Decl.); PX 0115 at ¶ 2 (Independence Decl.); PX 0111 at ¶ 2 (CCP Decl.); PX 0110 at ¶ 2
15 (Empire Decl.); PX0120 at ¶ 3 (Excel Decl.); PX 0121 at ¶ 2 (Prospect Decl.); PX 0102 at ¶ 4
16 (Quest Decl.); PX 0159 at ¶ 3 (HP Decl.); Moverley (Quest) 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 (Prospect Decl.); PX 0122 at ¶ 2
19 (CAPG Decl.); PX 0125 at ¶ 3 (CS Lab. Decl.); Moverley (Quest) Dep. 116-17; PX 0110 at ¶ 2
20 (Empire Decl.); PX 0159 at ¶ 3 (HP 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 (Nautilus Decl.); PX 0116 at ¶ 4 (Epic Decl.); PX
27 0159 at ¶ 5 (HP Decl.); Glenn (Path Logic) Dep. 35-37; Moverley (Quest) 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. Moverley (Quest) 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 (PAL Decl.); PX 0128 at ¶ 3 (Path Logic
10 Decl.); PX 0104 at ¶ 3 (Foundation Decl.); PX 0160 at ¶ 5 (Vantage 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 (Foundation Decl.); PX0118 at ¶ 4 (Long Beach Decl.); PX0131 at
14 ¶ 5 (Path. Inc. Decl.); PX0132 at ¶ 4 (SynerMed Decl.); PX 0136 at 2 (BioData Decl.); PX 0140
15 at ¶ 4 (PAL Decl.); PX 0117 at ¶ 4 (MuirLab 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 (LaBlue 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 (Zembik Dep.) 23:9-15; LX-5003 (O’Keefe Dep.)
16 18:5-14, 50:20-51:12; LX-5015 (Maring 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 (Gonzalez Dep.) 20:21-21:10; LX-5005 (Zembik
22 Dep.) 22:10-22, 43:6-9; LX-5002 (Glenn 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 (Glenn
27 Dep.) 72:17-73:12; 87:4-9.

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 (Maring 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 (Glenn Dep.) 42:17-43:7; LX-5003 (O'Keefe Dep.) 23:14-24:21,
12 25:5-25:15, 40:20-45:22; LX-2744 (Quest); 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 (Glenn 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 (O’Keefe Dep.) 13:2-7; LX-5005
13 (Zembik Dep.) 46:3-46:11; LX-5001 (Baroi Dep.) 74:11-24; LX-5000 (Ananthan Dep.) 25:6-10,
14 67:4-15; LX-5014 (Carrish Dep) 46:8-47:5; LX-5008 (Sonnenberg Dep.) 39:7-10; LX-5007
15 (LaBlue 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 (Moverley 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 (Workman Decl.); PX1139-018 (CID
21 Response); PX1139-017 (CID Response); LX-5002 (Glenn 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 (O'Keefe Dep.) 31:7-11, 102:25-103:19; LX-5004
23 (Flyer Dep.) 215:16-216:23; LX-0304 (Bohamed 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 (DiFrancesco 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 (Glenn Dep.) 66:24-67:14, 71:3-73:12, 86:2-13, 87:4-9;

1 LX-5004 (Flyer Dep.) 97:3-7.

2
3 73. Many laboratories in California already process 1,000 or more accessions per day. LX-5002
4 (Glenn Dep.) 71:3-73:12.

5
6 74. Other clinical labs have offered IPAs prices that are lower than LabCorp's and Westcliff's
7 prices. LX-5004 (Flyer Dep.) 71:7-72:14, 73:14-75:4; LX-5011 (Wu Dep.) at 152:15-153:23,
8 209:19-211:4.

9
10 75. Westcliff's expansion into capitated contracting in 2007 represents entry by another
11 competitor into the alleged relevant market. LX-0407 (McCarthy/Wu Decl.) ¶ 30.

12
13 76. Westcliff's expansion did not lead to a reduction in LabCorp's capitated pricing or alter
14 LabCorp's bidding behavior. LX-0407 (McCarthy/Wu Decl.) ¶¶ 30-32; LX-5011 (Wu Dep.)
15 65:25-66:25, 105:16-106:8, 129:14-130:10; LX-2412.

16
17 77. LabCorp customers were not diverted from LabCorp to Westcliff following Westcliff's
18 entry. LX-0407 (McCarthy/Wu Decl.) ¶ 30.

19
20 78. Westcliff offered lower capitation rates to physician groups than LabCorp and Quest. PX
21 1026 at 1 ("I was able to estimate that [Westcliff's] average cap rate is likely in the range of
22 \$0.75 PMPM. (The range was calculated at a low of \$0.55 and high of \$0.94 PMPM.) The
23 average is lower than what LabCorp typically accepts for IPA cap rates, but appears to be
24 consistent with the rates Westcliff has reportedly accepted based on local intelligence.").

25
26 79. To offer capitated contracts to physician groups on competitive terms, a clinical laboratory
27 must have sufficient economies of scale and an extensive network of PSCs providing convenient
28 access for the physician group's entire patient membership. *E.g.*, PX 0128 at ¶¶ 5-6 (Path Logic

1 Decl.); PX 0138 at ¶ 6 (AMA 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 (Memorial Decl.); PX
7 0117 at ¶ 6 (Muir Decl.); PX 0131 at ¶ 8 (Path. Inc. Decl.); PX 7007 at 292 (Vernaglia Tr.); *see*
8 PX 0145 at ¶ 6 (Hoag 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 (Excel Decl.); PX 0121 at ¶ 3 (Prospect Decl.); Dempsey (Hemet) Dep. 38-41, 43-44.

17
18 83. Dr. Wu, an expert for Defendants, analyzed efficiencies and found \$22 million 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 \$2.3 million 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 \$2.3 million 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 lost \$495,000 in September 2010. LX-0405 (Rogge Decl.) ¶¶ 6-8.

18
19 91. LabWest lost \$766,000 in October 2010. LX-0405 (Rogge Decl.) ¶¶ 6-8.

20
21 92. LabWest lost \$1,481,000 in November 2010. LX-0405 (Rogge Decl.) ¶¶ 6-8.

22
23 93. LabWest lost \$1,319,000 in December 2010. LX-0652 (Rogge Decl.) ¶ 6

24
25 94. LabWest’s total losses since the acquisition exceed \$3 million. 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 195,000 in August to under 175,000 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 10-15 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 \$29 million. 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 90 and 100 courier positions can be eliminated, generating a
2 monthly savings of \$200,000. Additionally, LabCorp estimates that by combining with
3 Westcliff it will be able to reduce outside-courier expenses by about \$100,000 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

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

3
4 125. Evidence establishing undue concentration in the relevant market makes out the
5 government’s prima facie case and gives rise to a presumption of unlawfulness. *Phila. Nat’l*
6 *Bank*, 374 U.S. at 363 (“a merger which produces a firm controlling an undue percentage share
7 of the relevant market, and results in a significant increase in the concentration of firms in the
8 market is so inherently likely to lessen competition substantially that it must be enjoined in the
9 absence of evidence clearly showing that the merger is not likely to have such anticompetitive
10 effects.”); *see also U.S. v. Gen. Dynamics Corp.*, 415 U.S. 486, 497, 94 S. Ct. 1186, 1194, 39 L.
11 Ed. 2d 530, 542 (1974) (quoting *U.S. v. Aluminum Co. of Am.*, 377 U.S. 271, 279, 84 S. Ct.
12 1283, 1288, 12 L. Ed. 2d 314, 319 (1964) (“if concentration is already great, the importance of
13 preventing even slight increases in concentration is correspondingly great.”)).

14
15 126. Once the government has established a prima facie violation of Section 7 based on the
16 market share statistics, it is “incumbent upon [the defendant] to show that the market-share
17 statistics gave an inaccurate account of the acquisition’s probable effects on competition.” *U.S.*
18 *v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 120, 95 S. Ct. 2099, 2118, 45 L. Ed. 2d 41, 66 (1975);
19 *see Olin Corp. v. FTC*, 986 F.2d 1295, 1305 (9th Cir. 1993); *Heinz*, 246 F.3d at 715; *U.S. v.*
20 *Baker Hughes Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990).

21
22 127. “[T]he more compelling the prima facie case, the more evidence the defendant must present
23 to rebut it successfully.” *Heinz*, 246 F.3d at 725 (quoting *Baker Hughes*, 908 F.2d at 991). If the
24 defendant comes forward with evidence sufficient to rebut the presumption, the burden of
25 producing further evidence of anticompetitive effect shifts to the government, which retains the
26 ultimate burden of proof at all times. *Baker Hughes*, 908 F.2d at 982-83.

27
28 128. 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. Syfy 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 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