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9 Counsel for Plaintiff

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13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
**SOUTHERN DIVISION**

15  
16 FEDERAL TRADE COMMISSION,

17 Plaintiff,

18 v.

19 LABORATORY CORPORATION  
20 OF AMERICA, et al.,

21 Defendants.  
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No. SACV-10-1873-AG (MLGx)

**PLAINTIFF'S NOTICE OF A  
MOTION AND MOTION FOR  
AN INJUNCTION PENDING  
APPEAL**

Date:

Time:

Hon. Andrew J. Guilford

1 PLEASE TAKE NOTICE that Plaintiff Federal Trade Commission hereby  
2 moves this Court to issue an injunction pending Plaintiff's appeal of the Court's  
3 Order Denying Preliminary Injunction. This motion is being made pursuant to this  
4 Court's order granting Plaintiff's application for an order shortening time.

5 This motion is brought pursuant to Federal Rule of Civil Procedure 62(c),  
6 and the cases cited in the attached Memorandum of Points and Authorities, on the  
7 following grounds:

8 Plaintiff would be faced with the extremely difficult task of re-creating  
9 Westcliff as a viable competitor if the FTC ultimately were to conclude that  
10 divestiture was necessary to restore competition. Thus, the Commission's ability  
11 to obtain effective relief will be jeopardized if divestiture is ultimately ordered in  
12 the administrative proceedings.

13 The public interest will be immediately and irreparably harmed by  
14 LabCorp's elimination of the competitive pressure represented by an independent  
15 Westcliff, which leaves LabCorp unconstrained from raising prices and reducing  
16 service levels.

17 For the reasons discussed above and in the attached Memorandum of Points  
18 and Authorities, Plaintiff respectfully requests that the Court GRANT Plaintiff's  
19 Motion for an Injunction Pending Appeal. A proposed order is attached.

1 This motion is made following an email to counsel for Defendants on  
2 February 22, 2011, and conference with counsel pursuant to Local Rules 7-3 and 7-  
3 19 on February 22, 2011

4  
5 Dated: February 23, 2011

6 Respectfully submitted,

7  
8 By:     /s/J. Thomas Greene    

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**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 Pennsylvania Avenue, N.W. Washington, DC 20580.
2. That on February 23, 2011, declarant served the PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN INJUNCTION PENDING APPEAL by emailing a true and correct .pdf to J. Robert Robertson at robbly.robertson@hoganlovells.com, Benjamin Holt at benjamin.holt@hoganlovells.com, and Corey W. Roush at corey.roush@hoganlovells.com.

\_\_\_\_\_/s/J. Thomas Greene\_\_\_\_\_

J. Thomas Greene

Counsel for Plaintiff

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION**

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FEDERAL TRADE COMMISSION,

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Plaintiff,

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v.

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LABORATORY CORPORATION  
OF AMERICA, et al.,

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Defendants.

No. SACV-10-1873-AG (MLGx)

**PLAINTIFF'S MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF ITS MOTION  
FOR AN INJUNCTION PENDING  
APPEAL**

Hon. Andrew J. Guilford

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Plaintiff Federal Trade Commission respectfully moves this Court, pursuant to Fed. R. Civ. P. 62(c), to grant an injunction pending appeal preventing Defendants Laboratory Corporation of America and Laboratory Corporation of America Holdings ("LabCorp") from taking any further steps to integrate the acquired assets and business of Westcliff Medical Laboratories ("Westcliff") and reinstating the Court's pre-existing temporary restraining order ("TRO")

1 preserving the hold separate agreement in order to maintain the pre-decision status  
2 quo pending appeal of this Court’s denial of the FTC’s motion for preliminary  
3 injunction. Alternatively, Plaintiff respectfully moves this Court for an injunction  
4 pending appeal for the limited period of time needed for the FTC to file, and for  
5 the Court of Appeals to rule on, an emergency application in that court for an  
6 injunction pending appeal. The Commission is filing its Notice of Appeal  
7 concurrently with these papers, and has conferred with counsel for the Defendants,  
8 pursuant to Local Rule 7(m), and was informed that Defendants oppose this  
9 motion. Unless the Court issues an injunction pending appeal (or pending a  
10 decision by the Court of Appeals on such an injunction), *LabCorp will immediately*  
11 *begin integrating Westcliff into its own operations.*

12 LabCorp intends to commence disassembling and effectively obliterating the  
13 former Westcliff business immediately by “consolidating redundant facilities and  
14 employees” – i.e., closing or “repurposing” the Westcliff main laboratory in Santa  
15 Ana, California and other testing facilities, Order Denying Prelim. Inj. (“Order”)  
16 87; “eliminating duplicative operations” such as patient service centers, Order 100;  
17 firing not only couriers, but also salespeople and other key employees who had  
18 been the linchpin of Westcliff’s ability to attract and maintain good relationships  
19 with customers and to provide high-quality service; converting Westcliff’s IT  
20 system and client billing system to LabCorp’s systems; terminating vendor  
21 contracts under which Westcliff had obtained the equipment and supplies needed  
22 for it to operate independently; and migrating customers from Westcliff contracts  
23 over to LabCorp’s own contracts. *See* PX 1139 at 47-54 (LabCorp CID Response  
24 § 14) (describing steps LabCorp intended to take once permitted to integrate the  
25 Westcliff business into LabCorp’s own operations); LX 0406 at 9 (¶ 15), 10-11  
26 (¶¶ 22-24) (Aicher Decl.). These actions would substantially impede any  
27 subsequent effort to re-create Westcliff as a viable competitor if the FTC ultimately

1 were to conclude that divestiture was necessary to restore competition, since the  
2 entity would never be able to regain the “sufficient economies of scale and []  
3 extensive network of PSCs providing convenient access” necessary “[t]o offer  
4 capitated contracts to physician groups on competitive terms.” Order 79. Nor  
5 would a future divested, but decimated, Westcliff be able to surmount the  
6 “[r]eputational barriers [that] can make it difficult for a new laboratory to break  
7 into the market . . . .” Order 82. For the purposes of this motion, Plaintiff notes  
8 that any costs associated with extending the hold separate agreement that has been  
9 in place for almost eight months, by a few days, is minimal, and that the requested  
10 relief pending the Court of Appeals’ ruling on its application to that court will not  
11 meaningfully interfere with this already-consummated transaction.

#### 12 **ARGUMENT**

13 Federal Rule of Civil Procedure 62(c) authorizes a court to issue an  
14 injunction pending appeal of an order or final judgment “that grants, dissolves, or  
15 denies an injunction.” Fed. R. Civ. P. 62(c). “A party seeking a stay must  
16 establish that he is likely to succeed on the merits, that he is likely to suffer  
17 irreparable harm in the absence of relief, that the balance of equities tip in his  
18 favor, and that a stay is in the public interest.” *Humane Society of the U.S. v.*  
19 *Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) (citing *Winter v. Natural Resources*  
20 *Defense Council, Inc.*, --- U.S. ---, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008)).

21 If injunctive relief pending appeal is denied, LabCorp will be free to  
22 dismantle Westcliff. LabCorp intends to irrevocably alter the ongoing operations  
23 of an independent Westcliff by closing overlapping PSCs, firing hundreds of  
24 Westcliff employees, moving Westcliff’s laboratory testing operations to  
25 LabCorp’s testing facility in San Diego, repurposing Westcliff’s testing facility in  
26 Santa Ana, and integrating Westcliff’s sales force into that of LabCorp. Following  
27 such integration, it will be extraordinarily difficult for the Court of Appeals

1 subsequently to provide relief if the Commission prevails on appeal. Without such  
2 an injunction, the destruction of a still-ongoing, independent Westcliff will occur  
3 and the Commission would also be severely impaired in obtaining effective relief  
4 “if the Commission ultimately prevails and divestiture is ordered” in the  
5 administrative proceedings in FTC Docket No. 9345, *see FTC v. Warner*  
6 *Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984), and the public interest  
7 will be permanently, and irreparably, injured, *id.* at 1165;<sup>1</sup> *see also FTC v. H.J.*  
8 *Heinz Co.*, No. 00-5362, 2000 U.S. App. LEXIS 34474 (D.C. Cir. Nov. 8, 2000)  
9 (order granting emergency motion for injunction pending appeal and expedited  
10 appeal). In *Heinz*, the trial court had denied both the FTC’s motion for a  
11 preliminary injunction against the proposed merger and the FTC’s motion for an  
12 injunction pending appeal. The Court of Appeals, however, granted an injunction  
13 pending appeal in order to allow for full appellate review and meaningful relief in  
14 the event the FTC ultimately prevailed. *Id.* at \*10 (injunction pending appeal  
15 necessary to “protect the public interest” from “irreversible” injury). Similarly, in  
16 *Warner*, the Court of Appeals for the Ninth Circuit granted the FTC’s emergency  
17 motion for an injunction pending appeal before ultimately reversing the district  
18 court’s denial of the FTC’s motion for a preliminary injunction. 742 F.2d at 1159.

19 Most critically, the public interest will be immediately and irreparably  
20 harmed by LabCorp’s elimination of the competitive pressure represented by an  
21 independent Westcliff if it is able to incorporate Westcliff’s physician group

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22  
23 <sup>1</sup> Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), reflects Congressional  
24 recognition that post-merger divestiture is an inadequate and unsatisfactory remedy  
25 in a merger case, 119 Cong. Rec. 36,612 (1973), a point that also has been the  
26 subject of judicial notice by the United States Supreme Court. *See, e.g., FTC v.*  
27 *Dean Foods*, 384 U.S. 597, 607, 86 S. Ct. 1738, 16 L. Ed. 2d 802 (1966)  
28 (“Administrative experience shows that the Commission’s inability to unscramble  
merged assets frequently prevents entry of an effective order of divestiture.”)

1 contracts into its portfolio. Once LabCorp has taken over Westcliff's physician  
2 group contracts, nothing would constrain LabCorp from raising prices and further  
3 reducing service levels, and neither the Commission nor the courts would be as  
4 able to afford fully effective relief if there is a final determination that the merger  
5 violates Section 7 of the Clayton Act.

6 The FTC also respectfully submits that the Court's finding that the FTC  
7 failed to show a likelihood of success on the merits of its claim that the merger  
8 violated Section 7 of the Clayton Act, 15 U.S.C. § 18 (2006), or Section 5 of the  
9 FTC Act, 15 U.S.C. § 45 (2006), raises important antitrust and public interest  
10 issues that warrant careful review by the Court of Appeals. The Court of Appeals  
11 should be able to resolve these issues before the structure of the market is  
12 irrevocably altered by the integration of Westcliff, the third largest clinical  
13 laboratory in Southern California. In particular, this case, and the Court's  
14 disposition of it, present substantial issues of law that the Court of Appeals should  
15 have an opportunity to address, including:

16 (a) Whether the Court properly applied the facts of this case to the correct  
17 legal standard in this section 13(b) action;

18 (b) Whether the Court applied the correct legal standards for determining  
19 relevant product and geographic markets;

20 (c) Whether it is error to consider firms that have acquired incumbent  
21 suppliers to be "new entrants";

22 (d) Whether the Court abused its discretion by improperly weighing  
23 evidence contained in contemporaneous business documents and post-litigation  
24 party official declarations;

25 (e) Whether the Court applied the incorrect legal standard regarding  
26 presumptions of anticompetitive effects;

27 (f) Whether the Court properly considered the public interest in balancing  
28

1 the equities, and whether the Court imposed an improper burden on the  
2 Commission to demonstrate that effective relief would not be obtainable via  
3 divestiture; and

4 (g) Whether it was legal error to accord significant weight to private  
5 equities when the law of this Circuit is that although private equities may be  
6 considered, public equities receive far greater weight.

7 The FTC satisfied its burden of raising serious and substantial questions to  
8 be resolved at trial, justifying a statutory preliminary injunction. *Warner*, 742 F.2d  
9 at 1162. The Court’s opinion does not mention the Commission’s key evidence on  
10 the anticompetitive effects of the acquisition, including, most significantly,  
11 LabCorp’s own due diligence documents cataloging the disruptive effect Westcliff  
12 has had on the relevant market and LabCorp’s plan to raise prices to physician  
13 groups, *see, e.g.*, PX 1030, or business documents further describing LabCorp’s  
14 post-acquisition plans to increase prices when it would “leave us and Quest as the  
15 only viable options.” PX 1040 at 1. The Court’s opinion includes findings  
16 supporting the conclusion that the relevant market is the provision of clinical  
17 laboratory testing services to physician groups on a capitated basis; that the  
18 relevant geographic market is Southern California; and that pre- and post-merger  
19 market concentration levels are sufficiently high to establish a prima facie violation  
20 of the Clayton Act. The Court’s opinion includes additional findings that the  
21 anticompetitive implications of the high market shares are buttressed by barriers to  
22 entry and expansion. These findings are sufficient to raise “serious, substantial,  
23 difficult” questions regarding the anticompetitive effects of the acquisition – and  
24 therefore the likelihood of success – even where there are conflicts in the evidence.  
25 *Warner*, 742 F.2d at 1164.

26 Under the law of this Circuit, if the Commission “demonstrate[s] a  
27 likelihood of success and the public equities do not support the denial of injunctive

1 relief, a preliminary injunction is warranted.” *Warner*, 742 F.2d at 1165. The  
2 principal public equity to be considered is effective enforcement of the antitrust  
3 laws. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001); *FTC v. Univ.*  
4 *Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991). Effective enforcement of the  
5 antitrust laws means preserving the benefits of competition during the pendency of  
6 the determination of the legality of the acquisition by the Commission, *see Heinz*,  
7 2000 U.S. App. LEXIS 34474 at \*10; *Warner*, 742 F.2d at 1159, and ensuring that  
8 effective relief will remain available if the Commission prevails and divestiture is  
9 ordered, *Warner*, 742 F.2d at 1165. Other public equities include an acquisition’s  
10 potential beneficial economic effects and pro-competitive advantages for  
11 consumers, but where the record contains conflicting evidence on the  
12 anticompetitive effects of the merger, it is unclear whether such equities support  
13 the grant or denial of injunctive relief. *Id.*

14 Finally, LabCorp will not be irreparably harmed by the grant of injunctive  
15 relief in the form of a brief reimposition of the temporary restraining order pending  
16 the Commission’s appeal of this Court’s denial of the requested preliminary  
17 injunction. The Commission expects to seek an expedited appeal from the Court of  
18 Appeals; accordingly, little, if any, harm to LabCorp will be caused by the  
19 requested grant of injunctive relief. The small impact of this brief delay in  
20 LabCorp’s plans to integrate Westcliff’s operations into its own is far outweighed  
21 by the substantial public interest in maintaining free, open and competitive  
22 markets.

### 23 CONCLUSION

24 In view of the serious legal questions raised by the Court’s decision to allow  
25 Defendants to complete its planned integration of Westcliff, and in view of the  
26 grave potential for irreparable harm to the public before there can be full appellate  
27 consideration of the preliminary injunction, the Court should reinstate the TRO

1 until these important questions are resolved. *See Heinz*, 2000 U.S. App. LEXIS  
2 34474 at \*10 (“The public interest in enforcement of the antitrust laws is strong;  
3 any injury to competition from going forward with the merger would plainly be  
4 irreversible, while the same cannot be said for any loss to competition from its  
5 delay.”). In any event, this Court should grant an injunction pending a decision by  
6 the Court of Appeals on the emergency application by the Commission to that  
7 court for an injunction pending appeal. As the D.C. Circuit stated in *FTC v.*  
8 *Weyerhaeuser*, 665 F.2d 1072, 1076 (D.C. Cir. 1981), it is “not consistent with the  
9 fair, effective administration of justice for the district judge to deny to a party,  
10 situated as was the FTC in this case, even a brief holding order affording time to  
11 apply to this court for provisional relief.” Only a grant of interim relief will afford  
12 the Court of Appeals the opportunity to determine whether the Court’s denial of a  
13 preliminary injunction is correct and protect the public interest in the event that it  
14 is not. *See Heinz*, 2000 U.S. App. LEXIS 34474 at \*10 (“The [merging parties’]  
15 defense may yet carry the day, but only the grant of interim relief will both afford  
16 this court an opportunity to determine whether that should be the case and protect  
17 the public interest in the event that it is not.”). Therefore, Plaintiff respectfully  
18 requests that the Court grant Plaintiff’s Motion for an Injunction Pending Appeal.

19  
20 Dated: February 23, 2011

Respectfully submitted,

21  
22 By:   /s/J. Thomas Greene  \_\_\_\_\_

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**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 600 Pennsylvania Avenue N.W. Washington, DC 20580.
2. That on February 23, 2011, declarant served the PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR AN INJUNCTION PENDING APPEAL by emailing a true and correct .pdf to J. Robert Robertson at [robby.robertson@hoganlovells.com](mailto:robby.robertson@hoganlovells.com) and Corey W. Roush at [corey.roush@hoganlovells.com](mailto:corey.roush@hoganlovells.com).

\_\_\_\_/s/J. Thomas Greene\_\_\_\_  
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Counsel for Plaintiff  
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