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America and LabWest, Inc. f/k/a Wave Newco,
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8 **UNITED STATES BANKRUPTCY COURT**

9 **CENTRAL DISTRICT OF CALIFORNIA**

10 **SANTA ANA DIVISION**

11 In re:

12 WESTCLIFF MEDICAL LABORATORIES,
13 INC.,

14 Debtor.

15 BIOLABS, INC.,

16 Debtor.

17
18 LABORATORY CORPORATION OF
19 AMERICA AND LABWEST, INC. F/K/A
20 WAVE NEWCO, INC.,

21 Plaintiffs,

22 vs.

23 FEDERAL TRADE COMMISSION,

24 Defendant.
25
26
27
28

Case No. 8:10-bk-16743-TA
Jointly Administered with 8:10-bk-16746-TA

Chapter 11 Cases

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

**APPLICATION FOR ORDER
SHORTENING TIME ON MOTION BY
PLAINTIFFS LABORATORY
CORPORATION OF AMERICA AND
LABWEST, INC. FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE REGARDING
PRELIMINARY INJUNCTION;
DECLARATIONS OF MICHAEL AICHER
AND ROBERT J. ROBERTSON IN
SUPPORT THEREOF**

[No Hearing Required]

Judge: Hon. Theodor C. Albert

1 **TO THE UNITED STATES BANKRUPTCY COURT AND ALL PARTIES IN**
2 **INTEREST:**

3 Plaintiffs Laboratory Corporation of America and LabWest, Inc. f/k/a Wave Newco, Inc.
4 hereby submit this application (“Application”) for order shortening time for the hearing on Plaintiffs’
5 Motion (the “Motion”) for a Temporary Restraining Order and Preliminary Injunction against the
6 Federal Trade Commission (the “FTC”).¹ The hearing on the Motion is currently set for December
7 22, 2010 at 2:00 p.m. By this Application, LabCorp and LabWest request that the hearing on the
8 Motion be set on the earliest available date during the week of December 6 – 10.

9 As described more fully below, LabCorp and LabWest request that the Court set the hearing
10 on the Motion on shortened time, *i.e.*, advance the hearing on the Motion to next week, because
11 circumstances have arisen necessitating an expedited hearing. As set forth in the underlying Motion,
12 LabCorp and LabWest seek to prevent the FTC from collaterally attacking this Court’s order
13 approving the sale of assets by Debtors Westcliff Medical Laboratories, Inc. and Biolabs, Inc.
14 (collectively, “Debtors”) to LabWest by commencing an action in another court and seeking relief
15 that could result in the other court ordering rescission of the sale, a remedy that would obviously have
16 a significant negative impact on the administration of the Debtors’ estates. A hearing on the Motion
17 is currently set for December 22nd. Notwithstanding the pending adversary proceeding and the
18 pending Motion, on December 1, 2010, the FTC filed a lawsuit in the United States District Court for
19 the District of Columbia seeking to enjoin LabCorp² from taking operational control of the assets
20 purchased from the Debtors “in order to preserve the FTC’s ability to effectuate an adequate
21 remedy.” A hearing on the FTC’s temporary restraining order is set for December 3, 2010 at 12:00
22 p.m. (PST) and a hearing on any preliminary injunction is expected to be set for next week. These
23 efforts constitute a collateral attack on this Court’s order and should be enjoined, particularly because
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25
26 ¹ LabCorp previously filed an Application for Order Shortening Time (the “OST Application”) for a
27 hearing on the Motion, which the Court denied without prejudice, finding that LabCorp had failed to
28 demonstrate the existence of an emergency. LabCorp believes that new developments since the OST
Application was denied warrant the Court’s granting this Application and setting the hearing on the
Motion on shortened time.

² The FTC failed to name the actual purchaser of the Westcliff assets – LabWest, Inc.

1 the FTC's action could vitiate this Court's sale order and negatively impact the administration of the
2 Debtors' estates.

3 In addition, the FTC's action involves the same set of facts and issues as this action and is,
4 therefore, barred by the "first to file rule." As a result, the FTC should be immediately enjoined from
5 proceeding in the District Court for the District of Columbia. If this Court does not enjoin the FTC's
6 action, the FTC will be permitted to collaterally attack this Court's order in a foreign jurisdiction and
7 cause severe and irreparable injuries to LabCorp and the bankruptcy estate. Moreover, if the FTC is
8 permitted to prosecute its action in the District of Columbia, it will create an unnecessary waste of the
9 courts' and parties' resources by litigating the same issues in two separate courts, and create the
10 potential for inconsistent rulings.

11 **I. BRIEF BACKGROUND**

12 **A. The Bankruptcy Sale**

13 From its founding in 1964 until June 2006, Westcliff operated profitably as a small,
14 independent clinical laboratory services provider headquartered in Orange County, California.
15 Following its acquisition by a private equity firm in June 2006, Westcliff underwent significant
16 changes in management and sales strategy. The company subsequently fell into steep financial
17 decline and decided to sell its assets to the highest bidder.

18 Westcliff was engaged in an active sale process throughout much of 2009 and the early part of
19 2010. In early 2010, LabCorp, through its wholly owned subsidiary LabWest (f/k/a Wave Newco,
20 Inc.) offered to buy Westcliff's assets and quickly emerged as the only acceptable purchaser. Other
21 potential purchasers either lost interest in Westcliff after conducting diligence or required unrealistic
22 sale conditions, such as restructuring of debt or extensive exclusivity periods. LabWest, on the other
23 hand, was willing to pay a substantially higher price than any other prospective bidder and had the
24 financial means to quickly consummate its purchase of Westcliff's assets. In Westcliff's view,
25 gaining approval of the transaction and closing on an expedited basis was absolutely critical to its
26 ability to maintain the viability of its assets.

27 LabCorp, LabWest and Westcliff executed an Asset Purchase Agreement ("APA") on May
28 17, 2010, whereby LabWest would acquire certain assets from Westcliff, constituting nearly all of the

1 Westcliff business, for about \$57 million. As a condition of the APA, Westcliff filed a chapter 11
2 bankruptcy petition with this Court on May 19, 2010.

3 With the Bankruptcy Court's approval, Westcliff conducted an auction sale for its assets, but
4 no party offered to pay more than LabWest. The Bankruptcy Court held a sale hearing on June 3,
5 2010, but no other bidders for Westcliff's assets appeared at that hearing. The Bankruptcy Court
6 subsequently entered an order (the "Sale Order") approving the sale to LabWest on June 9, 2010.
7 The transaction closed on June 16, 2010.

8 **B. The FTC's Interference with the Bankruptcy Sale**

9 As detailed in LabCorp's and LabWest's Complaint filed on November 16, 2010, and more
10 fully in the Motion, the FTC Staff has interfered with the bankruptcy sale process from the early
11 stages.

12 Without appearing in this Court to take a position on the sale, the FTC instead attempted to
13 re-open the bidding process and contacted potential bidders in an effort to get them to submit a bid
14 acceptable to the FTC. Further, LabCorp and LabWest are informed that the FTC told at least one
15 potential bidder that it might be successful as long as it bid above liquidation value because the FTC
16 intended to block the sale of Westcliff's assets to LabWest.

17 The FTC Staff also commenced a preliminary inquiry into the acquisition of Westcliff's assets
18 by LabWest on or before June 2, 2010, to determine whether the acquisition violated Section 5 of the
19 FTC Act and Section 7 of the Clayton Act. In early June, FTC Staff informed LabCorp that the
20 investigation would likely last no more than two weeks. Following the June 16th close of the sale,
21 however, the FTC Staff's position changed. The FTC Staff informed LabCorp that the Commission
22 intended to sue the company unless LabCorp and LabWest agreed to hold the assets purchased from
23 Westcliff separate from the rest of LabCorp's business and to refrain from integrating the Westcliff
24 assets into the LabCorp network to allow the Commission to continue its investigation. LabCorp and
25 LabWest agreed to the FTC's demands to hold the purchased assets separate. LabCorp's agreement
26 with the FTC was later memorialized in a letter signed on June 25, 2010 ("Hold Separate
27 Agreement").
28

1 On July 1, 2010, the Commission issued a Subpoena *Duces Tecum* (“Subpoena”) and Civil
2 Investigative Demand (“CID”) to LabCorp. The Subpoena and CID were so extensive that
3 LabCorp’s response required nearly five months, \$7 million, and an untold number of employee
4 hours. Such costs are extraordinarily burdensome, particularly for a transaction involving a sale of
5 less than \$57 million in assets.

6 LabCorp and LabWest completed their response to the FTC in early November 2010, after
7 producing to the Commission more than 27 million pages of material from over 100 custodians. In
8 the course of the investigation, the Commission required LabCorp and LabWest to respond to
9 numerous document requests, interrogatories, and requests for data and information; to review and
10 produce the files of dozens of employees from LabCorp and LabWest; and to produce ten employees
11 for separate day-long investigational hearings held at the FTC’s offices in Washington, DC.

12 The Hold Separate Agreement with the FTC comes to an end on December 3, 2010, at which
13 point LabCorp intends to integrate the Westcliff assets into the LabCorp network.³

14 Due to the companies’ belief that the FTC was planning to ask a different court to collaterally
15 attack the Court’s Sale Order, to seek rescission of the sale or to prevent them from taking
16 operational control of the Westcliff assets, LabCorp and LabWest filed their complaint commencing
17 this adversary proceeding in this Court on November 16, 2010 (Adv. Docket No. 1) and the Motion,
18 with supporting papers (all under seal) on November 18, 2010 (Adv. Docket Nos. 6, 8-23). On
19 November 18, 2010, LabCorp and LabWest also filed the OST Application which was denied
20 without prejudice. Adv. Docket No. 18.

21 The FTC filed a motion to dismiss (the “Motion to Dismiss”) the complaint on November 24,
22 2010. Adv. Docket No. 26. The hearing on the Motion to Dismiss is currently scheduled for January
23 27, 2011.

24 In spite of the pending proceedings in this Court, on December 1, 2010, the FTC commenced
25 an action in the United States District Court for the District of Columbia, Case No. 1:10-cv-02053

27 ³ Additional details and evidence supporting these facts are contained in the Complaint, Motion and
28 papers in support of the Motion on file with this Court under seal. *See* Adv. Docket No. 1, 6, 8-23.
Given that those papers are filed under seal, they are not attached to this emergency motion.

1 (RWR) seeking to enjoin LabCorp from taking operational control of the Westcliff assets.
2 Declaration of Robert J. Robertson (“Robertson Decl.”), Exhibits 1 and 2. A hearing on the FTC’s
3 Motion is set for December 3, 2010 at 12:00 p.m. (PST). *Id.* ¶ 2.

4 In response to the FTC’s Motion, on December 2, 2010, Plaintiffs filed, in the District Court
5 for the District of Columbia, a Motion to Dismiss for Improper Venue or for Failure to Sue the
6 Acquirer of Assets or, in the Alternative, to Transfer Venue. *Id.* ¶ 3.

7 Should the FTC succeed in obtaining a temporary protective order, the District Court for the
8 District of Columbia will likely set a hearing on the FTC’s request for a preliminary injunction during
9 the week of December 6 – 10. *Id.* ¶ 4.

10 **II. ARGUMENT⁴**

11 The Court should advance the hearing on the Motion for three primary reasons as follows:

12 **A. The FTC’s Action is a Collateral Attack on the Sale Order.**

13 The FTC has now commenced an action in the District Court for the District of Columbia
14 collaterally attacking this Court’s Sale Order. This action could result in rescission of the sale,
15 adversely impact the administration of these bankruptcy estates and keep the bankruptcy cases in
16 limbo for years while the FTC conducts an even more thorough investigation. The filing of the
17 FTC’s action in another court is precisely the sort of action that LabCorp and LabWest anticipated
18 and sought to prevent by filing the Motion.

19 The FTC’s action is a collateral attack on the Sale Order because any one of the numerous
20 potential outcomes would either undermine the finality of the Sale Order and/or effectively vitiate the
21 Sale Order without the FTC ever coming into this Bankruptcy Court. For instance, as fully set forth
22 in the Motion, one available remedy is rescission of the sale, a remedy that could be ordered by the
23 District Court *sua sponte*. The FTC should not be permitted to collaterally attack the Sale Order
24 through an independent action in a foreign jurisdiction.⁵

25
26 ⁴ Local Bankruptcy Rule 9075-1 requires that an application for order shortening time be supported
27 by a declaration that establishes a *prima facie* basis for granting the relief requested in the underlying
28 motion. The Motion and supporting declarations were filed under seal on November 18, 2010. *See*
Adv. Docket Nos. 6, 8-23.

⁵ In the FTC’s Motion to Dismiss, the FTC argues at length that it is not seeking to rescind the sale.
Notwithstanding this assertion, however, the FTC filed its complaint and seeks to enjoin LabCorp

1 The FTC's action has already and will continue to complicate the procedure established for
2 assuming and rejecting executory contracts and unexpired leases. For example, LabWest's deadlines
3 to assume or reject executory contracts and unexpired leases are December 14th and 15th, respectively.
4 LabCorp must make a decision by those dates to assume or reject. The FTC's attempt to prevent
5 LabCorp and LabWest from taking operational control of those assets, however, is causing significant
6 difficulties in the decision making process. Declaration of Michael Aicher ("Aicher Decl.") ¶ 3.

7 The bankruptcy process cannot operate as intended by Congress if this kind of interference
8 and collateral attack on bankruptcy sales is permitted. This Court should, therefore, advance the
9 hearing on the TRO to address whether the FTC's actions in the District Court for the District of
10 Columbia should be permitted to continue.

11 **B. The FTC's Action Violates the "First to File Rule".**

12 The FTC's action is barred by the "first to file rule," also known as the "first filed rule." The
13 first to file rule applies when two parallel proceedings involving the same parties and issues are
14 pending in different district courts. In such a situation, "[w]hen a district court has jurisdiction over
15 all parties involved, it may enjoin later filed actions." *Decker Coal Co. v. Commonwealth Edison*
16 *Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (citing *United States v. Oregon*, 657 F.2d 1009, 1016 n. 17
17 (9th Cir.1981)). The "doctrine is designed to avoid placing an unnecessary burden on the federal
18 judiciary, and to avoid the embarrassment of conflicting judgments." *Church of Scientology of*
19 *California v. U.S. Dept. of Army*, 611 F.2d 738, 750 (9th Cir. 1979). The "'first to file' rule is not a
20 rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the
21 dictates of sound judicial administration." *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93,
22 95 (9th Cir.1982). The traditional injunction standards do not apply to an injunction issued based on
23 the first to file rule. *See Decker Coal Co.* (9th Cir. 1986).

24 Here, the Court should set the hearing on the Motion on shortened time, *i.e.*, advance the
25 hearing on the Motion, because the FTC's action violates the first to file rule.

26
27 from taking operational control of the Westcliff assets. As the FTC knows, such an order would
28 leave open the possibility of rescission. If the FTC did not want to keep open the possibility of
rescission, it would allow LabCorp and LabWest to take operational control of the Westcliff assets
and seek the alternative remedy of divestiture.

1 1. The Similarity of Parties

2 LabCorp and LabWest are Plaintiffs in the present action and LabCorp and its parent are
3 defendants in the FTC action. The FTC is the Plaintiff in the FTC action and the defendant in the
4 present action. With the exception of LabWest (which was not named as a defendant in the FTC
5 action) and LabCorp's parent (which is not a party to this action), the parties are the same. *See*
6 *generally* Robertson Decl., Exhibit 1; Adv. Docket No. 1.

7 2. The Similarity of Issues

8 The issues in both actions are all based on the same set of facts and circumstances. The
9 issues involve the sale approved by the Sale Order. Specifically, in the FTC action, the FTC is
10 mounting a collateral attack on the Sale Order arguing that the sale and integration of assets is
11 anticompetitive. One available remedy is rescission. The relief in this adversary proceeding is based
12 on the FTC's collateral attack of the sale order and violation of the Sale Order injunction. Each
13 action requires an analysis on the possible effects of the FTC's claims on the sale and the Sale Order,
14 an adjudication of whether the Sale Order injunction was violated and whether the sale must be
15 reversed. *See generally* Robertson Decl., Exhibits 1 and 2; Adv. Docket Nos. 1, 6, 8-23.

16 3. The Dictates of Sound Judicial Administration

17 The dictates of sound judicial administration include judicial economy, a preference for this
18 Court to interpret its own order, preventing forum shopping and preventing the FTC's attempt to
19 collaterally attack the Sale Order.

20 First, this Court is the court with extensive knowledge of the parties and sale process. No
21 other court is as familiar with the facts and circumstances surrounding this case.

22 Second, this Court issued the Sale Order and is consequently in the best position to interpret
23 the collateral attack on the Sale Order and to enforce the Sale Order. In addition, given the potential
24 implications for the bankruptcy case, this Court is the most appropriate to adjudicate issues relating to
25 the Sale Order. Conversely, if the FTC is allowed to proceed in the District of Columbia, that court
26 may order rescission *sua sponte* and this Court would be stuck with dealing with the aftermath of any
27 such order.

1 Third, the FTC is clearly forum shopping. The FTC has at all times been aware of the
2 bankruptcy case and sale process. It participated in efforts to influence the bankruptcy sale process
3 by, for example, “suggesting” that the Debtors conduct a new sale auction (Robertson Decl., Exhibit
4 2:41), but intentionally avoided formally appearing in the bankruptcy case to address its concerns
5 with the sale and the Sale Order. Instead, the FTC chose to wait until after the sale was consummated
6 and then retroactively collaterally attack the Sale Order in another jurisdiction. The FTC filed in
7 another jurisdiction *after* having been served with the complaint and the Motion and *after* filing its
8 Motion to Dismiss in this adversary proceeding. To avoid forum shopping and an attempt to
9 collaterally attack the bankruptcy sale process, this Court should advance the hearing on the Motion
10 to determine whether to enjoin the FTC from further action. In light of these pending matters, the
11 FTC should not be permitted to side-step these matters in this Court in hopes of obtaining a more
12 favorable ruling in the District of Columbia.

13 This Court should, therefore, advance the hearing on the Motion to determine whether the
14 first to file rule applies and, if so, enjoin the FTC’s action.

15 **C. LabCorp and LabWest Will Suffer Prejudice Unless the Hearing is Advanced,**
16 **but the FTC Will Suffer No Prejudice.**

17 LabCorp intends to take operational control of the WestCliff assets on December 3, 2010;
18 however, the FTC has sought to enjoin the integration of assets. A hearing on the FTC’s motion for a
19 temporary restraining order is scheduled for, December 3, 2010, at 12:00 p.m. *See* Aicher Decl. ¶ 4.
20 If the FTC obtains a temporary restraining order, a preliminary injunction hearing will likely be set
21 during the week of December 6 – 10. Should the FTC obtain a preliminary injunction, LabCorp and
22 LabWest will suffer irreparable injury. LabCorp has already suffered harm as a result of the FTC’s
23 Hold Separate Agreement, which requires LabCorp to refrain from taking operational control of the
24 former Westcliff assets which costs LabCorp hundreds of thousands of dollars per month in
25 unnecessary expenses. Aicher Decl. ¶ 4. A preliminary injunction would increase this irreparable
26 damage for an unknown period of time. *Id.*

27 On the other hand, the FTC will suffer no harm from an advancement of the hearing on the
28 Motion, but simply not be able to capitalize on their improper procedural maneuver and forum

1 shopping. Indeed, the FTC is free to seek a preliminary injunction in this Court. Accordingly,
2 LabCorp and LabWest request this Court's immediate assistance in preventing such injuries by
3 advancing the hearing on the Motion.

4 **III. CONCLUSION**

5 Based on the foregoing, LabCorp respectfully request that the Court enter an order shortening
6 time for a hearing on the Motion and advancing the hearing on the Motion to a date and time as early
7 as possible during the week of December 6 – 10. A proposed order shortening time is being uploaded
8 concurrently herewith.

9
10 Respectfully submitted,

11 Michael B. Lubic
12 Michael J. Heyman
13 K&L GATES LLP

14 Dated: December 2, 2010

15 By: /s/ Michael B. Lubic

16 Michael B. Lubic

17 and

18 J. Robert Robertson (*Admitted Pro Hac Vice*)
19 Corey W. Roush (*Admitted Pro Hac Vice*)
20 Benjamin F. Holt (*Admitted Pro Hac Vice*)
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Attorneys for Laboratory Corporation of America
and LabWest, Inc. f/k/a Wave Newco, Inc.

DECLARATION OF MICHAEL AICHER

I, Michael Aicher, hereby declare:

1. I am Senior Vice President of Laboratory Corporation of America and make this declaration in support of the Emergency Motion of Laboratory Corporation of America and LabWest, Inc. f/k/a Wave Newco, Inc. for entry of an order advancing the hearing on LabCorp's and LabWest's Motion for a Temporary Restraining Order and Preliminary Injunction (the "TRO Motion") against the Federal Trade Commission (the "FTC").

2. If called upon to do so, I could and would competently testify to the facts stated herein based upon my own personal knowledge.

3. The FTC's action has already and will continue to complicate the procedure established for assuming and rejecting executory contracts and unexpired leases. For example, under the Sale Order, the deadlines to assume or reject executory contracts and unexpired leases are December 14th and 15th, respectively. A definitive decision to assume or reject must be made by those dates. The FTC's attempt to prevent LabCorp and LabWest from taking operational control of those assets, however, is causing significant difficulties in the decision making process.

4. LabCorp intends to take operational control of the WestCliff assets on December 3, 2010; however, the FTC has sought to enjoin the integration of assets. Should the FTC obtain a preliminary injunction, LabCorp and LabWest will suffer irreparable injury. LabCorp has already suffered harm as a result of the FTC's Hold Separate Agreement, which requires LabCorp to refrain from taking operational control of the former Westcliff assets which costs LabCorp hundreds of thousands of dollars per month in unnecessary expenses. A preliminary injunction would increase this irreparable damage for an unknown period of time.

5. I am informed and believe that if the FTC succeeds in obtaining a temporary protective order, the District Court for the District of Columbia will likely set a hearing on the FTC's request for a preliminary injunction during the week of December 6 – 10. Consequently, LabCorp and LabWest request a hearing on the Motion as early as possible during the week of December 6 – 10.

1 I declare under penalty of perjury under the laws of the United States of America that the
2 foregoing is true and correct.

3 Executed at _____ on December 2, 2010.

4
5 *Signature Page to Follow*
6 Michael Aicher

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DECLARATION OF J. ROBERT ROBERTSON

I, J. Robert Robertson, hereby declare:

1. I am partner at the law firm of Hogan Lovells, counsel to Plaintiffs ("Plaintiffs") Laboratory Corporation of America and LabWest, Inc. f/k/a Wave Newco, Inc. I make this declaration in support of Plaintiffs' application ("Application") for order shortening time for the hearing on Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction against the Federal Trade Commission (the "FTC"). If called upon to do so, I could and would competently testify to the facts stated herein based upon my own personal knowledge.

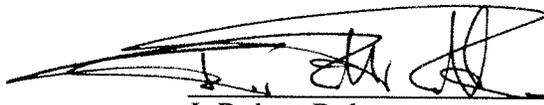
2. On December 1, 2010, the FTC commenced an action in the United States District Court for the District of Columbia, Case No. Case No. 1:10-cv-02053 (RWR). A true and correct copy of the Complaint is attached hereto as Exhibit 1. Concurrently therewith, the FTC filed a motion for a temporary restraining order seeking to enjoin LabCorp and LabWest from taking operational control of the Westcliff assets. A true and correct copy of the Memorandum of Points and Authorities in Support of the FTC's Motion (the "FTC's Motion") for a Temporary Restraining Order is attached hereto as Exhibit 2. A hearing on the FTC's Motion is currently set for December 3, 2010 at 12:00 p.m. (PST).

3. In response to the FTC's Motion, on December 2, 2010, Plaintiffs filed, in the District Court for the District of Columbia, a Motion to Dismiss for Improper Venue or for Failure to Sue the Acquirer of Assets or, in the Alternative, to Transfer Venue.

4. Should the FTC succeed in obtaining a temporary protective order, I anticipate that the District Court for the District of Columbia will likely set a hearing on the FTC's request for a preliminary injunction during the week of December 6 - 10.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Washington, D.C. on December 2, 2010.



J. Robert Robertson