UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of **LABORATORY CORPORATION OF AMERICA** **and** **LABORATORY CORPORATION OF AMERICA HOLDINGS,** **corporations.**	**Docket No. 9345** **REDACTED PUBLIC VERSION**

RESPONDENTS' MOTION TO THE COMMISSION TO WITHDRAW MATTER FROM ADJUDICATION

Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp"), pursuant to Commission Rule 3.26(c), 16 C.F.R. § 3.26(c), respectfully move to withdraw the above-captioned matter from adjudication to allow the Commission to consider whether further litigation is in the public interest following the United States District Court for the Central District of California's denial of the Federal Trade Commission's ("FTC's") motion for a preliminary injunction in this matter and the United States Court of Appeals for the Ninth Circuit's denial of the FTC's emergency motion for an injunction pending appeal. The public interest would be well-served if the Commission withdrew the matter from adjudication. Withdrawal from adjudication will permit the Commission to consider whether to pursue the matter without the normal adjudicative constraints and will save significant Commission resources that would otherwise be expended on the administrative litigation that is set to commence in just over six weeks.

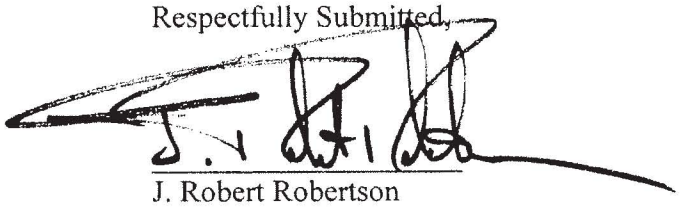
Respondents understand that Complaint Counsel does not oppose the motion for withdrawal from adjudication, although Complaint Counsel does not join in Respondents'

memorandum in support of this motion. In addition, because Complaint Counsel and LabCorp both face imminent deadlines for service of witness lists, exhibit lists and exhibits, deposition designations, and expert reports, both parties respectfully request a ruling by the Commission as soon as possible in order to save litigation costs that may ultimately prove to be unnecessary.

A memorandum in support of the motion and a proposed form of order are attached hereto.

Dated: March 17, 2011

Respectfully Submitted,



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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO THE COMMISSION TO WITHDRAW MATTER FROM ADJUDICATION

Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively, "LabCorp") submit this memorandum in support of their motion to withdraw this matter from adjudication pursuant to Commission Rule 3.26(c), 16 C.F.R. § 3.26(c). LabCorp further submits this memorandum to explain why LabCorp believes this case should be dismissed in its entirety. We believe that the public interest would be well-served if the Commission withdrew the matter from adjudication because, after careful analysis of an extensive evidentiary record in a 40-page opinion, Judge Andrew J. Guilford of the United States District Court for the Central District of California definitively concluded that the Federal Trade Commission ("FTC") failed to "raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'" Order ¶¶ 137, 167. Withdrawal from adjudication will permit the Commission to consider whether to pursue the matter without the normal adjudicative constraints and will save significant Commission resources that would otherwise be expended on the administrative trial

that is set to commence in six weeks and the pre-trial proceedings currently underway. Moreover, withdrawal from adjudication will give the Commission the opportunity to consider facts that were not before it when it voted out the Complaint, including entry by new competitors and testimony from customers that they either believe the LabCorp-Westcliff transaction will benefit the public or have no concerns about the transaction.[1]

Respondents anticipate that this memorandum will also be useful to the Commission in determining whether to proceed with the administrative litigation or dismiss the Complaint. Indeed, all five factors that the Commission considers in determining whether to continue administrative litigation after the denial of a preliminary injunction strongly favor both withdrawal from adjudication and ultimate dismissal of the administrative litigation against LabCorp.

BACKGROUND

The Commission commenced the instant administrative proceeding on December 1, 2010 (the "Complaint"), and also authorized Complaint Counsel to file a largely identical complaint seeking a temporary restraining order and preliminary injunction in the United States District Court for the District of Columbia under Section 13(b) of the Federal Trade Commission Act. *FTC v. Lab. Corp. of Amer. et al.*, No. 10-2053 (RWR) (D.D.C. Dec. 1, 2010) (the "PI Complaint"). Both the Complaint and the PI Complaint charged that LabCorp's acquisition of Westcliff Medical Laboratories ("Westcliff") violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The evidentiary hearing before Administrative Law Judge Chappell is scheduled to commence on May 2, 2011.

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[1] *See infra*, n.37-46 & n.49.

On December 3, 2010, the Section 13(b) proceedings were transferred to the United States District Court for the Central District of California ("District Court"). Judge Guilford granted the FTC's motion for a temporary restraining order. However, rather than proceeding directly to a decision on the preliminary injunction motion as the FTC requested, Judge Guilford instead granted the parties more than a month to conduct discovery. *FTC v. Lab. Corp. of Amer. et al.*, No. 10-1873 (MLG) (C.D. Cal. Dec. 16, 2010; Dec. 29, 2010) (Order Granting Defendants' Motion for Discovery and an Evidentiary Hearing; Scheduling Order). In the course of this discovery period, LabCorp deposed 13 third-parties and obtained relevant documents and information from an additional two third-parties and from the FTC. The FTC deposed one additional third party and secured additional sworn declarations from three others. Both parties deposed the other's expert economist.

Prior to commencing the administrative and federal court lawsuits, the FTC had undertaken more than six months of investigation, in which it interviewed dozens of third parties, held 14 investigational hearings of LabCorp employees and others, and sought and obtained 27 million pages of documents, substantial amounts of data, and lengthy narrative responses to the FTC's civil investigative demand from both LabCorp and Westcliff. The FTC in turn submitted numerous declarations and documents from this investigation to the District Court in support of its motions for a temporary restraining order and preliminary injunction.

Ultimately, the evidentiary record before Judge Guilford consisted of over 550 exhibits, including deposition transcripts; investigational hearing transcripts; expert declarations; business records of LabCorp, Westcliff, their customers, and competitors; and more than 90 sworn declarations of party and third-party witnesses. This record was supplemented by a February 3, 2011 hearing and extensive pre- and post-hearing briefing. On February 22, 2011, based on this

record, the District Court denied the FTC's request for preliminary injunctive relief in a 40-page opinion containing detailed findings of fact and conclusions of law. Judge Guilford concluded that the FTC had failed to establish a prima facie case, but even if it had, LabCorp successfully rebutted the FTC's evidence. As a result, Judge Guilford found that the FTC had not demonstrated a likelihood of success on the merits under the standard applicable to 13(b) proceedings. He further ruled that, even if the FTC had demonstrated a likelihood of success, such a showing would be "heavily outweighed" by the equities favoring denial of the preliminary injunction. Order Denying Prelim. Inj. ("Order"), *FTC v. Lab. Corp. of Am., et al.*, No. 10-1873 (MLG) (C.D. Cal. Feb. 22, 2011).[2]

Following denial of the preliminary injunction motion, the FTC moved for a stay pending appeal, which the District Court denied on February 25, 2011. Order Denying Stay Pending Appeal, *FTC v. Lab. Corp. of Am., et al.*, No. 10-1873 (MLG) (C.D. Cal. Feb. 25, 2011). The FTC then filed an emergency motion for an injunction pending appeal with the United States Circuit Court of Appeals for the Ninth Circuit. *FTC v. Lab. Corp. of America, et al.*, No. 11-55293 (9th Cir. Feb. 28, 2011). The Ninth Circuit denied the FTC's emergency motion on March 14, 2011.[3]

ARGUMENT

After the denial of a preliminary injunction, the Commission should decline to continue with administrative litigation of a merger case if it determines that "the public interest does not

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[2] The Order denying the FTC's motion for preliminary injunction was filed under seal at the direction of Judge Guilford. Although a redacted version of the Order is available publicly, a copy of the Order in its entirety is attached as Exhibit B. Pursuant to 16 C.F.R. § 3.26(f) the un-redacted Order as well as several other exhibits attached hereto that have been filed under seal at the direction of Judge Guilford shall be treated as *in camera* materials for purposes of this proceeding. Respondents will separately file a public, redacted copy of this motion and memorandum pursuant to 16 C.F.R. §§ 3.26(f) and 3.45(e). Respondents have not included the full record before the District Court with this motion, but would be pleased to submit this evidence at the Commission's request.

[3] The Ninth Circuit's order denying the FTC's emergency motion for a stay pending appeal is attached as Exhibit C.

warrant further litigation." Policy Statement Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39741 (Aug. 3, 1995) ("Policy Statement"). A determination by a district court – such as the determination in this case – that the Commission has not raised "questions going to the merits so serious substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals" will "itself raise serious questions about whether the Part 3 case should continue." 74 Fed. Reg. 1812 (Jan. 13, 2009). The Policy Statement outlining whether the Commission should proceed in the administrative action provides five factors that the Commission considers "highly relevant" in determining whether to continue administrative litigation: (1) the factual findings and conclusions of law of the district court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge. 74 Fed. Reg. 1811 (Jan. 13, 2009). The "determination to continue a merger challenge in administrative litigation is not, and cannot be, either automatic or indiscriminate." Policy Statement, 60 Fed. Reg. 39741. Rather, a "case-by-case determination is appropriate." *Id.*

Here, withdrawal of the case from adjudication is undoubtedly in the public interest and will permit the Commission to hear from both Complaint Counsel and Respondents and to determine whether to proceed with the administrative litigation given the denial of the FTC's preliminary injunction motion and new evidence that has come to light during the preliminary injunction proceeding. Ultimately, the decision of the District Court to deny preliminary relief,

the decision of the Appellate Court to decline to grant a stay pending appeal, and each of the five factors that the Commission considers strongly favor dismissal of the Complaint.

I. THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW DEMONSTRATE THAT THE FTC IS UNLIKELY TO SUCCEED ON THE MERITS OF THE CASE

The District Court denied the FTC's motion for a preliminary injunction in a 40-page opinion with detailed findings of fact and conclusions of law with respect to each element of the FTC's claims. In that opinion, Judge Guilford concluded that the FTC failed to demonstrate a likelihood of success on the merits under the standard for 13(b) preliminary injunction proceedings set forth in cases such as *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008) (Brown, J.), and *FTC v. H.J. Heinz, Co.*, 246 F.3d 708, 714-15 (D.D.C. 2001). Specifically, the District Court held that the FTC may satisfy "its burden to show likelihood of success 'if it raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'"[4] Despite the fact that the FTC faced a reduced burden of proof under this standard, Judge Guilford concluded that the FTC failed to demonstrate a likelihood of success on the merits.[5] There is now no reason to believe that the FTC will prevail on the merits in the administrative proceeding, at which the FTC will be held to a substantially higher burden of proof. Statement of the Commission, *In re Arch Coal, Inc., et al.*, No. 9316, at 8 (June 13, 2005) ("*Arch Coal* Dismissal Statement") (noting that the FTC bears "a higher standard of proof [in] a full trial on the merits"); *compare FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (holding that Commission must only "raise

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[4] Order ¶ 137 (citing *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984); *Whole Foods Mkt., Inc.*, 548 F.3d at 1035; *H.J. Heinz, Co.*, 246 F.3d at 714-15 (D.D.C. 2001); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999); *FTC v. Univ. Health*, 938 F.2d 1206, 1218 (11th Cir. 1991)).

[5] Order ¶ 167.

questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals") (citation omitted), *with In re R.R. Donnelly & Sons Co.*, 120 F.T.C. 36, 1995 WL 17012641, *204 (July 21, 1995) (dismissing complaint "for failure ***to prove*** that the acquisition is likely to reduce competition in a relevant market") (emphasis added). Withdrawal from adjudication will permit the Commission to carefully consider whether further litigation is in the public interest in light of the District Court's findings and conserve substantial Commission resources should the Commission determine that further litigation is unwarranted at this time.

A. The District Court found that the FTC was not likely to prevail on its alleged product market.

As a threshold matter, Judge Guilford found that the FTC's alleged product and geographic markets were unsupported by the evidence, a factual finding that is fatal to a Section 7 claim.[6] Indeed, Judge Guilford agreed with Commissioner J. Thomas Rosch that the FTC's alleged product market consisting of clinical lab services provided pursuant to capitated contracts with IPAs is "'misleading' in that it fails to account for the fact that discretionary FFS business is 'inextricably linked' to an IPA's capitated business."[7] To that end, a properly-defined relevant product market in this case must include clinical laboratory services provided pursuant to ***both***

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[6] Order ¶ 142 ("The failure to properly define a relevant market may lead to the dismissal of a Section 7 claim." (citing *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) ("Without a well-defined relevant market, an examination of a transaction's competitive effects is without context or meaning."); *United States v. Engelhard Corp.*, 970 F. Supp. 1463, 1485 (M.D. Ga. 1997) ("If the market is incorrectly defined, the market shares will have no meaning."))); Order ¶ 143 ("Not only is the proper definition of the relevant . . . market the first step in [a] case, it is also the key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anti-competitive effects of the transaction." (citing *United States v. Sungard Data Sys.*, 172 F. Supp. 2d 172, 181 (D.D.C. 2001); *United States v. Marine Bancorp.*, 418 U.S. 602, 618-23 (1974) (Market definition is the first step in the analysis); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116-17 (D.D.C. 2004) ("[A]ntitrust theory and speculation cannot trump facts, and even Section 13(b) cases must be resolved on the basis of the record evidence relating to the markets and its probable future.")).

[7] Order ¶ 45 (citing Dissenting Statement of Commissioner J. Thomas Rosch, *In re Lab. Corp. of Amer., et al.*, FTC Dkt. No. 9345, at 2 (Nov. 30, 2010)).

capitated contracts with IPAs as well as fee-for-service ("FFS") contracts with IPAs and other payers. As Judge Guilford found, capitation and FFS are merely two ways of paying for otherwise ***identical*** lab services, and payment method alone does not define a product market.[8]

In addition, as the Merger Guidelines[9] and case law[10] recognize: "if the sale of one product affects the prices of another product sold by the same company, the two products should be placed in the same candidate market."[11] Judge Guilford found that "[d]iscretionary FFS business from tests billed to physicians, patients, or third-party payers is 'highly inter-related' to capitated business"[12] because "[a] capitated rate offered by a lab to an IPA is linked to the lab's estimate of the potential for discretionary FFS revenue the clinical lab hopes to realize from the

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[8] Order ¶ 39 (citing LX-5005 ([redacted] Dep.) 23:9-15; LX-5003 ([redacted]) 18:5-18:14; LX-5015 ([redacted] Dep.) 40:5-11); Order ¶¶ 150-51 (citing *Little Rock Cardiology Clinic P.A. v. Baptist Health*, 591 F.3d 591, 597 (8th Cir. 2009) (defining a market based on "how consumers pay…lacks support in both logic and law"); *HTI Health Servs. Inc. v. Quorom Health Group, Inc.*, 960 F. Supp. 1104, 1117-20 (S.D. Miss. 1997) (rejecting managed care provider market "based on the distinct discount pricing that is associated with managed care purchases…as myopic"); *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1410-11 (7th Cir. 1995) (Posner, J.) (HMOs do not constitute a separate market because they compete "not only with each other but also with the various types of fee-for-service provider[s]")); Order ¶ 40 ("Clinical labs use the same PSCs, same couriers, same equipment, same reagents, same interfaces, same test menu, same STAT labs, same labs, and same employees to perform the same exact lab tests on both capitated and FFS accessions." (citing LX-5006 ([redacted] Dep.) 20:21-21:10; LX-5005 ([redacted] Dep.) 22:10-22, 43:6-9; LX-5002 ([redacted] Dep.) 46:16-47:15; LX-5004 (Flyer Dep.) 69:19-70:7, 162:10-166:2-7; LX-0647 ([redacted] Decl.)).

[9] Under the Federal Trade Commission & U.S. Department of Justice Horizontal Merger Guidelines, "if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market," then the agencies must apply the SSNIP test to a "hypothetical profit-maximizing cartel comprised of all the firms (*with all their products*)" rather than to a hypothetical monopolist. Merger Guidelines at n. 4 (emphasis added). In other words, in this case the "small but significant and non-transitory increase in price" ("SSNIP") test must be applied to *both* the capitated business and discretionary FFS business combined, and *both* of these forms of contracting (as well as suppliers of those contracts) should be included in the relevant product market.

[10] *See U.S. v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (1970); *Cal. v. Sutter Health System, et al.*, 130 F. Supp. 2d 1109, 1119 (N.D. Cal. 2001); *Reazin v. Blue Cross and Blue Shield of Kan., Inc.*, 899 F. 2d 951, 959 n. 10 (10th Cir. 1990); *see also* Dissenting Statement of Commissioner J. Thomas Rosch, *In re Lab. Corp. of Am.,, et al.*, FTC Dkt. No. 9345, at 2 (Nov. 30, 2010) at p. 2 ("[S]everal courts have held that when a company sells a product at a deflated price (as in the case of a capitated contract) with the expectation of subsequent high-margin sales of related products (FFS contracts), the products should be treated as being in the same market."); Order ¶ 147.

[11] Dissenting Statement of Commissioner J. Thomas Rosch, *In re Lab. Corp. of Am.,, et al.*, FTC Dkt. No. 9345, at 2 (Nov. 30, 2010).

[12] Order ¶ 43 (citing LX-5015 ([redacted] Dep.) 58:1-18).

IPA's physicians."[13] Because all clinical labs actively compete for discretionary FFS business, properly defining the market to include both capitated and FFS business "dramatically reduces LabCorp's and Westcliff's market shares."[14] Although the FTC alleged an "alternative" product market consisting of both capitated and FFS contracts with IPAs – the same market alleged in another relatively recent FTC enforcement action involving clinical lab services in California[15] – it has not alleged market shares in this market, and the District Court found that expanding the market to include FFS contracts "dramatically expands the number of competitors in the market and reduces LabCorp's and Westcliff's market share significantly."[16]

B. The District Court found that the FTC was not likely to prevail on its alleged geographic market.

The District Court also rejected the FTC's alleged geographic market. Pursuant to the Merger Guidelines, geographic markets must be defined by *either* customer locations or supplier locations. Merger Guidelines at ¶¶ 4.2.1, 4.2.2. However, the Complaint (and PI Complaint) alleged a geographic market consisting of ten counties that the FTC defines as "Southern California," a region that Judge Guilford found corresponded to *neither* the locations of customers nor suppliers. With respect to customers, Judge Guilford found that IPAs only require clinical laboratories to have patient service center ("PSC") networks encompassing "the handful of individual localities where their physicians have offices and where their patients reside. They

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13 Order ¶ 44 (citing PX-0154 (Flyer Decl. ¶ 9); LX-5002 ([redacted] Dep.) 42:17-43:7; LX-5003 ([redacted] Dep.) 23:14-24:21, 25:5-25:15, 40:20-45:22; LX-2744 ([redacted]); LX-1610 (Feb. 23, 2010, Prospect P&L); LX-1611 (May 4, 2009, Promed P&L); LX-5011 (Wu Dep.) 56:20-24, 63:2-17, 274:15-275:24); *see also* Order ¶ 34 ("Laboratory vendors offer capitated contracts to physician groups because the contract guarantees fixed monthly revenue for all of the physician group's HMO patients and provides a significant advantage in getting referrals from individual physician members of the physician group to conduct testing for their non-HMO patients.") (citations omitted).

14 Order ¶ 46.

15 Order ¶ 38 (citing Compl ¶ 8, *In re Quest Diagnostics Inc. / Unilab Corp.*, FTC Docket No. C-4074 (Feb. 21, 2003) ("[T]he relevant line of commerce in which to analyze the effects of the [Quest / Unilab] Merger is the provision of clinical laboratory testing services to physician groups.")).

16 Order ¶ 42.

do not require a clinical lab to have a network of PSCs across all of 'Southern California.'"[17] Moreover, Judge Guilford found that LabCorp's and/or Westcliff's market share is "effectively zero in six of the ten counties in 'Southern California,'" and thus the acquisition "does not (and could not) present any threat of competitive harm to IPAs in any of those areas."[18] With respect to suppliers, Judge Guilford found that "[b]oth LabCorp and Westcliff have PSCs and laboratory facilities throughout California" and provide clinical lab services to customers throughout California from their labs located in San Diego and Santa Ana, respectively.[19] Judge Guilford concluded that a market based on the locations of LabCorp's and Westcliff's respective lab locations "would reduce the companies' combined market shares because other prominent competitors exist in 'Northern California' such as Sutter Health Systems, Hunter Laboratories, and Muir Lab."[20]

C. The District Court found that the FTC was not likely to prevail in establishing that the transaction would result in anticompetitive effects.

Even accepting *arguendo* the FTC's proposed geographic and product market definitions, Judge Guilford found that the market shares alleged in the Complaint were insufficient to create a rebuttable presumption of competitive harm. Although the Complaint alleged a combined 29 percent market share, Judge Guilford found that "a presumption of anticompetitive effects from a combined share of [less than] 35 percent in a differentiated products market is unwarranted, and essentially a monopoly or dominant position is required to prevail on a differentiated products

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17 Order ¶ 50 (citing LX-5003 ([redacted] Dep.) 13:2-7 ([redacted]); LX-5005 ([redacted] Dep.) 46:3-46:11; LX-5001 ([redacted] Dep.) 74:11-24; LX-5000 ([redacted] Dep.) 25:6-10, 67:4-15; LX-5014 ([redacted] Dep.) 46:8-47:5; LX-5008 ([redacted] Dep.) 39:7-10; LX-5007 ([redacted] Dep.) 44:13-19); Order ¶ 51 ("The FTC has not identified any IPAs that require PSCs covering more than the local geographic area of their IPA physician/patient membership.").

18 Order ¶ 53.

19 Order ¶¶ 54-57.

20 Order ¶ 58.

unilateral effects claim."[21] Furthermore, Judge Guilford found that Westcliff's business was in financial distress,[22] meaning that its alleged current market share significantly overstates its competitive significance.

In addition to rejecting the FTC's structural prima facie case, the District Court held that "even assuming a prima facie case, Defendants have presented sufficient rebuttal evidence, particularly about new entrants."[23] The District Court thus rejected the FTC's evidence of anticompetitive effects. Instead, Judge Guilford evaluated the best evidence available of this transaction's probable competitive impact – whether Westcliff's entry in 2007 affected prices in the relevant market – and found that Westcliff's entry "did not lead to a reduction in LabCorp's capitated pricing or alter LabCorp's bidding behavior."[24] Moreover, the District Court found that other clinical labs have offered IPAs prices that were lower than LabCorp's and Westcliff's prices,[25] and therefore these labs currently serve (and will serve in the future) as competitive constraints.[26]

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[21] Order ¶ 156 (citing *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1123 (N.D. Cal. 2004) (internal quotations omitted), and Commentary on the Horizontal Merger Guidelines at 26) ("As an empirical matter, the unilateral effects challenges made by the Agencies nearly always have involved combined shares greater than 35%.")). The Guidelines further state that the presumption only applies if "the merging products are especially close substitutes." Commentary on the Horizontal Merger Guidelines (March 2006) at 26 *available at*: http://www.justice.gov/atr/public/guidelines/215247.htm. Judge Guilford even noted that the FTC allowed Quest to purchase Unilab with minimal divestiture even though their combined market share was *70 percent* and the next largest competitor (LabCorp) had only a 4 percent market share. Order ¶ 64.

[22] *See* Order ¶¶ 88-100.

[23] Order ¶ 167.

[24] Order ¶ 76 (citing LX-0407 (McCarthy/Wu Decl.) ¶¶ 30-32; LX-5011 (Wu Dep.) 65:25-66:25, 105:16-106:8, 129:14-130:10; LX-2412).

[25] Order ¶ 74 (citing LX-5004 (Flyer Dep.) 71:7-72:14, 73:14-75:4; LX-5011 (Wu Dep.) 152:15-153:23, 209:19-211:4).

[26] The FTC also initially alleged that the transaction could lead to coordinated effects. *See* PI Compl. ¶ 39. However, the FTC failed to gather or submit evidence on this theory and did not assert a coordination theory in its briefing for the preliminary injunction hearing. The District Court declined to find that coordinated effects were likely post-transaction.

Judge Guilford also held that entry and expansion by existing clinical laboratories into the alleged product market is not difficult and therefore likely to mitigate any possible competitive effects: "[c]linical laboratories that do not currently contract on a capitated basis are capable of doing so since they already provide the fundamental service – clinical lab service."[27] In fact, the court noted that Westcliff itself "entered into capitated contracting and expanded into new geographies in a relatively short period of time."[28] The District Court found that the minimum viable scale to serve capitated contracts with IPAs is likely less than or equal to a mere 1,000 accessions per day – a threshold that many laboratories in California already exceed.[29] As a result, expansion by those existing clinical laboratories is likely.

Moreover, the District Court found that "entry" into the alleged market had already occurred. Of primary importance, Judge Guilford found that Sonic Healthcare, the third-largest clinical lab services provider in the United States, recently made acquisitions that took the company from "no presence in California to operating in at least four of the ten counties that the FTC defines as constituting 'Southern California,'" the alleged relevant geographic market.[30] Importantly, the labs purchased by Sonic already had capitated contracts with IPAs,[31] meaning that in addition to competing both for fee for services arrangements and on a national level, the third-largest laboratory services provider in the United States had entered both the alleged relevant product and geographic markets in the span of two months.[32]

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[27] Order ¶ 41 (citing LX-5002 ([redacted] Dep.) 72:17-73:12; 87:4-9).

[28] Order ¶ 65 (citing LX-503 ([redacted] Dep.) 31:7-11, 102:25-103:19; LX-5004 (Flyer Dep.) 215:16-216:23; LX-0304 ([redacted] Decl.)).

[29] Order ¶¶ 72-73.

[30] Order ¶ 67 (citing PX-0140; PX-0111; LX-0407 (McCarthy/Wu Decl.) Ex. 5; Ex. 5 (Updated 2/2/2011)).

[31] *Id.*

[32] Sonic is not the only example of what Judge Guilford found were "new entrants into the 'Southern California' market." Order ¶ 66. He also found that Pathology, Inc. recently acquired a "leading California provider

The District Court also found that substantial efficiencies justify the acquisition. Judge Guilford found that the transaction would likely result in "over [redacted] annually in merger-specific efficiencies" from both cost and supply savings.[33] He also found that the transaction would result in savings to customers of [redacted] from moving Westcliff customers to more favorable LabCorp contracts.[34] The opinion notes that these savings reflect a "major benefit" of "combining Westcliff's service model with the resources and potential economies of scale of LabCorp."[35]

D. The District Court evaluated an extensive evidentiary record.

The District Court made all these findings and conclusions with the benefit of an extensive record.[36] While Complaint Counsel has argued in an appellate motion that the District Court's ruling is incorrect, Complaint Counsel did not argue (nor can it) that the District Court's decision was based on a deficient factual record. Where – as here – a federal District Judge has reviewed a robust evidentiary record and denied a preliminary injunction, mere disagreement with the result of the District Court's decision should not spur the Commission to continue the case. Indeed, the Commission has withdrawn a matter from adjudication and dismissed a complaint following the denial of a preliminary injunction even where the Commission found that the District Court "made numerous factual and legal errors that contributed to what [it] believe[d] was an erroneous decision." Statement of the Commission, *In re Paul L. Foster, et al.*, No. 9323, at 3 (Oct. 3, 2007) ("*Foster* Dismissal Statement"). The Commission recognized that

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of clinical laboratory testing" in Templeton, California. Order ¶ 71. These acquisitions and other actual and possible entrants are discussed further at pages 14-16.

[33] Order ¶¶ 83, 87, 102.

[34] Order ¶¶ 84-85.

[35] Order ¶ 86 (internal citations omitted).

[36] *See supra* at 3.

before it engages in "lengthy and resource-intensive administrative litigation . . ., there must be support for the conclusion that the additional expense will improve the evidentiary record." *Id.* In particular, the focus is on "whether the record before the District Court was deficient in any serious respect" because it is "essential to understand whether the court's errors resulted from a flawed record or simply from a mistaken view of a sufficient record." *Id.* In *Foster*, the Commission concluded that even though the record was short of a fully developed trial record, the FTC was not prevented from presenting any important evidence regarding the potential impact of the merger to the District Court. Thus, the court's ruling was based in that case (as it would be here) on essentially the same "evidence" that would likely be considered in the administrative proceeding

Here, the District Court afforded FTC staff ample opportunity to present important evidence. The record is not deficient or flawed; rather, it is voluminous and comprehensive. On the basis of that evidentiary record the District Court concluded that the FTC was unlikely to succeed on the merits.

II. NEW EVIDENCE DEVELOPED DURING THE PRELIMINARY INJUNCTION HEARING SUPPORTS RESPONDENTS' CASE

New evidence discovered during the pendency of the preliminary injunction hearing strongly weighs in favor of withdrawal in order for the Commission to re-evaluate whether to pursue the Complaint, and in favor of ultimate dismissal. For instance, during the preliminary injunction discovery period, at least three different companies expanded into the provision of clinical lab services in southern California. While there are already numerous providers of lab services in southern California, these three entrants are particularly significant.

First, Sonic Healthcare's December 31, 2010 acquisition of Physicians Automated Laboratory ("PAL") gives Sonic "a central location from which to build further business in

California"[37] and was coupled with an announcement by Sonic's managing director that the acquisition "was the first step in a long-term growth plan for America's most populous state of 32 million residents. *Sonic plans more purchases in California.*"[38] Subsequently, Sonic acquired a second clinical laboratory in California, Central Coast Pathology Consultants ("CCPC") on February 7, 2011.[39] With these acquisitions, Sonic now has several capitated contracts with IPAs in the alleged relevant geographic market and is poised to become a strong competitor to LabCorp and Quest in Southern California.[40]

Second, Pathology, Inc., a pathology lab previously without clinical laboratory capabilities, acquired Central Coast Clinical Laboratories ("CCCL") located in Templeton, California on January 24, 2011.[41] Prior to the FTC commencing litigation against LabCorp, [redacted][42] However, with the acquisition of CCCL, "a leading

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37 *Sonic Healthcare Buys California Clinical Pathology Laboratory Company*, Dark Daily, Jan. 17, 2011 (attached as Exhibit E).

38 Order ¶ 68; Teresa Ooi, *Sonic in $84m Laboratory Spending Spree*, The Australian, Jan. 18, 2011 (emphasis added) (attached as Exhibit F).

39 Order ¶ 70.

40 [redacted].

41 Order ¶ 71.

42 PX0131 ([redacted] Decl.) ¶ 6 (attached as Exhibit G).

California provider of clinical laboratory testing," [redacted].[43]

Third, also in January, Pathology Associates Medical Laboratories ("PAML"), a significant clinical laboratory services provider in the Pacific Northwest, began operating a joint venture with a hospital system in southern California that [redacted].[45] These transactions confirm that Judge Guilford was correct in concluding that entry is relatively easy and likely, and they represent a significant change in the competitive landscape in the alleged market since the Commission voted out the present Complaint. Indeed, other firms appear poised to grow or to enter the market in the near future.[46]

Discovery during the pendency of the preliminary injunction hearing also revealed evidence that further undermines the case that was presented to the Commission by the FTC Staff and that ultimately formed the basis for the Complaint. For instance, the FTC's claims were based almost entirely on a series of declarations from customers and competitors.[47]

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43 Order ¶ 71.

44 [redacted] Dep. 8:16-25, 9:18-10, 27:13-22 (attached as Exhibit H).

45 *Id.* 17:20-25.

46 [redacted]

47 Even the original "expert" report of Dr. Fredrick Flyer was based almost entirely on the declarations gathered by the FTC Staff as it investigated the acquisition. Defs. Opp'n to Pl. FTC's Mot. for Prelim. Inj., *FTC v. Lab. Corp. of Am. et al.*, SACV 10-1873 AG (MLGx) (C.D. Cal. Jan. 28, 2011) at 17 & n.57-59 (attached as Exhibit A).

Respondents deposed or sought additional information from fifteen of those declarants (specifically identified by the FTC pursuant to the District Court's scheduling order as those it would rely upon in the PI proceeding) during the preliminary injunction discovery period and found that the declarations were frequently misleading or incomplete, or that relevant circumstances had changed. Those depositions revealed not only that the declarants lacked foundation for many of their statements, but that the language in the FTC's declarations sometimes *distorted* the declarants' real opinions.[48] For example, many of the FTC's declarants testified both that their declarations were inaccurate and that they are actually *not concerned about the transaction*,[49] or that LabCorp and Westcliff were not actually competing against each other.[50] The chart on the following page provides just a few examples (but by no means all examples) in which individuals who signed declarations for the FTC testified contrary to statements in their declarations:

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[48] [redacted] Dep. 61:13-65:25 (attached as Exhibit J); [redacted] Dep. 39:23-53:18 (attached as Exhibit K); [redacted] Dep. 52:25-54:4 (attached as Exhibit L); [redacted] Dep. 68:15-25 (attached as Exhibit M); [redacted] Dep. 51:24-55:14 (attached as Exhibit N); [redacted] Dep. 106:6-109:8 (attached as Exhibit O); [redacted] Dep. 64:11-64:16 (attached as Exhibit P).

[49] *See, e.g.*, [redacted] Dep. 64:16-65:25 (attached as Exhibit J); [redacted] Dep. (attached as Exhibit S) 76:19-22, 108:1-22. In addition, other customers also indicated that they had no concerns with the transaction. *See, e.g.*, LX-301 (Mason Decl.) (attached as Exhibit CC); LX-302 (Dempsey Decl.) (attached as Exhibit DD); LX-303 (Beilman-Warner Decl.) (attached as Exhibit EE); LX-307 (Martin Decl.) (attached as Exhibit FF); LX-412 (Marten Decl.) (attached as Exhibit GG); LX-647 ([redacted] Decl.) (attached as Exhibit HH); [redacted] Dep. 88:13-19 (attached as Exhibit R); [redacted] Dep. 74:6-13 (attached as Exhibit P).

[50] *See, e.g.*, [redacted] Dep. 68:15-25 (attached as Exhibit M) ([redacted]); [redacted] Dep. 65:7-11 (attached as Exhibit S) ([redacted]); [redacted] Dep. 17:7-20:16 (attached as Exhibit N).

Declaration	Deposition Testimony
[redacted] Decl. (PX0100) ¶ 5 (attached as Exhibit Z)	[redacted] Dep. 63:21-64:1 (attached as Exhibit J)
[redacted] Decl. (PX0100) ¶ 6 (attached as Exhibit Z)	[redacted] Dep. 65:9-18 (attached as Exhibit J)
[redacted] Decl. (PX0113) ¶ 7 (attached as Exhibit AA)	[redacted] Dep. 49:18-21 (attached as Exhibit K)
[redacted] Decl. (PX0105) ¶ 6 (attached as Exhibit BB)	[redacted] Dep. 49:10-15 (attached as Exhibit M)

Importantly, discovery in the administrative proceeding is now closed. Although the parties engaged in additional discovery following the preliminary injunction hearing, the evidence revealed in that period did not lend additional support to Complaint Counsel's claims, and instead cast further doubt on the evidentiary merit of the various declarations obtained by FTC Staff. For example, one of Complaint Counsel's customer declarants, [redacted], who was not deposed until after the preliminary injunction hearing, testified that [redacted]

[redacted]

[redacted]. Instead, [redacted] testified that [redacted][51]

In a second example, one of the individuals from whom the FTC obtained a declaration in lieu of deposition testimony during the preliminary injunction discovery period subsequently stated in a separate sworn declaration that [redacted][52] At the subsequent deposition of this individual, Complaint Counsel went so far as to apologize to this witness for the events leading to signing her declaration.[53]

In short, the new evidence collected during the course of the preliminary injunction proceeding (and beyond) weighs in favor of dismissal of the Complaint. Since the FTC filed its Complaint, there has been no new evidence that the acquisition will have adverse competitive effects, but abundant new evidence further undermining the FTC's claims. The Commission should, therefore, withdraw the matter from adjudication to re-assess its Complaint in light of this new evidence. *See Arch Coal* Dismissal Statement, No. 9316, at 5 (dismissing the

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51 [redacted] Dep. 49:9-50:1 (attached as Exhibit R).

52 LX-0654 (Beilman-Werner Decl.) ¶ 7 (attached as Exhibit Q);

53 Beilman-Werner Dep. 139:1-5 (attached as Exhibit T).

administrative complaint in part because the majority of the new evidence developed during the preliminary injunction hearing undermined the Commission's case).

III. THE TRANSACTION DOES NOT RAISE IMPORTANT ISSUES OF FACT, LAW, OR MERGER INJUNCTION POLICY

The District Court decision related to the LabCorp/Westcliff transaction does not raise important issues of fact, law, or merger policy that need resolution in an administrative proceeding. To the contrary, the District Court's ruling was fact-driven, and its legal analysis "did little more than recite established principles of competition law," *Foster* Dismissal Statement, No. 9323, at 3-4. Indeed, Complaint Counsel has even admitted that the District Court employed the proper legal standard to review the FTC's likelihood of success on the merits. Emerg. Mot. for Inj. Pending Appeal, *FTC v. Lab. Corp. of Am., et al.*, No. 11-55293, at 10 (9th Cir. Feb. 28, 2011). Therefore, the District Court's opinion will have little precedential value beyond the specific facts of this case. *See Foster* Dismissal Statement, No. 9323, at 4. Moreover, there already exist "many established, well-reasoned, and well-articulated recent merger cases, to which courts considering future merger challenges by the Commission may look for guidance." *Id.* at 6.

IV. THE COSTS OF FURTHER PROCEEDINGS FAR OUTWEIGH ANY LIKELY BENEFITS

The Commission should also withdraw the matter from adjudication to more carefully weigh whether continuing litigation is worth its significant costs. "The use of FTC resources is always an important consideration in determining whether to continue in administrative litigation." *Foster* Dismissal Statement, No. 9323, at 6. Respondents submit that the Commission should not squander significant FTC resources in an attempt to revive a case that – as the District Court's Order has established – it has little chance of winning. Despite the substantial effort and expense incurred by the FTC to date in bringing this action against

Respondents,[54] and despite the accumulation of a voluminous evidentiary record, the District Court found that Complaint Counsel is unlikely to succeed on the merits of its case. The District Court's findings cast serious doubt on the FTC's alleged product and geographic markets, establish that competitive effects are unlikely, demonstrate that entry is likely, and describe in detail the transaction's substantial efficiencies and other benefits for consumers.

The District Court's detailed findings, based on an extensive evidentiary record, demonstrate that the FTC is highly unlikely to succeed in administrative litigation. Withdrawing the Complaint from adjudication will allow the Commission to review those findings and consider the substantial costs of proceeding. Given the record to date, the Commission should ultimately find that its resources are better allocated elsewhere. *See Foster* Dismissal Statement, No. 9323 at 6 ("Given the district court's finding that the Commission failed to define a geographic market, and its negative assessment of our two experts' analysis, we believe that an administrative proceeding would require substantially more resources, which should instead be reallocated to new competition matters . . . ."); *see also Arch Coal* Dismissal Statement, No. 9316, at 8 ("The higher standard of proof prescribed by a full trial on the merits would require the Commission to expend at least an equivalent level of resources to pursue a trial before an administrative law judge," which "would not serve the public interest.").

V. OTHER FACTORS INDICATE THAT WITHDRAWAL AND DISMISSAL ARE IN THE PUBLIC INTEREST

There are "significant ramifications to both the Commission and Respondents that arise" when the Commission exercises its authority to pursue an administrative proceeding after the

[54] Respondents are aware of at least FTC 21 attorneys involved in the three months of the preliminary injunction and Part III proceedings *alone*. This staggering count does not include the large team of attorneys involved in the many months of the investigation, nor does it include the paralegals and support staff involved in this litigation. Complaint Counsel also has prepared and served the reports of two outside experts in the Part III proceeding. The demands of expert discovery, a lengthy trial, and an appeals process that is likely to last well into 2012 will surely require the FTC to allocate even more resources to this case.

denial of a preliminary injunction. *Foster* Dismissal Statement, No. 9323, at 7. Therefore, "it is crucial that the Commission exercise this authority judiciously." *Id.* Withdrawing the Complaint allows the Commission to do just that. Now that the companies are integrating, there is no urgent need for the Commission to act hastily in pursuing litigation. To the contrary, withdrawal gives the Commission additional time to re-evaluate this matter in light of the District Court's findings and the extensive evidence discovered since the Commission first considered this case. Withdrawal also gives the Commission the ability to review the declarations and deposition testimony discovered in the course of the preliminary injunction proceeding of customers who state that they have no concerns regarding the transaction, and others who testify that they and the public will benefit from the transaction.[55]

Moreover, the pending *qui tam* lawsuit by the California Attorney General against several laboratories in California – including LabCorp – and the ongoing Medi-Cal enforcement action by California's Department of Health Care Services (DHCS) may have significant consequences for the entire laboratory services industry in California.[56] To that end, on December 27, 2010, the Dark Report, a laboratory services industry publication, reported that DHCS had sent letters to between 10 and 30 California laboratory companies in the Summer of 2010 accusing them of submitting fraudulent claims in connection with the State's Medi-Cal program by billing private payers below the rates charged to the Medi-Cal program (including through the use of capitated

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[55] *See* supra n.49; *see also* LX-412 (Marten Decl.) (attached as Exhibit GG); LX-301 (Mason Decl.) (attached as Exhibit CC).

[56] In the *qui tam* lawsuit the plaintiffs allege that, beginning in 1995, several laboratories overcharged Medi-Cal in violation of the California False Claims Act. *California ex rel. Hunter Laboratories, LLC v. Quest Diagnostics Incorporated, et al.*, No. CIV 34-2009-00048046. Similarly, DCHS initiated an enforcement program because it contends that laboratory billings are not consistent with applicable California regulations, as currently interpreted by DCHS. *See Medi-Cal Gets Tough on Low Lab Test Prices*, The Dark Report at 5-8 (Dec. 27, 2010) (attached as Exhibit U).

agreements).[57] As a result of that enforcement action, the Dark Report reported that several laboratories targeted by DHCS raised lab test prices to those payers in order to avoid further allegations that the laboratories were violating state law.[58]

Those suits have also impacted other providers of clinical lab services in California. For instance, Westcliff entered into a settlement agreement and release with the State of California Office of the Attorney General. The terms of that agreement are instructive in how future settlements may impact pricing. The Westcliff settlement provided that if Westcliff remained a stand-alone entity it would have to refund to the State of California the difference between the Medi-Cal fee schedule for laboratory tests and the capitated payments received by Westcliff over that same period.[59] Similarly, on January 25, 2011, Quest Diagnostics, the largest clinical laboratory provider in California, reported in its 2010 year-end earnings report that it had reached an agreement in principle (subject to further negotiation) to settle both the *qui tam* action and the DHCS enforcement action.[60] The settlement reportedly involves a possible payment of $241 million if the parties can agree on various other terms, including going-forward pricing terms.[61]

The impact of these settlements and the continued prosecution of the *qui tam* lawsuit and DHCS enforcement action cannot be fully predicted – but it also should not be ignored, as it has the very real potential of impacting price in the alleged product market in the near future and

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57 *Medi-Cal Gets Tough on Low Lab Test Prices*, The Dark Report at 5 (Dec. 27, 2010) (attached as Exhibit U).

58 *Who Wins and Who Loses with 51501 Enforcement*, The Dark Report at 10 (Dec. 27, 2010) (attached as Exhibit U).

59 Westcliff Settlement Agreement and Release (May 2010) at 9-10 (attached as Exhibit V).

60 Press release, Quest Diagnostics Reports Fourth Quarter 2010 Financial Results; Provides Guidance for 2011 (Jan. 25, 2011), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=82068&p=irol-newsArticle&ID=1519416&highlight=.

61 *Id.*

potentially rendering moot Complaint Counsel's arguments regarding the price differential between capitated and FFS billing arrangements. This could, in turn, completely change the alleged competitive landscape by incentivizing even more entry and expansion, including by hospital labs.

In addition, withdrawal will not foreclose Commission action at a later date should any action appear appropriate. Indeed, the Commission can monitor the effects of the transaction and of entry – as well as the *qui tam* litigation – in deciding how to proceed. Neither withdrawal nor dismissal will affect the Commission's ability to bring any future enforcement actions in the market generally. *See Arch Coal* Dismissal Statement, No. 9316, at 9 (finding that another public interest factor is the fact that "the Commission remains free to enforce the antitrust laws in these markets.").

CONCLUSION

The record demonstrates that this is simply not a case in which the Commission should continue to expend its scarce resources. The Commission should instead withdraw the Complaint in order to evaluate the wealth of new evidence and findings that support dismissal and then should dismiss the Complaint. Indeed, the Commission has come to that same conclusion in multiple cases.[62] Commissioner Rosch has even noted that, following the denial of a preliminary injunction, the Commission should not proceed to administrative litigation "absent *extraordinary circumstances* – for example, where a court decision is obviously a home town

[62] *See, e.g.*, *Arch Coal*, No. 9316 (June 13, 2005) (order granting motion to dismiss per Rule 3.26(d)); *Foster*, No. 9323 (Oct. 3, 2007) (same); *In re Butterworth Health Corp, et al.*, No. 9283 (Sept. 25, 1997) (same); *In re Freeman Hosp., et al.*, No. 9273, 120 F.T.C. 1003, 1995 WL 17012691 (Nov. 30, 1995) (same).

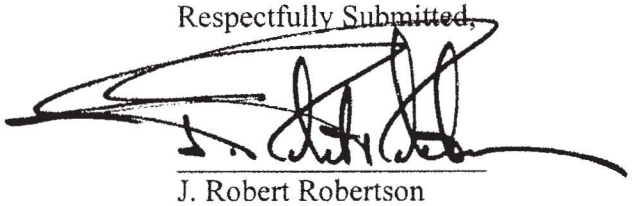
decision."[63] This is clearly not a case of "extraordinary circumstances" Or a "home town decision."

In sum, the Commission should withdraw this matter from adjudication to more fully reevaluate this matter in light of the District Court's findings, the significant new evidence, and the rapidly changing dynamics in the provision of clinical laboratory services in California. Taking this opportunity to consider these factors will save the Commission significant resources, which is strongly in the public interest.

For the reasons set forth herein, Respondents respectfully request that the Court grant Respondents' Motion to the Commission to Withdraw the Matter from Adjudication and consider whether to proceed further in this matter.

Dated: March 17, 2011

Respectfully Submitted,



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[63] Remarks Before the Antitrust Modernization Commission, J. Thomas Rosch, Commissioner, Federal Trade Commission (June 8, 2006) (noting that his remarks are not in his capacity as a Commissioner but as an antitrust litigator) (emphasis added), *available at* http://www.ftc.gov/speeches/rosch/Rosch-AMC%20Remarks.June8.final.pdf. Commissioner Rosch's remarks dealt with initiating an administrative proceeding after the denial of a preliminary injunction. Although Commissioner Rosch's remarks dealt with initiating an administrative proceeding after the denial of a preliminary injunction, the principle that he sets forth remains applicable to this case.

Attorneys for Laboratory Corporation of America and Laboratory Corporation of America Holdings

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
LABORATORY CORPORATION OF AMERICA	)	**Docket No. 9345**
and	)	**PUBLIC**
LABORATORY CORPORATION OF AMERICA HOLDINGS, corporations.	)	

[PROPOSED] ORDER

Upon consideration of Respondents' Motion to the Commission to Withdraw Matter from Adjudication, any opposition thereto, and the Commission being fully informed,

IT IS HEREBY ORDERED, that Respondents' Motion is GRANTED.

IT IS FURTHER ORDERED, pursuant to Rule 3.26(c) of the Commission Rules of Practice, that this matter in its entirety be, and hereby is, withdrawn from adjudication, and that all proceedings before the Administrative Law Judge be and they hereby are stayed.

By the Commission.

Donald S. Clark
Secretary

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed via FTC e-file a PDF copy that is true and correct copy of the signed original of the foregoing PUBLIC Motion to the Commission to Withdraw Matter from Adjudication with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-159
Washington, DC 20580
secretary@ftc.gov

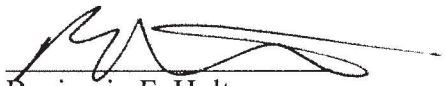
I also certify I delivered via electronic mail and hand delivery a courtesy copy of the foregoing PUBLIC Motion to the Commission to Withdraw Matter from Adjudication to:

D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Rm. H-113
Washington, DC 20580
oalj@ftc.gov

I also certify I delivered via electronic mail a copy of the foregoing PUBLIC Motion to the Commission to Withdraw Matter from Adjudication to:

J. Thomas Greene
Michael R. Moiseyev
Jonathan Klarfeld
Stephanie A. Wilkinson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Date: March 23, 2011



Benjamin F. Holt
Hogan Lovells US LLP
Counsel for Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings

Exhibit A

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit B

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION, **Plaintiff,** **v.** **LABORATORY CORPORATION OF AMERICA, et al.,** **Defendants.**	**CASE NO. SACV 10-1873 AG (MLGx)** **ORDER DENYING PRELIMINARY INJUNCTION** **REDACTED**

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.

EXHIBIT A

FINDINGS OF FACT

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

1. THE PARTIES AND THE TRANSACTION

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

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

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

bGF3YnVzaW5lc3MuY29tL2RvY3VtZW50L3YxLzAwMDA5MjAxNDgtMTAtMDAwMDIx
L3htbA%3d%3d.

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

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

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

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

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

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

10. In 2009, LabCorp had revenues of $4.69 billion. *See* Laboratory Corporation of America Holdings Announces 2009 Fourth Quarter and Full Year Results, Feb. 11, 2010, 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

2. PRODUCT MARKET

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

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

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

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

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

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

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

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

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

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

31. Under the delegated managed care model, physician groups are responsible for purchasing ancillary services, including laboratory services, for their HMO patients. PX 0109 at ¶ 2 ([redacted] Decl.); PX 0115 at ¶ 2 ([redacted] Decl.); PX 0111 at ¶ 2 ([redacted] Decl.); PX 0110 at ¶ 2 ([redacted] Decl.); PX0120 at ¶ 3 ([redacted] Decl.); PX 0121 at ¶ 2 ([redacted] Decl.); PX 0102 at ¶ 4 ([redacted] Decl.); PX 0159 at ¶ 3 ([redacted] Decl.); [redacted] ([redacted]) Dep. 112. In Southern California, physician groups purchase clinical laboratory services directly from independent commercial laboratories for patients covered by HMO plans. PX 0121 at ¶ 2 ([redacted] Decl.); PX 0122 at ¶ 2 ([redacted] Decl.); PX 0125 at ¶ 3 ([redacted] Decl.); [redacted] ([redacted]) Dep. 116-17; PX 0110 at ¶ 2 ([redacted] Decl.); PX 0159 at ¶ 3 ([redacted] Decl.).

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

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

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

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

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

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

37. Other laboratories, although they do not currently have capitated contracts with physician groups, also currently compete to provide clinical laboratory services. For example, Primex, a clinical laboratory based in Van Nuys, California, previously provided clinical lab services to Community Medical Group under a capitated arrangement and submitted a proposal to provide laboratory services to a physician group on a capitated basis as recently as summer 2010. PX0113 ([redacted] Decl.); LX-0407 (McCarthy/Wu Decl.) Ex. 5; Ex. 5 (Updated 2/2/2011); PX0139-003.

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

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

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

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

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

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

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

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

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

3. GEOGRAPHIC MARKET

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

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

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

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

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

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

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

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

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

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

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

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

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

4. COMPETITIVE EFFECTS

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

among physician group customers). PX 3132.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

78. Westcliff offered lower capitation rates to physician groups than LabCorp and Quest. PX 1026 at 1 ('[redacted]

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

Decl.); PX 0138 at ¶ 6 ([redacted] Decl.).

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

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

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

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

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

85. Dr. Wu calculates that the overall savings to health plan customers will be approximately [redacted] annually. LX-0407 (McCarthy/Wu Decl.).

5. EQUITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

107. The FTC is seeking to hold separate products that are outside of the FTC's alleged geographic market, including LabWest's clinical laboratory services business in "Northern California" and Arizona. Plaintiff's Proposed Order.

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

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

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

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

financially devastate or destroy LabWest.

CONCLUSIONS OF LAW

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

1. LEGAL STANDARD AND BURDEN-SHIFTING

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

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

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

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

Clayton Act, 15 U.S.C. § 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

is not exercised when a court responds automatically to the agency's threshold showings." *Weyerhaeuser*, 665 F.2d at 1082 (quotation omitted).

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

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

2. LIKELIHOOD OF SUCCESS ON THE MERITS

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

regarding market definition."), aff'd, 126 F.3d 1302 (11th Cir. 1997).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. BALANCING THE EQUITIES

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

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

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

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

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

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

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

174. A district court "may properly consider both public and private equities in undertaking the weighing mandated by Section 13(b)." *Freeman Hosp.*, 69 F.3d at 272 (quoting *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 697 (8th Cir. 1979); *see also Warner Commc'ns*, 742 F.2d at1165 (ruling that private interests "are entitled to serious consideration").

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

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

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

Commission ultimately prevails and divestiture is ordered." *Warner Commc'ns*, 742 F.2d at 1165.

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

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

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

defendants ultimately prevail").

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

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

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

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

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

DISPOSITION

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

IT IS SO ORDERED.

DATED: February 22, 2011

Andrew J. Guilford
United States District Judge

Exhibit C

FILED

MAR 14 2011

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff - Appellant, v. LABORATORY CORPORATION OF AMERICA and LABORATORY CORPORATION OF AMERICA HOLDINGS, Defendants - Appellees.	No. 11-55293 D.C. No. 8:10-cv-01873-AG Central District of California, Santa Ana ORDER

Before: LEAVY, TASHIMA, and BYBEE, Circuit Judges.

The temporary injunction issued on March 4, 2011 is lifted. Appellant's opposed emergency motion for injunctive relief is denied. *See* 15 U.S.C. §53(b); *see also FTC v. Affordable Media*, 179 F.3d 1228, 1233 (9th Cir. 1999).

The previously established briefing schedule remains in effect. No request for an extension of time for briefing shall be granted absent extraordinary circumstances. This case shall be calendared during the week of June 6, 2011 at The Richard H. Chambers Courthouse in Pasadena, California.

AW/MOATT

Judge Tashima would have granted the emergency motion for injunctive relief. *See FTC v. Warner Commc'ns*, 742 F.2d 1156, 1160, 1162 (9th Cir. 1984).

Exhibit D

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit E

E-Briefing Categories

- Laboratory Pathology
  - Coding, Billing, and Collections
  - Compliance, Legal, and Malpractice
  - Digital Pathology
  - Instruments & Equipment
  - Laboratory Hiring & Human Resources
  - Laboratory Instruments & Laboratory Equipment
  - Laboratory Management and Operations
  - Laboratory News
  - Laboratory Operations
  - Laboratory Sales and Marketing
  - Managed Care Contracts & Payer Reimbursement
  - Management & Operations
  - News From Dark Daily

Popular Topics

- **Clinical Pathology Laboratories Should Prepare for the iPad Era!**
- **Fully Automated Molecular Diagnostic Solutions Find a Home in Hospital Laboratories**
- **Medical Laboratory Technologists a U.S. News & World Report "Best Career" for 2011**
- **Sonic Healthcare Buys California Clinical Pathology Laboratory Company**
- **Leapfrog Study Shows Hospital Use of CPOE Can Affect Clinical Pathology Laboratory Test Utilization**
- **American Pathology Partners Announces Acquisition of Laboratory Assets of Palm Beach Pathology**
- **Innovative Telemicroscopy Solution Can Allow City-Based Pathologists to Diagnose Specimens from Remote Regions**
- **CDC Improvement Project Reports Big Drop in the Number of Hospital-Acquired Infections**
- **In Vivo Pathology Testing Might Use Injectable Microbeads to Detect Excessive Glucose Levels**
- **Nation's List of Top Ten Largest Healthcare Systems Include Some Surprises**
- **Pathologists and Clinical Labs Can Expect to See More Companion Diagnostic Tests**
- **Washington Post Gives Phlebotomists New Respect**
- **Good News for Clinical Laboratories as CMS Delays Physician's Signature Requirement**
- **Pathologists Watch as New Lab-on-a-Chip Technology Is Developed for Testing Patients in Doctor's Offices**
- **British Health Service Budget Cuts Mean Less Funding for Pathology Laboratories**
- **Is Whole-genome Sequencing Reaching a Tipping Point for Clinical Pathology Laboratories?**
- **Westcliff Medical Laboratories Files Bankruptcy, Will Be Sold to LabCorp**
- **Clinical Pathology Laboratories Have Opportunity to Learn More about ISO 15189**
- **ISO 15189 Proves to Be a "Hot Topic" for Clinical Pathology Laboratories at Lab Quality Confab**
- **New Rapid Molecular Pathology Test for Tuberculosis Wins Favor with World Health Organization**

LX-0638.0001

Sonic Healthcare Buys California Clinical Pathology Laboratory Company

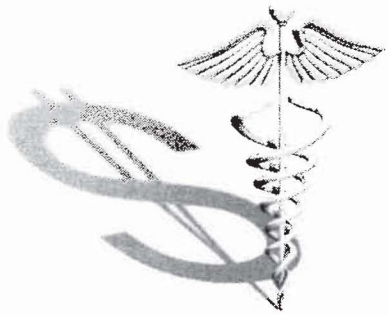
Category: **Laboratory News**, **Laboratory Pathology**
Published: January 17 2011

Rating: 0.0/**5** (0 votes cast)

This Medical Laboratory Acquisition Positions Sonic in Nation's Largest Lab Testing Market

Sonic Healthcare, Ltd. (**ASX: SHL**) acquired **Physicians Automated Laboratory, Inc.**, (PAL) of Bakersfield, California, in a transaction that closed December 31, 2010. With this acquisition, Sonic Healthcare gains its first medical laboratory in California—the nation's largest and most competitive market for clinical laboratory testing services.

Physicians Automated Laboratory was founded in 1967. It employs about 210 people and handles approximately 2,000 patient tests daily. One of the last of the pathologist-owned and operated local laboratory companies, PAL has two primary owners who are nearing retirement. Pathologist and Medical Director William Schmalhorst, M.D., is 80 years old. Chief Executive Officer C. Bruce Smith is 65 years old.



As of press time, Sonic Healthcare had not issued a press announcement about this acquisition. News of Sonic's purchase of PAL was reported by the ***Bakersfield Californian*** newspaper last week.

Clinical Laboratory Acquisition Puts Sonic Healthcare in Central California

Although PAL is a modest-sized clinical laboratory business, it gives Sonic Healthcare a central location from which to build further business in California. Located at the southern end of the Central Valley, PAL is within a two-hour drive to the heavily populated counties of Los Angeles, Ventura, Orange, San Bernadino, and Riverside. Going north, PAL's location in Bakersfield is about a four to five-hour drive to the large population centers of Sacramento and the San Francisco Bay area.

Sonic Healthcare's acquisition of Physicians Automated Laboratory comes about six weeks after its most recent acquisition. On November 8, 2010, Sonic announced that it would pay US$123.5 million to purchase **CBLPath, Inc.**, headquartered in Ocala, Florida. CBLPath has annual revenues of about $80 million. CBLPath primarily offers a test menu of anatomic pathology assays.

Sonic's last acquisition of a clinical laboratory company was about 12 months ago. In December 2009, Sonic Healthcare purchased **East Side Clinical Laboratory**, in Providence, Rhode Island. Earlier in 2009, Sonic Healthcare acquired **Axiom Labs** (Tampa, Florida) and **Piedmont Medical Labs** (Winchester, Virginia) in June and August, respectively.

Related Information:

PAL Sells to Australian Company

Sonic Makes Big Play in Anatomic Pathology With CBLPath Buy; *THE DARK REPORT*, November 15, 2010

Sonic Healthcare to Acquire CBLPath

Sonic Healthcare Enters New England with Latest Clinical Laboratory Acquisition

Sonic Healthcare's Latest Lab Buying Spree Nets Two U.S. Labs for $20 Million

One Response to "Sonic Healthcare Buys California Clinical Pathology Laboratory Company"

LX-0638.0002

1. *alexsilcox* says:
   January 17, 2011 at 10:13 am

   My wife and two children and I live in the state of Illinois. Our current health insurance plan is a Choice Plan that is provided by Wise Health Insurance. The plan itself is a consumer driven health care plan.

Leave a Reply

Name (required)

Mail (will not be published) (required)

Website

Submit Comment

Pathology and Radiology's Combined Future is Now at KU: How Integrated Breast Cancer Diagnostics are Improving Patient Care

Lab Managers: How to Become A Better Coach and Create a More Productive Working Environment

Laboratory and Pathology Mergers & Acquisition Activity: How Recent Sales and The Current Economy Could Impact the Value of Your Lab

Sure-Fire Methods to Slash Your Laboratory's Reference and Send-Out Testing Costs

Staff Your Lab with Top Performers: How to Recruit and Retain the Best Med Techs

Creating Patient Requisition Forms That Dramatically Increase Market Share and Profitability

Lab Test Reports That Create Brand Awareness

Negotiate The Best Pricing And Terms For Your Laboratory

Genetic Tests On The Internet

Laboratory and Pathology Mergers & Acquisitions

Increase Your Laboratory Revenue with Better Billing & Coding

Profit From New Must-Have Molecular Tests and Technologies

Improving Laboratory Management Productivity

Find And Eliminate All Waste In Your Laboratory

Improve Pathologist Compensation and Productivity in Your Lab

Using Your Lab's Culture For Productivity

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Best Investigative Reporting

LX-0638.0004

Exhibit F

The Australian

Sonic in $84m laboratory spending spree

- Teresa Ooi
- From: The Australian
- January 18, 2011 12:00AM

SONIC Healthcare, Australia's biggest provider of pathology services, has kicked off an aggressive acquisition spree.

Sonic paid $54m for KBL-BML-Unilabo and Woestyn Laboratory in Belgium and made its first foray into the Californian market, paying $30m for Physicians Automated Laboratory.

Sonic managing director Colin Goldschmidt said the acquisitions were part of the company's growth strategy in Europe and the US and added there were more to come.

"Europe and the US market are fragmented markets and provide attractive acquisition opportunities for us," he said.

"We are the biggest pathology player in Europe and the third-biggest in the US. Our overseas operations make up about 60 per cent of our revenue with Australia contributing the remainder. The three purchases are synergistic acquisitions, culturally, they are similar to our company."

He said the acquisitions would lift earnings per share immediately and had been funded from existing cash and debt facilities.

KBL has annual revenues of $12.2m, Woestyn $4m and PAL more than $20m.

Sonic said KBL would be integrated with Sonic Medhold Group, which recently moved to Antwerp.

"The merger would result in substantial operational and financial synergies and lead to the creation of the largest laboratory in Belgium," Mr Goldschmidt said.

He said the acquisition of PAL in California was the first step in a long-term growth plan for America's most populous state of 32 million residents. Sonic plans more purchases in California.

Several analysts said the purchases were in line with market expectations, with more bolt-on acquisitions to come.

LX-0637.0002

Exhibit G

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit H

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Exhibit I

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Exhibit J

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Exhibit K

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Exhibit L

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Exhibit M

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Exhibit N

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Exhibit O

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Exhibit P

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[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit Q

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LABORATORY CORPORATION OF
AMERICA HOLDINGS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. LABORATORY CORPORATION OF AMERICA, et al, Defendants.	Case No. SACV 10-1873 AG (MLGx) **DECLARATION OF HELENE BEILMAN-WERNER IN CONNECTION WITH DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

DECLARATION OF HELENE BEILMAN-WERNER

This declaration is being made in accordance with and pursuant to 28 U.S.C. § 1746.

I, Helene Beilman-Werner, declare under penalty of perjury that the following statements are true and correct:

1. I am over eighteen (18) years of age, am competent to testify to the matters contained herein, and have personal knowledge of these facts.

2. I provided a declaration to the Federal Trade Commission on January 13, 2011 that supplemented a prior declaration that I had provided to LabCorp's counsel on September 4, 2010. This declaration seeks to clarify certain statements in my declaration from January 13, 2011.

3. In Paragraph 5, I state that the "opportunity for 'pull-through' was not part of the laboratory contracting process." To clarify this statement, I understand that laboratories are able to offer favorable capitated rates to IPAs because of the opportunity to capture fee-for-service referrals from the physician-members of the IPA. I understand that in the absence of associated fee-for-service business, the capitated rates offered to IPAs may not be as favorable as they are at present.

4. In Paragraphs 8, I state that "[b]ecause LabCorp's pricing was unacceptable, we explored other options and I contacted . . . Westcliff Medical Laboratories." This statement mischaracterizes the situation at the time that VMG sought alternatives to Quest for the Alpha Care and Vantage IPAs. VMG did seek

a proposal from LabCorp in 2007 for the Alpha Care IPA and my understanding is that LabCorp responded with a proposed rate [redacted] VMG did not seek a proposal from LabCorp for the Vantage IPA and it would be wrong to compare the pricing LabCorp submitted for Alpha Care IPA to any proposals received for the Vantage IPA. It simply makes no sense to compare per-member-per-month rates between two different IPAs because doing so fails to take into account the unique characteristics of each IPA's membership and the full cost to the IPA of the laboratory contract, which includes: carve outs, send outs and other testing that is performed outside of the capitated rate.

5. In Paragraph 9, I stated that "I did not consider laboratories other than Westcliff and LabCorp when Quest terminated Vantage IPA's contract." This statement mischaracterizes the description of events that I provided in the prior paragraphs. In reality, I never considered LabCorp as an option for the Vantage IPA contract.

6. In Paragraph 11, I stated that with regard to the Citrus Valley IPA and CalNet IPA, "VMG received a bid from LabCorp and we subsequently requested one from Westcliff." I do not have personal knowledge that VMG sought a proposal from LabCorp for this business or that LabCorp actually submitted a pricing proposal for these two IPA accounts. I never spoke to LabCorp about these IPA accounts nor did I personally receive a proposal from LabCorp.

7. Finally, the declaration that I provide to the Federal Trade Commission ("FTC") was in lieu of attending a deposition. I met with attorneys from the FTC and they presented me with a draft of a declaration, that they had prepared prior to our meeting or talking with me, for me to review and sign on the spot because they expressed concern about exchanging drafts and the limited timeline available. Had I had more time to absorb the nuances of the language they used in the declaration that they drafted, I would have caught these mischaracterizations of the circumstances surrounding my direct involvement in contracting with providers of lab services. Furthermore, I believe the pending transaction between LabCorp and Westcliff will benefit laboratory access in our markets by providing a stronger competitor to Quest Labs.

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

Executed on January 27 2011

Exhibit R

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Exhibit S

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Exhibit T

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Exhibit U

Volume XVII, Number 18 • Monday, December 27, 2010

Specialized Information Publishers Foundation — EDITORIAL EXCELLENCE AWARD WINNER

A DARK REPORT EXCLUSIVE!

California's Med-Cal Program Targets Discounted Lab Testing

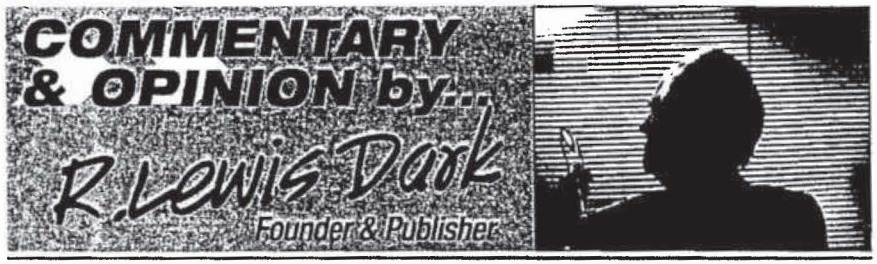
From the Desk of

Labs Caught in the Crosshairs!

DARK REPORT

RELIABLE BUSINESS INTELLIGENCE, EXCLUSIVELY FOR MEDICAL LAB CEOs / COOs / CFOs / PATHOLOGISTs

Restricted information, see page 3



Any Future for Loss-Leader Lab Pricing?

OUTSIDE OF CALIFORNIA, few pathologists or laboratory administrators are aware of the unfolding enforcement campaign that was initiated by the state's Medi-Cal program. At issue is a decades-long practice of offering providers low laboratory test prices—in some cases well below the Medi-Cal fee schedule.

You may say, "what's the big deal?", since, for years, you've seen public laboratory companies in many other states give similar rock-bottom prices to providers and payers that are also much less than the Medicare Part B lab test fee schedule and/or local Medicaid fees.

Well, in California, the big deal is that the California **Department of Health Care Services** (DHCS) is now in the midst of enforcing its interpretation of a 40-year-old state law, section 51501(a), that deals with the issue of laboratories passing low prices to providers, but not passing those same lab prices to Medi-Cal, the state's Medicaid program. I will leave it to you to read this special issue of THE DARK REPORT and make up your own mind as to whether DHCS or the laboratory companies have the strongest legal position.

And this brings me back to my starting point. Once you read about the details of this unexpected enforcement campaign of California state law, I'd like you to ponder this question: If many state Medicaid programs are at the brink of insolvency, and if the federal Medicare program is outspending revenue, then how much longer will deep-discounting lab test price arrangements continue before catching the attention of government health program administrators? Can the lab industry defend a situation where a profitable big laboratory gives a below-cost test price of, say, $2 to a client, then turns around and bills the federal/state health program the full fee-for-service price of $10 or $20, on a patient seen in the same doctor's office, no less!

I would further observe that the financial times in 2011 are much different than in 2000 and 2005. Government health programs are desperate to find the money needed to fund their mission. With that in mind, allow me to ask you this question: If you were in Las Vegas at the oddsmaker's desk, would you bet your own money that, in five years, government health plans will still allow labs to give providers discounted prices that are less than Medicare and Medicaid fees, while not also passing those same low prices along to the Medicare and Medicaid programs? If you wouldn't make that bet, you may be acknowledging that loss-leader pricing for lab tests doesn't have much of a future. TDR

Discounted Lab Prices Become Issue in California

➤Low prices for lab tests come under scrutiny of regulators at both the state and federal level

➤➤CEO SUMMARY: For decades, California's lab testing market has been considered the Wild West because clinical lab companies have felt relatively free to offer deeply-discounted prices to expand market share and take business away from competitors. Now these discounted pricing practices are being scrutinized by no less than three government bodies. First came a whistle-blower lawsuit still winding through a state court. Next were Medi-Cal officials and then it was the Federal Trade Commission.

IN CALIFORNIA, THREE UNRELATED ACTIONS by three different government regulatory bodies may soon unleash disruptive forces on the Golden State's intensely competitive market for lab testing services.

At the core of the three government agencies' concerns is the widespread practice of offering deeply-discounted lab test prices to selected physicians, private payers, and other providers as a way to win business from competing laboratory companies.

Three government agencies are now separately reviewing the marketing practices of medical laboratories in California—for different regulatory reasons. But one common theme in these government reviews is the practice of clinical laboratory companies using low lab test prices as a marketing tool to gain new clients and expand market share.

There is a high probability that the regulatory decisions that result from these government agencies will end up triggering major changes in how and when laboratory testing companies can offer private providers a price for lab tests which is lower than these labs charge government health programs like Medi-Cal.

For this reason, this entire issue of THE DARK REPORT is devoted to the events now unfolding in California. Pathologists and laboratory administrators working in other states are generally unaware of the details about these developments.

The significance of these regulatory events should not be underestimated. Clients and regular readers of THE DARK REPORT are encouraged to make their own informed analysis of each government body's interest in enforcing a laboratory industry activity that incorporates the use of

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THE DARK REPORT Intelligence Briefings for Laboratory CEOs, COOs, CFOs, and Pathologists are sent 17 times per year by The Dark Group, Inc., 21806 Briarcliff Drive, Spicewood, Texas, 78669, Voice 1.800.560.6363, Fax 512.264.0969. (ISSN 1097-2919.)

R. Lewis Dark, Founder & Publisher. Robert L. Michel, Editor.

SUBSCRIPTION TO THE DARK REPORT INTELLIGENCE SERVICE, which includes THE DARK REPORT plus timely briefings and private tele-conferences, is $14.10 per week in the US, $14.90 per week in Canada, $16.05 per week elsewhere (billed semi-annually).

deeply-discounted lab test pricing for marketing purposes. Such an analysis points to a primary conclusion that, within California, there are likely to be important changes in how state healthcare officials interpret and enforce existing statutes that govern how a lab can offer lower test prices to a provider than it charges to the Medi-Cal program.

➤California State Court Case

The first threat to current lab pricing practices is a whistleblower case in a state court that could result in a decision or settlement that alters existing lab industry marketing practices in situations where labs offer providers lab test prices that are less than what the same labs charge Medi-Cal.

Then, at the beginning of the summer, the **California Department of Health Care Services** (DHCS) initiated an unexpected and aggressive new enforcement program to address its interpretation of the state statute that deals with the issue of low prices for laboratory tests (and other health services) that are less than the provider charges to the state Medicaid program. This enforcement program goes further than any previous lab price enforcement effort by DHCS.

Meanwhile, early this December, the **Federal Trade Commission** (FTC) formally challenged the acquisition of **Westcliff Medical Laboratories, Inc.**, in Santa Ana, California, by **Laboratory Corporation of America**. The FTC stated that its concerns were about market concentration.

➤Lab Test Prices Play A Role

But, a closer reading of the FTC's analysis of the downstream market consequences of the acquisition is a concern that the new owner would raise lab test prices from current levels. The FTC notes that this would be negative for the public health clinics, IPAs, and other providers that benefit from lower lab test pricing.

THE DARK REPORT is the first lab industry publication to identify the common theme of deeply-discounted lab test prices that is central to the issues now in front of these three different government bodies. If just one of these agencies successfully prevails in issuing a ruling against current marketing practices for pricing lab tests, that would alter the ability of labs to offer deeply-discounted lab prices to favored customers.

Such a ruling would likely trigger significant disruption to California's competitive market for lab testing services. There would be new winners and losers among the labs operating in the Golden State.

A word of warning before reading further. Government bodies with enforcement and regulatory powers are tackling a lab industry marketing practice that is controversial even within the laboratory profession. Lab executives, attorneys, providers, payers, and government health program regulators will line up on opposing sides of this issue.

➤Interpreting Existing Laws

Each party will put forth compelling arguments that favor their interpretation of laws that govern lab test marketing practices. However, it is judges, elected officials, and regulatory agencies with the raw power to effect their interpretation of the law. That is, at least until a state legislature or Congress steps in and passes a new law that overturns a regulatory practice or clarifies the law in response to an unpopular court ruling.

The point here is that an impassioned debate about the legitimate use of deeply-discounted laboratory test prices is about to take place in California. It will be an emotionally-charged debate because an interesting mix of healthcare stakeholders will all stand to win or lose.

In the intelligence briefings which follow, THE DARK REPORT provides information and perspectives about these unfolding events. Because of the billions of dollars at stake, high-powered legal teams on both sides of the low price issue will be earnestly working to see that their clients' interests prevail in whatever decisions are made by the courts and government regulators. **TDR**

Medi-Cal Gets Tough on Low Lab Test Prices

➤This summer, state Medi-Cal officials targeted up to 30 labs for immediate suspension & restitution

➤➤CEO SUMMARY: This may be the most significant lab industry story of 2010, which has gone unreported until now. Starting in June and July, California's Department of Health Care Services determined that between 10 and 30 labs had submitted what the agency considers to be false claims. It sent out letters to these labs to notify them that they were suspended from the Medi-Cal program. It has since softened that stance, but in September, the agency sent letters to as many as 300 laboratories requiring them to self-audit their Medi-Cal claims.

ENFORCEMENT ACTIONS by California's Medi-Cal program that were both unannounced and uneven have roiled the competitive marketplace for laboratory testing in the Golden State. Upset owners of lab testing companies singled out for enforcement action have even complained to elected officials.

At the core of this issue is the fact that California's **Department of Health Care Services** (DHCS), beginning this summer, singled out between 10 and 30 California laboratory companies for submitting what the state's Medicaid agency asserts are fraudulent claims because they were priced in violation of California state law.

➤Allegations Of False Claims

DHCS sent letters to these labs informing them of its decision on the alleged false claims, along with notice that it had immediately stopped Medi-Cal reimbursement payments to these laboratories and was suspending their Medi-Cal licenses.

Meanwhile, the majority of the state's laboratory companies continued business as usual, offering the same competitive lab test pricing as the handful of labs that had received the Medi-Cal enforcement and suspension letters from DHCS.

This inequity in enforcement action was quickly recognized by those lab companies whose Medi-Cal payments and licenses had been suspended by DHCS. It put these laboratories at a competitive disadvantage in the day-to-day conduct of their business and raised a host of legal issues.

Of interest for the entire laboratory industry: did DHCS follow due process of law when it singled out the first 10 to 30 laboratory companies and sent them a letter with the notice that it was immediately withholding all Medi-Cal payments to that laboratory, as well as suspending its Medi-Cal license? Were these laboratory companies getting equal treatment under the law, relative to all the laboratories operating in California that extend similar low lab test prices to clients?

Apparently, in response to the problems caused for the handful of labs unlucky enough to be singled out for

immediate suspension of Medi-Cal payments and licenses, DHCS has stayed the suspensions of those laboratories.

However, DHCS still had the problem of selective enforcement, since it targeted only between 10 and 30 laboratories in the state for audits and suspension. That may be why, in September, DHCS next mailed out letters to most other laboratories in California directing them to conduct a self-audit of Medi-Cal claims submitted between July 1, 2009 to December 31, 2009.

DHCS told the labs receiving the letter that failure to conduct the self-audit could lead to sanctions that could involve suspension from the Medi-Cal program. In its letters, DHCS describes this enforcement program as the "DHCS Laboratory Price Sweeps Special Project."

DHCS said the mandatory self-audit was "to ensure compliance with California Code of Regulations (CCR), Title 22, section 51501(a), which states in part, 'Notwithstanding any other provisions of these regulations, no provider shall charge for any service or any article more than would have been charged for the same service or article to other purchasers of comparable services or articles under comparable circumstances...'"

➤National Labs Were Audited

Both **Laboratory Corporation of America** and **Quest Diagnostics Incorporated** have disclosed in their respective public filings that, in the third quarter of 2010, each laboratory company was audited by the Department of Health Care Services. *(See sidebar on page 11.)* It is not known whether DHCS initially suspended Medi-Cal payments and the Medi-Cal licenses of either national lab company after it completed its audits.

LabCorp and Quest Diagnostics are currently defendants in a *qui tam* lawsuit in California. The plaintiffs charge that, dating back to 1995, seven laboratories filed Medi-Cal false claims that violated California's 51501(a) statute. Trials in this lawsuit for LabCorp and Quest Diagnostics are scheduled to commence during 2011. *(See TDR, April 9, 2010.)*

Both the set of letters sent to the 10 to 30 laboratories earlier in the summer, and the subsequent set of letters sent out this fall, were signed by Jan Inglish, N.P., Chief, Medical Review Branch, Audits & Investigations at DHCS. People involved in negotiations say that Inglish had a primary role on behalf of DHCS during meetings this summer between DHCS and the laboratories facing immediate suspension from the Medi-Cal program.

When the first DHCS letters announcing the suspension of Medi-Cal payments and licenses were delivered to between 10 and 30 labs in June and July, no laboratory executives with knowledge of this situation were willing to talk publicly about this matter.

➤Follow-Up To DHCS Letters

Since each lab was in negotiations with DHCS on a possible settlement, no lab executive wanted to be first to criticize the manner in which DHCS was conducting audits to determine instances of fraudulent claims, and then suspending Medi-Cal payments and licenses of the audited laboratories.

The reluctance of clinical laboratory executives to make public statements was understandable. When the DHCS letter arrived at a targeted lab, that laboratory was faced with four major issues.

First, DHCS was "(1) temporarily withholding 100 percent of payment to you, effective the date of this letter." This denied payment to the laboratory for all Medi-Cal claims currently in the pipeline for reimbursement. The DHCS action was a serious blow to the lab company's cash flow, particularly if it served a high proportion of Medi-Cal patients. It would also further undermine the ongoing financial stability of the laboratory.

Second, DHCS was "(2) temporarily suspending and deactivating your Medi-Cal provider number and National Provider Identifier (NPI) number, effective [on a date 15 days from the date of the letter]." This enforcement action meant that the laboratory would be unable to handle Medi-Cal specimens from its clients, even as it continued performing work for private pay patients. That would create an immediate competitive disadvantage with the targeted lab's client physicians.

Third, the DHCS letters typically stated in direct language that the department had determined that the laboratory was guilty of submitting false claims.

➤False Claims Defined

Here is how DHCS explained its findings of false claims to one laboratory that had its Medi-Cal payments withheld:

[Name deleted] Lab routinely submitted false claims to the Medi-Cal program by misrepresenting that the amount that they charged to the Medi-Cal program was not more than what [name deleted] Lab charged to other payor types for the same service as per California Code of Regulation, Title 22, section (22 CCR §) 51501, which states in part, "(a) Not withstanding any other provisions of these regulations, no provider shall charge for any service or any article more than would have been charged for the same service or article to other purchasers of comparable services or articles under comparable circumstances..." This was evidenced by a review of invoices for private pay patients that were obtained from [name deleted] Lab and/or its referring providers.

In another part of the letter, DHCS reinforces its decision about false claims by writing that "The evidence set out above, which includes evidence of fraud, leads the DHCS to conclude that you may have committed fraud or willful misrepresentation against the Medi-Cal Program."

Because it had sent a letter of finding that the target laboratory company had "routinely submitted false claims," DHCS was creating additional legal jeopardy for the laboratory. There are numerous federal and state statutes that criminalize the submission of false claims to a federal health program. To avoid the potential of criminal action against the laboratory company and its executives individually, it was important for the targeted laboratory to take immediate steps to challenge the evidence and the legal process used by DHCS to assert that false claims had been submitted to the Medi-Cal program.

LabCorp Acknowledges Medi-Cal Claims Audit

IN ITS THIRD QUARTER FINANCIAL STATEMENT, Laboratory Corporation disclosed some details about the Department of Health Care Services audit of one of its laboratories in the Golden State. LabCorp wrote that:

During the third quarter, the Company responded to an audit from the California Department of Health Care Services ("DHCS") of one of the Company's California laboratories for the period of January 1, 2010 through June 30, 2010.

DHCS subsequently indicated that this laboratory charged the Medi-Cal program more than what was charged to other payers for some lab services and that this is inconsistent with DHCS's current interpretation of California regulations. DHCS provided the Company with a proposed agreement related to the Company's billing to the Medi-Cal program, including a requirement that the Company charge Medi-Cal the "lowest price" it charges others for a particular laboratory test.

The Company disagrees with DHCS' contentions and interpretation of its regulations and believes that it has properly charged the Medi-Cal program under all applicable laws and regulations. The Company is continuing to cooperate with DHCS with respect to the audit.

The fourth major issue linked to the DHCS's enforcement campaign is subjective and relates to the process of resolving the issues raised in the DHCS letter. Executives of the laboratory facing suspension describe the series of events as more like a "shake down" than due process of law. That's because, from the first contact with DHCS after receiving the letter announcing that DHCS was withholding Medi-Cal payments, DHCS officials made it clear to the lab executives that the matter could be speedily resolved.

➤ Follow-Up To DHCS Letters

However, the department's proffered resolution would require the laboratory to agree to terms that would place it at a competitive disadvantage because other laboratories in the state would continue to charge the lower prices common in California. That would not be true of the targeted laboratory company. It would need to agree to extend lab test prices that comply with 51501(a) and remit the substantial sum of money that DHCS had already determined to be the amount of "Medi-Cal overcharges" associated with its definition of the "false claims" submitted by the laboratory.

This aspect of the Medi-Cal enforcement action has not been disclosed to the public until now by THE DARK REPORT. Off the record, more than one laboratory executive over the course of the summer has told THE DARK REPORT that the amount of settlement demanded by DHCS was equal to or greater than one year's total reimbursement paid to that laboratory by the Medi-Cal program.

➤ Restitution Amount

In conversations about these meetings with their colleagues, laboratory executives who traveled to Sacramento to negotiate a resolution with DHCS officials said that the strategy and approach of DCHS was communicated to them in a blunt and direct manner. The message was along the lines of "We've determined that your lab broke the law on pricing. Here is the amount your laboratory must pay in order to restore its standing as a Medi-Cal provider."

Information gathered by THE DARK REPORT indicates that it would be reasonable to describe many of these hearings, meetings, or negotiations as hostile and the outcome not in doubt, from the perspective of DHCS officials. Their view is that labs broke the law. They have data generated from the audits to support their position that they have appropriately identified the number and amount of false claims involved in the case. Until the laboratory pays the designated amount back to Medi-Cal, state officals assert that it should not expect to be restored to good standing as a Medi-Cal provider.

This highly intimidating position taken by state officials is probably a major reason why, over the past six months, no laboratory executives nor their attorneys spoke out in a candid fashion about the DHCS demand letters. Nor did they issue a public statement of their confidence that their labs have complied with the law and that they have specific legal defenses with which to respond to the DHCS payment withhold and suspension letter.

➤ Labs Must Conduct Self-Audit

Since the latest enforcement campaign launched by DHCS this fall involves requiring clinical laboratories across the state to conduct a self-audit, it remains to be seen how the department may treat those laboratories which identify Medi-Cal claims that would violate 51501(a).

Moreover, since it is asking nearly every laboratory in the state to conduct a self-audit, DHCS may find itself overwhelmed by the need to negotiate a resolution should it rule that a large number of laboratories are in violation of its interpretation of 51501(a). Plus, DHCS has already learned that withholding payments to just a handful of laboratories can prove disruptive to labs, physicians, and patients alike. TDR

Who Wins and Who Loses With 51501 Enforcement

➤ Over many years, California's health system has benefited from the nation's lowest lab prices

➤➤ CEO SUMMARY: Assume that California's Department of Health Care Services (DHCS) wins all challenges to enforcement of its interpretation of 51501(a). DHCS will get a one-time cash infusion as it collects money from labs which violated the state statute. But going forward, federally qualified health centers, independent practice associations, private payers, and patients will pay more—and the bill will likely exceed an additional $100 million per year in higher lab test fees.

IT HAS YET TO OCCUR to many pathologists and laboratory executives in California that their state's free-wheeling, competitive market for laboratory testing services is about to be transformed in fundamental ways.

By all appearances, officials at California's Department of Health Care Services (DHCS) are prepared to strictly enforce their interpretation of California Code of Regulations (CCR), Title 22, section 51501(a). That's the part of the state code which says that the best price a provider gives to another provider must also be given to Medi-Cal.

Assume, for the moment, that DHCS prevails in all legal challenges to its interpretation of 51501. Lab executives believe that, moving forward, strict adherence to 51501(a) will result in the Medi-Cal lab test fee schedule turning into the de facto "lowest price" that clinical laboratories will offer to providers.

This will generate interesting consequences. For most of the past two decades, lab test prices in California have been consistently lowest in the nation. The direct beneficiaries of this have been patients, physicians, and private payers, as well as the Medi-Cal program itself. Because of the intense competition for market share among the state's laboratory companies, many lab clients pay much less for lab testing than the existing Medi-Cal fee schedule.

Thus, if DHCS does enforce 51501(a) in a strict, consistent manner, laboratories will probably decide to raise all their lab test prices up to the "floor level" of the Medi-Cal fee schedule. This means a significant lab test price increase is in the immediate future for providers in California.

This will create new winners and losers within the California healthcare system. It is instructive to speculate on who will be a winner and who will be a loser in this new competitive market environment. Here are some informed guesses at how things may play out in California.

California Medi-Cal Program:

If 51501(a) is enforced, many laboratory executives tell THE DARK REPORT that their laboratory will raise any discounted prices to be equal to the Medi-Cal fee schedule.

That would indicate, at least in the near term, that Medi-Cal will see little ongoing benefit from its enforcement of 51501(a), since it would continue to pay most lab test claims at its current fee schedule.

Because of its audit program, Medi-Cal will definitely be a winner because of all the restitution money and penalties it may collect from laboratories for past violations of 51501(a). But that is a one-time cash infusion into the financially-strapped program.

Will California labs have an incentive to discount below the Medi-Care fee schedule, then charge Medi-Cal the same lower fees to stay in compliance with 51501(a)? Few lab executives predict this will happen on any significant scale. But they don't rule out that possibility.

Federally Qualified Health Centers (FQHC):

Currently these medical clinics and care centers—organized to serve uninsured patients—benefit from the nation's lowest lab test prices. This group is predicted to be losers, since California laboratories must raise their deeply-discounted lab test prices up to the level of the Medi-Cal fee schedule.

FQHCs already recognize this threat and are feeling the financial pinch of higher laboratory test prices. This summer, some of those labs audited by DHCS did raise test prices to all clients, including a few FQHCs, to comply with DHCS' interpretation of 51501(a).

There are 478 FQHC clinic sites in California. These clinics serve 2.9 million patients, so this is a significant segment of the California healthcare system.

This first round of lab test price increases was painful for the affected FQHCs. In a letter circulated to some California laboratories, the **California Primary Care Association** (CPCA), which represents FQHCs, writes that "if discounting of laboratory services below Medi-Cal rates is eliminated, CPCA estimates that the financial impact on FQHCs will be between $40-$55 million annually."

Independent Physician Associations (IPA):

California's IPAs play a major role in care delivery. IPAs often contract globally for laboratory testing services. As a competitive sales strategy, lab companies have freely discounted the IPA contract work as a way to access the more lucrative fee-for-service specimens.

There are 142 IPAs in the state and they serve 4.6 million patients. Assume that half of these patients are covered by a global lab testing contract at a deep discount. Assume the same cost increase factor as used by CPCA. That projects that IPAs would pay between $55 million and $64 million more annually should their lab test fees be raised to the level of the Medi-Cal fee schedule. This negative financial consequence puts IPAs in the category of loser.

Clinical Laboratory Companies:

California's laboratory companies go into the winner's column. Once the state's labs have made restitution to DHCS for past discount pricing sins and paid any penalties, they will see increased cash flow as they raise all discounted lab test prices up to the same level as Medi-Cal fees.

As the higher lab test fee estimates for FQHCs and IPAs indicate, California laboratory companies will see an estimated revenue increase of between $95 million and $119 million annually just from these two sources! And those higher fees will flow into the state's laboratories for years into the future.

Private Practice Physicians, Patients, and Private Payers:

California laboratories regularly extend low lab test prices to these entities, who are likely to be in the loser category because laboratory companies will raise fees to the level of the Medi-Cal lab test fee schedule to comply with 51501(a). TDR

How Could So Many Labs Violate California Law?

➤51501(a) has been on the books for 40 years, as has the practice of labs offering low prices

➤➤CEO SUMMARY: If a 40-year-old state law on Medi-Cal pricing was known to regulators and clinical laboratories alike, how did the legal and compliance departments of so many laboratories—staffed by some of the smartest legal minds in California and nationally—interpret the law in such a different way as the state's primary laboratory regulator? After all, the civil and criminal penalties for submitting false claims to government health programs can be crushing and career-ending.

FEARING THE POWER that regulators have over the companies they regulate, it is no surprise that the usual lab industry spokespeople have not stepped into the public eye to speak out about how the California **Department of Health Care Services** (DHCS) suddenly launched an aggressive enforcement action based on its interpretation of state code 51501(a). They are wary of the wrath of bureaucrats who prefer that the regulatory matter stay out of the media spotlight.

But this is quiet acquiescence to a bureaucracy that is suddenly challenging a business practice that it has observed for decades, yet never took the types of actions that normally get the full attention—and strict compliance—of the companies under its regulation. So why now?

And why did DHCS design an enforcement campaign that suddenly drops a letter on the target laboratory company, declaring it to be a lawbreaker and notifying it that its Medi-Cal payments are immediately withheld and its Medi-Cal license is being suspended? The United States of America is a republic where the rule of law provides order to society, there is justice for all, and those charged with a crime are considered innocent until proven guilty.

It should not be overlooked that submitting false claims to a government health program can trigger criminal charges and criminal convictions. Laboratory executives received letters from DHCS where it was written that the department "...conclude(s) that you may have committed fraud or willful misrepresentation against the Medi-Cal Program." This sobering statement represents serious jeopardy because the civil matter in dispute could lead to criminal charges.

➤Payments Were Withheld

As reported on these pages, DHCS's decision to withhold Medi-Cal payments without advance notice caused some labs to lay off employees. It disrupted the service relationships these labs had with physicians and patients in California. While singling out these labs for enforcement, DHCS allowed other laboratories to continue using the same lab test pricing

practices, with no apparent regulatory restriction or contemporary warning on their marketing and business activities.

Further, as described on pages 5-6, should DHCS prevail in enforcing its interpretation of 51501(a), there is a high probability that the state's poorest citizens—and the medical clinics that serve them—will end up paying higher prices for lab tests. The **California Primary Care Association** (CPCA) estimates that, just for FQHCs in the state, the lab test cost increase would top out at $55 million per year. It would seem these outcomes are at cross purposes with the government's goal of improving care for California's neediest residents.

➤Asking The Larger Question

However, there is a larger question which must be asked. If medical labs in California are guilty of breaking the law by offering low prices, then the state's patients, physicians, and medical laboratories in California are owed an explanation. How could so many laboratories engage in a business practice—offering providers lower prices than the Medi-Cal fee schedule—for as long as 40 years if, as now insisted by DHCS officials, these low laboratory prices were in clear violation of 51501(a)?

Regulated companies have responsibilities and legal obligations. The same is true of the regulatory agencies that oversee their activities. Thus, over the past 40 years, did the government agencies of the State of California provide an accurate interpretation of the law governing situations where provider prices were less than the Medi-Cal fee schedule?

During this same time period, was the government's interpretation of 51501(a) reinforced by high-profile enforcement actions against laboratory companies or other types of healthcare providers that it judged in violation of 51501(a) by their continuing use of low prices, while not giving Medi-Cal those same lower prices?

Did California's regulators issue and/or update guidance on low pricing practices that became common as the healthcare marketplace evolved? The use of capitated, full-risk managed care contracts in the early 1990s is one example of such a new development.

➤Public Record About 51501(a)

The public record of such statements, such enforcement actions, and such advisory opinions is what guides the compliance programs that are required of every provider participating in a government health program. Some of the smartest lawyers in California and across the United States have studied the body of law and the regulatory actions associated with 51501(a).

Over the past 40 years, as legal advisors to California's laboratory companies, their interpretation of the law, based on relevant court cases and the published commentary by regulatory bodies on this section of state law, have formed the basis of the compliance policies that guide each laboratory licensed by the Medi-Cal program.

➤Lab Test Pricing Policies

Thus, why did such a sizeable number of well-established, respected laboratory companies fail to extend to Medi-Cal the same lower prices they were offering to IPAs, physicians, patients, FQHCs, and payers for periods extending back decades? The answer to this question represents a strong legal position for those laboratories currently in the cross hairs of DHCS, now that the agency has determined that the low pricing policies of the laboratory violated its interpretation of 51501(a).

It is quite unusual for a regulatory "mass non-compliance" event to occur in a highly regulated industry. Moreover, with hundreds of millions of dollars at stake, it is not difficult to predict that the stakeholders on both sides of this issue will not hesitate to go toe-to-toe. However, because the government typically holds most of the high cards in the deck, labs contesting DHCS' interpretation and enforcement of 51501(a) will face daunting odds. TDR

Calif. Officials Back Off From Suspending Labs

➤Settlement talks started last summer, but Medi-Cal officials have left the issue unresolved

➤➤CEO SUMMARY: Early in the summer, California's Department of Health Care Services (DHCS) delivered letters to between 10 and 30 laboratory companies notifying them that, effective immediately, it was withholding their Medi-Cal payments and was suspending each lab's Medi-Cal license. However, the intense reaction triggered by this unexpected and unequal enforcement campaign apparently caused DHCS to defer the ongoing withhold of Medi-Cal payments. DHCS also has yet to suspend the licenses of these labs.

IT WAS GRIM NEWS BACK IN JUNE AND JULY for a handful of laboratories that received compliance enforcement letters from the California **Department of Health Care Services** (DHCS). Upon opening the letters, each lab learned that DHCS was immediately withholding Medi-Cal payments to the lab and that the lab's Medi-Care license would be suspended within 15 days.

Because DHCS officials decline to comment on this matter, no one knows the precise number of laboratory companies which received these letters. It is known that more than 10 labs, and possibly as many as 30 labs, were sent these letters by DHCS during the summer months.

Recently THE DARK REPORT was able to speak with Byron J. Gross, who is an attorney with **Hooper Lundy & Bookman** in Los Angeles. His firm represents several of the laboratories that received DHCS letters this summer and faced the immediate withhold of their Medi-Cal payments and a suspension of their lab's Medi-Cal license. Gross was willing to discuss certain aspects of these cases.

"We represent five or six labs that got these withhold and suspension letters" stated Gross. "I know of other labs that also were sent these letters by DHCS, so there are at least 12 or 13 labs, maybe more, that were targeted in this way by DHCS.

"To my knowledge, none of the cases have been settled," added Gross. "Moreover, I don't think DHCS followed through and actually suspended the Medi-Cal licenses of the laboratory companies that received such a letter.

➤Licenses Not Suspended

"The laboratories we represent got the notices from DHCS, but the suspensions were never put into effect," he said. "Payments to these labs were withheld for a few weeks and the state is still holding that money.

"We hear that the amounts withheld range from $100,000 up to $1 million, depending on how much Medi-Cal business the lab does," stated Gross. "One laboratory company we represent does 50% of its business with Medi-Cal. They really suffered and had to lay off staff.

"Although the department threatened to suspend the labs from the Medi-Cal program, when we met with the department, they decided not to suspend any of our lab clients," he noted. "The department did withhold money for a few weeks, and the department is still holding some money for a number of labs."

➤Medi-Cal Audits of Labs

Gross said that the letters sent by DHCS last summer were in response to on-site audits the department had conducted at these laboratories in earlier months. "Last year, the department did audits for the six months of July 1, 2009, through December 31, 2009," he stated. "From these audits, DHCS developed a number it says is owed by each laboratory.

"DHCS asserts this number is an overpayment, meaning the difference between what Medi-Cal paid and the lowest price that the lab charged other payers for the same tests," Gross explained.

"The department has released some of the Medi-Cal money that it withheld from these laboratories because of the alleged overpayment," he continued. "But DHCS has not released all the funds pending settlement agreements with the laboratories.

"Work on a draft settlement agreement between these labs and DHCS is proceeding, but has not been finalized," commented Gross. "I am not aware that any laboratory has settled this matter with DHCS."

➤One Lab May Have Settled

THE DARK REPORT believes at least one laboratory did settle with DHCS this summer. This lab is said to have agreed to repay the alleged overpayment amount to DHCS, along with a penalty.

"Frankly, it's crazy to call this fraud and suspend labs when every laboratory in the state has offered clients the same range of competitive prices for years," declared Gross. "In our first meetings with the department, we explained that they can't just pick these 12 labs and withhold funds and suspend them when all other labs—especially the biggest lab companies in the state—are doing this. If you suspend these 12 labs, other labs will simply offer lower prices, and take over the business."

"For DHCS to take this action is unexpected," Gross said. "This has never been something that they enforced, except in a couple of isolated incidents. We do not think it's legal for them to do so.

"In the past, the department has taken the position that state law requires laboratories to give Medi-Cal the lowest rate," he added. "However, over the years, several different lawsuits were filed on this issue and the results were mixed.

➤*Qui Tam* Case Clouds Issue

"As we all know, in California, there is a *qui tam* [whistleblower] false claims action pending against a number of labs for this specific pricing principle," Gross explained. "While the *qui tam* case is being litigated, no laboratory in California has changed its pricing practices.

"Among the defendants in the *qui tam* lawsuit are the nation's two largest laboratory companies," added Gross. "Both **Quest Diagnostics Incorporated** and **Laboratory Corporation of America** are fighting this issue and continuing to offer lower rates than they offer to Medi-Cal.

"No one understands why the DHCS suddenly decided that labs haven't changed their billing practices, and so it was necessary for them to do these audits, then withhold funds and threaten to suspend these labs as providers to the Medi-Cal program."

For a state agency that was in a hurry last summer to immediately "shut down" or exclude a handful of laboratories from the Medi-Cal program—apparently to send a message to the rest of the laboratory industry—progress on the settlement agreements has been slow.

"Since we worked on a draft settlement agreement during the summer months, we haven't heard anything official from the state and the state has not pressured us to settle," Gross explained. "We thought that if we pushed back on certain issues and tried to work out a settlement, state officials would respond with guideline language about what is okay and what isn't okay.

➤Awaiting DHCS Guidelines

"However, because legal action in the *qui tam* lawsuit is ongoing and there are billions of dollars at stake, it may be that DHCS has been stymied by the California Attorney General (AG) who is prosecuting the case," postulated Gross. "It could be the AG does not want DHCS to set any specific guidelines until this *qui tam* suit is finished.

"Clarification and guidelines on interpretation of California statues is much needed," noted Gross. "For example, one issue we want clarified for medical laboratories in California involves pricing for the federal qualified health centers (FQHC) that provide care to the poor.

"The goal of these centers is to cover as many people as possible," he continued. "Many labs have agreements with these centers to charge them less for lab tests than they charge other payers.

➤FQHCs Are Concerned

"We have pushed back on this point and so has the **California Primary Care Association** (CPCA), which fears that its members will see the cost of laboratory testing increase," said Gross. "This example shows that there are situations where the lower prices offered by clinical laboratories are consistent with government health policy and legislative intent."

In fact, the CPCA believes its member FHQCs do meet certain safe harbors and the lab test price provided to these clinics are protected arrangements. It is actively lobbying all stakeholders with the goal of maintaining legal access to lower laboratory test prices.

Because the Department of Health Care Services did decide to forestall withholding Medi-Cal payments and suspended the licenses of those laboratories it had audited, that is an indication that a number of important legal issues involving low prices for laboratory tests are being contested. TDR

Contact Byron J. Gross at bgross@health-law.com or 310-551-8125.

—By Joe Burns

Attorney for Targeted Labs Lays Out the Issue of FQHCs

ONE GROUP OF LABORATORY CLIENTS in California that is widely recognized to get low-priced laboratory test prices are medical groups that operate as Federally Qualified Health Centers (FQHC). These health centers are eligible for Federal Section 330 grants and provide care to individuals without health benefits, or who lack access to quality healthcare.

"Low lab test pricing that is extended by California labs to FQHCs is an important element in this case," stated attorney Byron J. Gross of Hooper Lundy & Bookman. "It is our opinion that the California state Business and Profession's Code Section 667 specifically allows for discounts to uninsured patients.

"This means labs could charge low rates to Federally Qualified Health Centers," he said. "Similarly, these lab test discounts would be allowed under most agreements with physicians because, in many cases, the lab offers these discounts to benefit the uninsured treated by that client physician.

"While the regulations say that Medi-Cal can't pay more for comparable care under comparable circumstances, we would argue that an agreement with a FQHC is not a comparable circumstance," emphasized Gross. "In most cases, low rates are for uninsured patients and we believe that it is the legislature's intent that these patients be given a discount. But state officials have been stubborn and claim that low price agreements with other payers do not override the way they interpret the regulations."

Did Qui Tam Suit Trigger Medi-Cal Price Concerns?

➤Unsealing of whistleblower lawsuit in 2009 gave Medi-Cal officials a roadmap for lab audits

➤➤CEO SUMMARY: It is easy to track backwards to understand why the California Department of Healthcare Services (DHCS) began aggressive enforcement of its interpretation of statute 51501(a) against a number of labs this summer. DHCS officials were given a full education and a roadmap for action when, in April, 2009, the whistleblower lawsuit that accused seven lab companies of violating 51501(a) was unsealed and joined by Attorney General Jerry Brown. It appears that, informed by facts in this lawsuit, DHCS then decided to vigorously pursue the low price issue.

IT'S BEEN 21 MONTHS since California Attorney General Edmund G. Brown Jr., joined a whistleblower lawsuit filed against seven private laboratories to recover hundreds of millions of dollars in what Brown charged were illegal overcharges to the state Medi-Cal program for the poor.

At the time, Brown was joining a *qui tam* lawsuit filed under seal in 2005 by **Hunter Laboratories, LLC**, and Chris Riedel. The legal action alleges violations of the state's False Claims Act and was filed in San Mateo Superior Court. The suit charged that seven labs (including **Laboratory Corporation of America, Quest Diagnostics Incorporated, Westcliff Laboratories**, and four other labs based in California) had overcharged the Medi-Cal program since 1995. *(See TDR, April 9, 2009.)*

The basis of the whistleblower lawsuit is California Code of Regulations (CCR), Title 22, section 51501(a). Plaintiffs charged that the named defendants violated 51501(a) and said, "False claims result when providers submit claims to Medi-Cal at prices higher than what other providers were charged. The Medi-Cal program is entitled to restitution of the false claim payments."

THE DARK REPORT believes that it is the public unsealing of this lawsuit last April that directly led to the unprecedented enforcement campaign against low lab prices that was instituted this summer by the California **Department of Health Care Services** (DHCS). The state Medi-Cal agency's enforcement campaign is based on its interpretation of 51501(a).

This statute, which essentially tells a provider that it cannot bill Medi-Cal at a higher price than it charges another provider, is familiar to most laboratory executives. Further, over the past 20 years, DHCS officials have regularly stated their interpretation of this statute. But what the agency has failed to do during these same two decades is to take significant enforcement action against one or more clinical laboratories or other providers it views as having violated the pricing requirements of 51501(a).

Similarly, over the past two decades, as new pricing dynamics emerged in the healthcare marketplace, state officials have not regularly issued specific guidance on how to comply with 51501(a). For example, is 51501(a) violated if a capitated, full risk managed care or IPA contract was priced by a lab, a hospital, or a physician's office at a price that is less, on a fee-for-service basis, than what is billed to Medi-Cal?

Lacking ongoing regulatory enforcement action and updated guidance on situations like this, laboratory companies in California have continued the practice of low prices and deeply-discounted pricing into the present day. In legal challenges to its current enforcement actions against laboratories, DHCS will have to defend its current enforcement policy in the face of years of its perceived quiet acceptance of this market status quo.

THE DARK REPORT believes it was the public unsealing of the whistleblower lawsuit in April 2009 that motivated the Department of Health Care Services to mount its major enforcement campaign of 51501(a) this summer. That lawsuit lays out the massive scale of price discounting for laboratory tests that has been common for the past 20 years.

➤Whistleblower Lawsuit

As alleged in the *qui tam* lawsuit, the seven California laboratories regularly offered other providers laboratory test pricing that was significantly below the price these same labs charged the Medi-Cal program. In the unsealed and redacted lawsuit against LabCorp, the plaintiffs claim that Labcorp owes Medi-Cal a total of $72 million in overcharges, based on violations of 51501(a) that accrued over the past 14 years. During this time, the lawsuit says Medi-Cal paid Labcorp over $104 million.

In the case of Quest Diagnostics, plaintiffs say that the 14-year total of Medi-Cal payments was $726 million and overcharges associated with 51501(a) violations by Quest total $509 million.

These numbers reveal the extent to which the two national laboratories were willing to deeply discount lab test prices to favored providers, relative to the prices paid by Medi-Cal. Lab executives often complain that Med-Cal reimbursement for certain lab tests is below the cost of performing the test. The numbers provided in the whistleblower lawsuit give a different perspective on the pricing practices of the nation's largest lab companies.

➤Eyes Are Opened At DHCS

Further, one can now understand the reaction of DHCS officials to the details contained in this lawsuit. For bureaucrats at the cash-strapped Medi-Cal program, disclosure of overcharge amounts such as these must have been a true revelation.

Can it be a coincidence then, that Medi-Cal auditors began to show up at clinical laboratories in California in the months following the unsealing of the *qui tam* lawsuit? Next, having completed audits that revealed how, in the normal course of business, these laboratories were charging some providers less than they charged Medi-Cal, it would be expected that DHCS was now confronted with the dilemma of how to enforce their interpretation of 51501(a).

This is where DHCS found itself in a paradox of its own making. DHCS may be on the public record about its interpretation of 51501(a). But it had no history of ongoing enforcement of 51501(a), particularly as it applied to low-priced laboratory tests. Nor did DHCS have the benefit of having publicly provided detailed guidance, in prior years, on certain low price arrangements it may have determined violated its interpretation of 51501(a). *(See sidebar on page 18.)*

Therefore, both DHCS and California's clinical laboratories have reasons to be unhappy over the current situation involving low prices for laboratory tests as it relates to 51501(a). Each side comes to the table with a legal position that squarely opposes the other. How these events turn out is anyone's guess. However, it is likely that, going forward, DHCS intends to be diligent in enforcing its interpretation of 51501(a). TDR

Exhibit V

SETTLEMENT AGREEMENT AND RELEASE

I. PARTIES

This Settlement Agreement and Release ("Settlement Agreement") is entered into by the State of California, acting through the California Department of Justice ("DOJ"), Office of the Attorney General, Bureau of Medi-Cal Fraud and Elder Abuse ("BMFEA"), and the California Department of Health Care Services ("DHCS") (formerly known as the California Department of Health Services prior to July 1, 2007) (collectively, "California"); *Qui Tam* Plaintiffs Hunter Laboratories LLC and Chris Riedel ("*Qui Tam* Plaintiffs"); and defendant Westcliff Medical Laboratories, Inc., a California corporation ("Westcliff") and Biolabs, Inc., a Delaware corporation ("Biolabs"), through their authorized representatives, hereafter referred to collectively as the "Parties."

II. PREAMBLE

A. Biolabs is a corporation organized under the laws of Delaware. Defendant Westcliff is a corporation organized under the laws of the State of California and is a wholly-owned subsidiary of Biolabs.

B. *Qui Tam* Plaintiff Hunter Laboratories LLC is a limited liability corporation formed under the laws of California. *Qui Tam* Plaintiff Chris Riedel ("Chris Riedel") is an individual residing in California.

C. On November 7, 2005, *Qui Tam* Plaintiffs filed a *qui tam* action in San Mateo County Superior Court, captioned *State of California ex rel. [Relator] v. Quest Diagnostic Laboratories, Inc., et al.*, court case number CIV 450691 (hereinafter "Civil Action"). In the Civil Action, *Qui Tam* Plaintiffs asserted claims on behalf of California pursuant to the California False Claims Act, Cal. Gov. Code §§ 12650, *et seq.* ("CFCA").

D. The State of California filed a Notice of Intervention in the Civil Action on October 28, 2008, and the Civil Action was unsealed with respect to the general public on or about March 13, 2009. The Civil Action was subsequently transferred to the Superior Court for the County of Sacramento, and assigned court case number CIV 34-2009-00048046.

E. After intervention by the State of California, and the unsealing of the Civil Action, the State of California and Westcliff entered into a tolling agreement pursuant to which they agreed to dismiss Westcliff from the Civil Action, without prejudice, in order to facilitate settlement discussions. Accordingly, Westcliff is not named as a defendant in any of the currently operative complaints ("Litigation"). Neither is Biolabs named as a defendant in any of the currently operative complaints.

F. California and *Qui Tam* Plaintiffs contend that Westcliff submitted or caused to be submitted false claims for payment to the California Medical Assistance Program, which is California's Medicaid program and commonly known as Medi-Cal ("Medi-Cal"). Westcliff denies that it did so.

G. Specifically, California and *Qui Tam* Plaintiffs contended in the Civil Action that Westcliff engaged in the following conduct (hereinafter collectively referred to as the "Covered Conduct"):

1. During the period from November 7, 1995, through the Effective Date of this Settlement Agreement, Westcliff charged Medi-Cal more for Laboratory Tests as defined below in the range of Healthcare Common Procedure Coding System's Level I Current Procedural Terminology ("CPT") Codes 80000 to 89999 as authorized by the Centers for Medicare & Medicaid Services (CMS) of the U.S. Department of Health & Human Services for Westcliff's one (1) National Provider Identifier Standard number (NPI) of

number 118461567, and ten (10) Medi-Cal legacy provider numbers of LAB25263F, LAB25263G, LAB55508F, LAB77140F, LAB78685F, LAB86102F, LAB86102G, LAB89205G, ZZZ43472Z, and ZZZ59101Z ("Laboratory Tests") than it charged for the same Laboratory Tests to other purchasers of comparable Laboratory Tests under comparable circumstances; and

2. During the same period, Westcliff offered discounts on those Laboratory Tests to non-Medi-Cal purchasers in order to induce those purchasers to refer more-profitable Medi-Cal Laboratory Test business to Westcliff.

H. This Settlement Agreement is neither an admission of liability by Westcliff nor a concession by California or *Qui Tam* Plaintiffs that their claims are not well-founded. Westcliff expressly denies any such liability.

I. To avoid the delay, uncertainty, inconvenience, and expense of protracted litigation of the above claims, the Parties reach a full and final settlement pursuant to the Terms and Conditions below.

III. TERMS AND CONDITIONS

A. Westcliff will cause the remaining net proceeds available under the RUSI insurance policy (policy number NHP621827) in the amount of approximately $400,000 (the "Insurance Funds") to be paid to into an interest bearing trust account for the benefit of California, the *Qui Tam* Plaintiffs, Westcliff and Biolabs no later than **seven (7) business** days after the Signature Date as defined below of this Settlement Agreement. The Insurance Funds shall be paid to California and the *Qui Tam* Plaintiffs concurrently with the closing of the Sale Transaction (defined below).

B. In addition, Biolabs and Westcliff will pay to California and *Qui* Tam Plaintiffs ten percent (10%) of the Net Sale Proceeds (defined below) of any Sale Transaction (the "Net Sale Proceeds Payment") between Biolabs and/or Westcliff and a subsequent purchaser. The payment of the Net Sale Proceeds Payment to California and *Qui Tam* Plaintiffs is further consideration for this Settlement Agreement and shall be paid at the time of the closing of the Sale Transaction. It shall be the sole responsibility of California and the *Qui Tam* Plaintiffs to determine how to allocate the approximately $400,000 and the Net Sale Proceeds Payment between them and none of the other Parties to this Settlement Agreement shall have any role or responsibility with respect to any such allocation.

1. The term "Net Sale Proceeds" means gross cash proceeds less bankruptcy court-permitted transactions costs such as investment banker commission of MTS Health Partners L.P., transaction legal and professional fees including those of Kirkland & Ellis, Levine, Neale, Bender, Rankin and Brill L.L.P., FTI Consulting, Garvey, Schubert & Barer and other approved transaction expenses.

2. For purposes hereof, the term "Sale Transaction" means the sale (by purchase and sale, merger or other form of transaction) to an independent third party or parties of (i) all or a majority of the capital stock of Westcliff or Biolabs or (ii) all or a majority of the assets of Westcliff and Biolabs determined on a consolidated basis. The "Effective Date" means the date of the closing of the Sale Transaction.

3. Westcliff and Biolabs also agree that in exchange for this Settlement Agreement, California and *Qui Tam* Plaintiffs are entitled to and shall be provided and given "Senior Secured Status" with respect to the Net Sale Proceeds Payment. For purposes of this Settlement Agreement, Senior Secured Status means that California and

the *Qui Tam* Plaintiffs are paid the Net Sale Proceeds Payment before any other creditor is paid any portion of any Net Sale Proceeds from the consummation of a Sale Transaction.

4. Westcliff and Biolabs also agree that California and *Qui Tam* Plaintiffs are entitled to see records adequate to reasonably show that the Net Sale Proceeds are correctly determined. There will be full disclosure of all amounts, fees, etc. involved in the Sale Transaction.

C. No provision of this Settlement Agreement shall be interpreted to impose an obligation on Biolabs, Westcliff or any holders of Biolabs capital stock to accept, agree to or otherwise enter into any proposed or potential Sale Transaction. The decision to enter into (or to reject) a proposed transaction to consummate a Sale Transaction, and all terms and conditions of such Sale Transaction, including the amount, timing and form of consideration to be provided in connection therewith, shall be within the sole and absolute discretion of Biolabs, Westcliff and the holders of the capital stock of Biolabs (the "Seller(s)").

D. This Settlement Agreement does not create or convey any equity or ownership interest in Westcliff or Biolabs or any rights commonly associated with any such interest, including, but not limited to, the right to vote on any matters put before Westcliff or Biolabs' stockholders. Nothing contained in this Settlement Agreement and no action taken pursuant hereto shall create or be construed to create a fiduciary relationship between Westcliff, Biolabs and any of their respective directors, officers, shareholders, owners, employees, agents, representatives, on one hand, and California, *Qui Tam* Plaintiffs, or any other person, on the other hand.

E. Subject to the exceptions in Section III Paragraph H below, in consideration of the obligations of Westcliff and Biolabs in this Settlement Agreement, conditioned and effective upon full payment of the sums in Paragraph III.A and Paragraph III.B, California (on behalf of itself, its officers, agents, agencies, and departments) and *Qui Tam* Plaintiffs hereby release Westcliff and Biolabs and their individual directors, officers, employees and equity holders, and any successors and assigns, including any buyer of the stock and/or assets of Westcliff and Biolabs (collectively, "Releasees"), from any claims that were made, or could have been made, based upon the factual allegations asserted in the Civil Action, and from any civil or administrative claim California or the *Qui Tam* Plaintiffs have or may have for the Covered Conduct under any law or legal or equitable theory, including but not limited to the CFCA, Cal. Gov. Code § 12650, and the common law theories of payment by mistake, unjust enrichment, negligent misrepresentation, intentional misrepresentation, breach of contract, or fraud, up to and through the Effective Date. Upon full payment of the sums in Paragraph III.A and Paragraph III.B, California and *Qui Tam* Plaintiffs will file a dismissal with prejudice of Westcliff together with a copy of this Settlement Agreement, in the Civil Action. DHCS agrees to release and refrain from instituting, recommending, directing, or maintaining any administrative claim or action seeking a discretionary suspension or discretionary exclusion from the State's Medicaid program against Westcliff or Biolabs under Section 14123 of the Welfare and Institutions Code based on the Covered Conduct. Nothing in this Settlement Agreement precludes California from taking action against Westcliff or Biolabs in the event Westcliff or Biolabs is excluded by the federal government, or for conduct or practices other than the Covered Conduct, or for any breach of this Settlement Agreement.

1. This Settlement Agreement is binding on *Qui Tam* Plaintiffs' successors, transferees, heirs, and assigns. This is a full and final release as to Westcliff, Biolabs and the other Releasees as to all unknown and unanticipated damages for the Covered Conduct, as well as those now known or disclosed up to and through the Effective Date. In this regard, California and the *Qui Tam* Plaintiffs acknowledge and agree that their releases provided for herein include a release of all such unknown and unanticipated damages for the Covered Conduct up to and through the Effective Date. For all claims for the Covered Conduct up and through the Effective Date, **California and the *Qui Tam* Plaintiffs also specifically waive the provisions of California Civil Code Section 1542, which states as follows:**

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

Nothing in this Settlement Agreement precludes California from taking action against Westcliff or Biolabs in the event Westcliff or Biolabs is excluded by the federal government, or for conduct or practices other than the Covered Conduct, or for any breach of this Settlement Agreement.

F. If a Sale Transaction does not occur within 360 days after the Signature Date, Westcliff and Biolabs further agree to the following covenants related to compliance ("Compliance Covenants"), which are in addition to any other duties they may have under law or contract:

1. Within 30 days of the end of each calendar 6 month period, that is, June 30 and December 31 (starting with the six month period ending December 31, 2011 and

concluding with the six month period ending December 31, 2014), Westcliff and Biolabs shall send a written report ("Exception Report") to the settlement compliance contact or unit designated by DHCS ("Settlement Compliance Contact") listing all purchasers who were charged less for any Laboratory Test than Westcliff or Biolabs was paid by Medi-Cal for the same Laboratory Test during the same reporting period ("Lower Price Purchasers"). For the purposes of this Settlement Agreement, the amount a purchaser is charged means any amount that Westcliff or Biolabs, in advance of services, either explicitly or implicitly offers or agrees to accept as payment in full, whether orally or in writing, or that Westcliff or Biolabs knowingly and regularly does accept from a particular purchaser as payment in full, whether pursuant to a contract, price list, custom, practice, or otherwise, after giving effect to all offered, agreed, or regular rebates, adjustments, discounts, write-offs, services, and other allowances and consideration of any kind. For the purposes of Exception Reports, "knowingly" means with actual knowledge rather than with merely constructive knowledge. Notwithstanding anything to the contrary in this Settlement Agreement, the definition of "Lower Price Purchasers" excludes any purchaser that, during the year preceding the ending date of each Exception Report, paid Westcliff or Biolabs a total of less than ten thousand dollars ($10,000) for all Laboratory Tests, provided that those purchasers do not regularly refer Medi-Cal testing to Westcliff or Biolabs. Write-offs resulting from bona fide disputes over medical necessity or after bona fide attempts at collection and termination of a purchaser shall not constitute charges for the purposes of Exception Reports. Each Exception Report shall include, for each such Lower Price Purchaser,

i) the identity of the Lower Price Purchaser,

ii) the CPT codes for the Laboratory Tests for which the Lower Price Purchaser was charged less than Medi-Cal and the amount charged to the Lower Price Purchaser for each such CPT code,

iii) the facts, if any, based upon which Westcliff or Biolabs contends that it was not required to charge Medi-Cal at least as low a price, and

iv) the name, address, telephone number, and email address of a contact employed by Westcliff or Biolabs and a contact employed by the Lower Price Purchaser with knowledge of the circumstances of the relevant Laboratory Tests,

and shall be provided in the electronically stored format designated by DOJ, unless DHCS designates another format. Westcliff and the DOJ or DHCS shall meet and confer in good faith to identify the appropriate format, data fields and organization that the data shall be provided due to the size and volume of information being transmitted. Until DHCS' Fiscal Intermediary can receive the Exception Reports directly in an electronic format, such as DHCS' point of service format, the Exception Reports shall be mailed to the Settlement Compliance Contact. Exception Reports mailed to the Settlement Compliance Contact shall be on an appropriate electronic medium in the electronic format described above.

It is agreed that neither monthly account billing, nor volume of Laboratory Tests done by the purchaser, nor indigency of the patient for whom the Laboratory Test is done shall be used as a reason to not charge Medi-Cal at least as low a price.

For capitated contracts, the price shall be determined by calculating the total charges based on the then-existing Medi-Cal fee schedule for all Laboratory Tests provided under the capitated contract for the calendar 6 month period compared to the capitated payments received for the same 6 month calendar period. If the total capitated payments are less than the calculated

Medi-Cal fees, the percentage discount will be applied equally to all Laboratory Tests billed to Medi-Cal for that period and a refund to the Medi-Cal program will be required within 30 days.

California and the *Qui Tam* Plaintiffs agree that the Compliance Covenants shall not be binding on, or give rise to any liability on the part of, any successor and assigns of Westcliff and Biolabs, or any buyer of the stock and/or assets of Westcliff and Biolabs.

California and *Qui Tam* Plaintiffs agree that they will not bring any action under the CFCA that alleges a violation of Section 51501(a) of Title 22 of the California Code of Regulations, or any other recoupment, offset or repayment action that is based on a charge for Laboratory Tests that is truthfully, fully, accurately, and timely disclosed in an Exception Report pursuant to this Settlement Agreement. However, California and *Qui Tam* Plaintiffs reserve any right they may have to bring any other appropriate action or proceeding.

2. If a Sale Transaction does not occur within 360 days after the Signature Date, then within 390 days after the Signature Date, Westcliff and Biolabs shall appoint and identify to the Settlement Compliance Contact a compliance officer ("Compliance Officer") with duty and authority, to supervise and ensure compliance with all of the terms of this Settlement Agreement and to communicate with the Settlement Compliance Contact and any persons designated by the Settlement Compliance Contact concerning such compliance. If for any reason that person leaves the position, Westcliff and Biolabs shall ensure that the office of the Compliance Officer is occupied and the duties of the Compliance Officer performed until January 1, 2014, and shall identify to the Settlement Compliance Contact the identify of the new Compliance Officer within 30 days from the date the previous Compliance Officer left his or her position as Compliance Officer.

Westcliff and Biolabs will reasonably cooperate with the Settlement Compliance Contact and other agents designated by the Settlement Compliance Contact, in reviewing and exchanging information related to the Exception Reports, any information to which DHCS is entitled by law or contract, and any information reasonably requested by DHCS relating to the Exception Reports, or compliance with this Settlement Agreement.

3. Westcliff and Biolabs (or a buyer of their stock or assets) will retain, for five years after the Effective Date of this Settlement Agreement, all documents, records, and data relating to pricing and payment for laboratory testing services, in all formats (excluding email), relating to compliance with the Exception Report required by this Settlement Agreement, and will within a reasonable time period provide to DHCS and to DOJ such of those documents, records, and data as one or both of them may from time to time request.

G. If a Sale Transaction does occur within 360 days of the Signature Date of this Settlement Agreement, then Westcliff and Biolabs shall submit a one-time look-back Exception Report covering a 12 month period prior to the date of the Sale Transaction and shall designate and provide the name of a compliance officer that can be contacted regarding that one-time look-back Exception Report. Westcliff and Biolabs (or a buyer of their stock or assets) will retain, for five years after the Effective Date of this Settlement Agreement, copies of all documents, records, and data relating to pricing and payment for laboratory testing services, in all formats (excluding email), relating to compliance with the Exception Report required by this Settlement Agreement, and will within a reasonable time period provide to DHCS and to DOJ such of those documents, records, and data as one or both of them may from time to time request. California and the *Qui Tam* Plaintiffs agree that the one-time look-back Exception Report and the requirement to retain records (except to the extent a buyer of the stock or assets of Westcliff and

Biolabs undertakes responsibility for the retention and production of related documents) shall not be binding on, or give rise to any liability on the part of, any successor and assigns of Westcliff and Biolabs, or any buyer of the stock and/or assets of Westcliff and Biolabs for conduct up to and through the Effective Date.

H. Notwithstanding any term of this Settlement Agreement, specifically reserved and excluded from the scope and terms of this Settlement Agreement as to any entity or person, including Westcliff and Biolabs, are the following:

1. Any civil, criminal, or administrative liability arising under Title 26, U.S. Code (Internal Revenue Code), or the State of California's Taxation and Revenue Code;

2. Any criminal liability;

3. Any administrative liability for mandatory suspension or exclusion from State of California or United States health care programs;

4. Any liability to the State of California or the United States (or their agencies) for any conduct other than the Covered Conduct;

5. Any liability based upon such obligations as are created by this Settlement Agreement;

6. Any liability for express or implied warranty claims or other claims for defective or deficient products or services, including, but not limited to, quality of goods and services;

7. Any liability for failure to deliver goods or services due or to pay for goods or services; or

8. Any civil or related proceedings for violation of State of California unfair competition laws.

I. Upon the Effective Date and conditioned and effective upon full payment of the sums in Paragraph III.A and Paragraph III.B, Westcliff and Biolabs fully and finally release the State of California, and its agencies (including DHCS and DOJ), employees, servants, and agents, from any claims (including but not limited to attorney's fees, costs, and expenses of every kind and however denominated) that Westcliff or Biolabs have asserted, could have asserted, or may assert in the future against the State of California, or its agencies, employees, servants, and agents, related to the Covered Conduct and California's investigation and prosecution thereof, except to the extent that payments have not been made for any Laboratory Tests or other services rendered to them. This Settlement Agreement does not relate to any past, current or future Medi-Cal accounts receivable owed to Westcliff and Biolabs from California.

J. Upon the Effective Date and conditioned and effective upon full payment of the sums in Paragraph III.A and Paragraph III.B, Westcliff and Biolabs fully and finally release *Qui Tam* Plaintiffs from any claims (including but not limited to attorney's fees, costs, and expenses of every kind and however denominated) that Westcliff or Biolabs have asserted, could have asserted, or may assert in the future against *Qui Tam* Plaintiffs, related to the Covered Conduct, except to the extent that payments have not been made for any Laboratory Tests or other services rendered to them.

K. All notices required by or relating to this Settlement Agreement shall be sent by first class mail and when provided by email to the following addresses, or such other addresses as may be designated in writing by the party to receive the notice:

1. To the State of California:

   California Department of Justice
   Attention: Vincent DiCarlo, Deputy Attorney General
   Bureau of Medi-Cal Fraud and Elder Abuse
   1425 River Park Drive
   Sacramento, CA 95815
   Vincent.DiCarlo@doj.ca.gov

2. To the California Department of Health Care Services:

   Department of Health Care Services
   Attention: Steven A. Picco, Senior Counsel
   Office of Legal Services
   1501 Capitol Avenue
   P.O. Box 997413
   Sacramento, CA 95899-7413
   Steven.Picco@dhcs.ca.gov

3. To DHCS' Settlement Compliance Contact:

   California Department of Health Care Services
   Attention: Dr. Anne Heard, Medical Consultant II
   Settlement Compliance Contact
   Medical Review Branch
   1500 Capitol Avenue, 4th Floor, MS-2303
   Sacramento, CA 95899-7413
   Anne.Heard@dhcs.ca.gov

4. To Westcliff Medical Laboratories, Inc. and Biolabs, Inc.

   John Supple
   Gordon & Rees LLP275 Battery Street, 20th Floor Suire 2000
   San Francisco, CA 94111
   jsupple@gordonrees.com

5. To *Qui Tam* Plaintiffs:

   Niall P. McCarthy
   Cotchett, Pitre & McCarthy
   San Francisco Airport Office Center
   840 Malcolm Road, Suite 200
   Burlingame, CA 94010-1413
   nmccarthy@cpmlegal.com

K. Upon receipt of the sums described in Paragraphs III.A. and III.B. above, the tolling agreement signed by Westcliff on November 19, 2009, shall expire.

L. Except as expressly provided to the contrary in this Settlement Agreement, each Party shall bear its own legal and other costs and expenses incurred in connection with this matter, including the preparation and performance of this Settlement Agreement. Without limitation, neither Westcliff nor Biolabs will attempt to recoup any such costs or expenses from either Medi-Cal, Medicaid, or any other governmental program.

M. Westcliff and Biolabs represent that this Settlement Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

N. *Qui Tam* Plaintiffs represent that this Settlement Agreement is freely and voluntarily entered into without any degree of duress or compulsion whatsoever.

O. This Settlement Agreement is governed by the laws of the State of California. The Parties agree that the exclusive jurisdiction and venue for any dispute arising between and among the Parties under this Settlement Agreement is Sacramento County Superior Court.

P. For purposes of construction, this Settlement Agreement shall be deemed to have been drafted by all Parties to this Settlement Agreement and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

Q. This Settlement Agreement constitutes the complete agreement between the Parties. This Settlement Agreement may not be amended except by written consent of the Parties.

R. The individuals signing this Settlement Agreement on behalf of Westcliff and Biolabs represent and warrant that they are authorized by Westcliff or Biolabs to execute this Settlement Agreement. The individual signing this Settlement Agreement on behalf of *Qui Tam* Plaintiffs represents and warrants that he is authorized by Hunter Laboratories LLC to execute this

Settlement Agreement on behalf of all of the *Qui Tam* Plaintiffs. The California signatories represent that they are signing this Settlement Agreement in their official capacities and that they are authorized to execute this Settlement Agreement.

S. This Settlement Agreement may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Settlement Agreement.

T. California and *Qui Tam* Plaintiffs will provide Westcliff and Biolabs written instructions as to how to pay the sums described above in III.A. and III.B.

U. The date of the last signature on this Settlement Agreement shall be the "Signature Date" of this Settlement Agreement. Facsimiles and other images of signatures, including electronically transmitted signatures, shall constitute acceptable, binding signatures for purposes of this Settlement Agreement.

V. Except for the obligations in III.F., this Settlement Agreement shall be deemed null and void if a Sale Transaction does not occur within 360 days after the Signature Date of this Settlement Agreement, unless otherwise agreed to in writing by all of the parties hereto, and California, the *Qui* Tam Plaintiffs, Westcliff and Biolabs agree that if this occurs, the Insurance Funds shall be returned to Westcliff and Biolabs within 5 business days, and all parties agree that all conditions, releases and obligations in this Settlement Agreement shall be null and void and of no effect on California, the *Qui Tam* Plaintiffs, Westcliff, Biolabs and any successors or assigns thereto.

THE STATE OF CALIFORNIA

Dated: 5/3, 2010 By: _____
Brian Keats, Deputy Attorney General
Bureau of Medi-Cal Fraud and Elder Abuse
Office of the Attorney General
California Department of Justice

Dated: _____, 2010 By: _____
Karen T. Johnson, Chief Deputy Director
Medi-Cal Program
California Department of Health Care Services

WESTCLIFF MEDICAL LABORATORIES, INC.

Dated: _____, 2010 By: _____

BIOLABS, INC.

Dated: _____, 2010 By: _____

GORDON & REES LLP

Dated: _____, 2010 By: _____
John L. Supple
Counsel for Westcliff and Biolabs

***QUI TAM* PLAINTIFFS**

Dated: _____, 2010 By: _____
Chris Riedel

***QUI TAM* PLAINTIFFS**

Dated: _____, 2010 By: _____
Hunter Laboratories LLC

THE STATE OF CALIFORNIA

Dated: 5/13, 2010 By: _____

Brian Keats, Deputy Attorney General
Bureau of Medi-Cal Fraud and Elder Abuse
Office of the Attorney General
California Department of Justice

Dated: 5/13, 2010 By: _____

Karen T. Johnson, Chief Deputy Director
Medi-Cal Program
California Department of Health Care Services

WESTCLIFF MEDICAL LABORATORIES, INC.

Dated: _____, 2010 By: _____

BIOLABS, INC.

Dated: _____, 2010 By: _____

GORDON & REES LLP

Dated: _____, 2010 By: _____

John L. Supple
Counsel for Westcliff and Biolabs

***QUI TAM* PLAINTIFFS**

Dated: _____, 2010 By: _____

Chris Riedel

***QUI TAM* PLAINTIFFS**

Dated: _____, 2010 By: _____

Hunter Laboratories LLC

THE STATE OF CALIFORNIA

Dated: _____, 2010 By: _____
Brian Keats, Deputy Attorney General
Bureau of Medi-Cal Fraud and Elder Abuse
Office of the Attorney General
California Department of Justice

Dated: _____, 2010 By: _____
Karen T. Johnson, Chief Deputy Director
Medi-Cal Program
California Department of Health Care Services

WESTCLIFF MEDICAL LABORATORIES, INC.

Dated: _____, 2010 By: _____

BIOLABS, INC.

Dated: _____, 2010 By: _____

GORDON & REES LLP

Dated: _____, 2010 By: _____
John L. Supple
Counsel for Westcliff and Biolabs

***QUI TAM* PLAINTIFFS**

Dated: 5/3, 2010 By: C. Riedel
Chris Riedel

***QUI TAM* PLAINTIFFS**

Dated: 5/3, 2010 By: C. Riedel
Hunter Laboratories LLC

COTCHETT, PITRE & McCARTHY

Dated: 5/3, 2010 By: _____

Niall P. McCarthy
Counsel for *Qui Tam* ~~Plaintiffs~~

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Office of the Attorney General
California Department of Justice

Dated:_____, 2010 By: _____
Karen T. Johnson, Chief Deputy Director
Medi-Cal Program
California Department of Health Care Services

WESTCLIFF MEDICAL LABORATORIES, INC.

Dated: 5-5, 2010 By: _____
Matthew Pakkala
Chief Restructuring Officer

BIOLABS, INC.

Dated: 5-5, 2010 By: _____
Matthew Pakkala
Chief Restructuring Officer

GORDON & REES LLP

Dated:_____, 2010 By: _____
John L. Supple
Counsel for Westcliff and Biolabs

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Dated:_____, 2010 By: _____
Chris Riedel

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California Department of Justice

Dated: _____, 2010 By: _____
Karen T. Johnson, Chief Deputy Director
Medi-Cal Program
California Department of Health Care Services

WESTCLIFF MEDICAL LABORATORIES, INC.

Dated: _____, 2010 By: _____

BIOLABS, INC.

Dated: _____, 2010 By: _____

GORDON & REES LLP

Dated: 5/7/10, 2010 By: _____
John L. Supple
Counsel for Westcliff and Biolabs

***QUI TAM* PLAINTIFFS**

Dated: _____, 2010 By: _____
Chris Riedel

***QUI TAM* PLAINTIFFS**

Dated: _____, 2010 By: _____
Hunter Laboratories LLC

Exhibit W

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit X

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit Y

Exhibit Under Seal Pursuant to Protective Order –

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Exhibit Z

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit AA

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit BB

Exhibit Under Seal Pursuant to Protective Order –

[*FTC v. Lab. Corp. of Am.*, SACV 10-1873 (MLGx) (C.D. Cal)]

Exhibit CC

DECLARATION OF JAMES P. MASON

I, James P. Mason, declare:

1. I am President and CEO of SynerMed, the largest Medi-Cal managed services organization, which manages several independent practice associations (IPAs). SynerMed's headquarters are located at 1200 Corporate Center Drive, Suite #200, Monterey Park, CA 91754.

2. I have been in the managed care business since 1992. In 1999, I became the Vice President of Operations for Comprehensive Healthcare Management, which became SynerMed after a successful turnaround and reorganization. I was named President and CEO of SynerMed in 2002. I am responsible for the management and strategic direction of the company. During my tenure, SynerMed has grown from one client and a few hundred covered lives to over 500,000 covered lives.

3. SynerMed operates a number of IPAs across the state of California. In total, we serve 400,000 Medi-Cal lives, 100,000 commercial lives, and 15,000-17,000 Medicare lives.

4. We have 7,000 contracted physicians across all of our IPAs, with the largest IPA comprised of approximately 2,000 physicians. Many of our contracted physicians participate in multiple IPAs, but some are exclusive members of one IPA.

5. Two of the IPAs that SynerMed manages have capitated contracts with Westcliff for laboratory services. The other SynerMed IPAs use a variety of lab service providers, including Advanced Medical Analysis (AMA) Laboratory, LabCorp, and Quest. AMA has a contract with a SynerMed IPA to cover 200,000 capitated lives in Los Angeles County.

6. I contract on a capitated basis with smaller, local labs because SynerMed creates pockets of business in different geographic areas in which doctors have particular preferences as to which labs they want to use. To work with these groups of doctors, SynerMed will sign contracts with the preferred lab of the physician group.

7. We have not had any issues receiving the necessary data from these smaller labs. In order for any lab to receive payment on the fee-for-service (FFS) side, it must be able to provide claims data. In turn, these smaller labs are also able to provide us with Encounter data (which is essentially the same as claims data) for our capitated claims where the payment owed is zeroed-out in exchange for the per-member-per-month (PMPM) payment. It is therefore not a problem for us to get the data from smaller labs to enable us to contract on a capitated basis. As such, I can contract on a capitated or FFS basis with nearly all labs. In my experience, the smaller labs that I work are also able to provide sufficiently robust data for purposes of measuring quality and controlling utilization.

8. Although capitation is a great way for the lab services provider to partner with an MSO or IPA, MSOs and IPAs can also easily switch from capitation to FFS contracting for lab services. In fact, SynerMed also contracts with smaller labs on an FFS basis if the lab is unable to take risk under capitated agreements. In this situation, the risk relating to overutilization of lab services shifts from the lab to the IPA. The IPA takes on this risk along with the risk it bears for delivery of physician services. In either situation, capitation or FFS, there are operational controls that an IPA can employ in order to control costs. For example, an IPA can expand or contract the list of tests requiring prior authorization in order to control utilization. The prior authorization list is a point of negotiation with a capitated lab service provider in that an IPA may lengthen the list of lab services requiring prior authorizations in order to receive a lower capitated rate, because this helps control utilization and costs for the lab.

9. By far, the most important consideration when choosing a lab service provider is access, in other words, convenient draw stations. It is important to have the infrastructure for collecting samples, processing samples, and providing results.

10. Another consideration, but the one with which I am least concerned about, is price. If physicians are happy and the lab provider is easy to integrate into the practice, then price is the least of my concerns. This is particularly true because lab services are only 3% of my operating budget.

11. With respect to LabCorp's acquisition of Westcliff, I have limited concerns. I do not believe that Westcliff's disappearance as an independent entity will have any significant effect on my IPAs and contracting for lab services. Frankly, this instance of industry consolidation will not have a negative impact because there are still labs competing for the opportunity to gain physicians' FFS business, and there will continue to be plenty after this transaction.

12. If the market price for lab services increased too much, as an MSO, I could create a lab to serve my IPAs. Other MSOs that manage several IPAs like mine would likely do the same thing in the face of rising prices.

13. I support LabCorp's acquisition of Westcliff because I see a major benefit in combining Westcliff's service model with the resources and potential economies of scale that a larger lab can provide.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

James P. Mason
President and Chief Executive Officer, SynerMed
Signed this 27 day of August, 2010

Exhibit DD

DECLARATION OF MARY DEMPSEY

1. I am the Vice-President of Network Management at the Hemet Community Medical Group (HCMG), which is headquartered at 1545 W. Florida Avenue, Hemet, California.

2. HCMG is an independent practice association (IPA) that includes 6 IPAs located in the area around Hemet and Temecula in Riverside County, California, which is inland from Los Angeles County and south of San Bernardino County. My job includes being responsible for contracting for clinical lab services for HCMG, where I have worked and have had this responsibility since 1999.

3. HCMG includes about 125 primary care physicians (PCPs) and 200 specialists. The PCPs are exclusive to HCMG, but many of the specialists also belong to multiple IPAs other than HCMG. HCMG has about 70,000 commercial capitated lives and 30,000 capitated senior lives. For their capitated patients, HCMG physicians use only the HCMG-contracted laboratory, but for their fee-for-service patients they use other laboratories. We do not keep track, however, of what labs our physicians use for non-capitated patients or for patients who are in IPAs other than HCMG..

4. Over the years, HCMG has used both LabCorp and Quest as its contracted lab services provider. For a long time we had a contract with LabCorp, but then we switched to Quest in the early 2000s because we could not agree with LabCorp on rates. About 2-3 years ago, however, we were unhappy with the services that we were receiving from Quest. We were not receiving biopsy reports from Quest in the way that we needed. Also, Quest was not providing encounter data that we needed about the services they had provided. When we approached Quest to discuss these issues, they notified us that they were terminating our contract. As a result, we had to look for an alternative lab services provider, and we contracted with LabCorp, who still is providing us lab services today.

5. Westcliff contacted us at the time to see if we wished to work with them. But I did not wish to work with them for several reasons. First, they offered me a rate that was so low that I knew it couldn't last. Second, I was uncomfortable with some of their business practices. For example, they were placing draw stations in physicians offices, which can raise compliance issues. Third, I was concerned that they would not be able to provide me with the encounter data we needed, or that they would not be able to work easily with the NextGen electronic health record system that we are rolling out. I also had heard that Westcliff had financial issues, and it seemed that their real goal might be to make themselves look attractive so that they could be bought by someone else.

6. I have no concerns about LabCorp's acquisition of Westcliff. Westcliff was not a big player in this area. They did not have a lot of customer reps here, and did not directly provide genetic tests, which LabCorp does. LabCorp has been able to work with us on providing an interface to NextGen. LabCorp already has done this for other accounts and they know that it works, and we can take advantage of that, which is something that Westcliff could not offer. And as I mentioned I have not been interested in contracting

with Westcliff for a variety of reasons.

7. One advantage of the acquisition for us is that it will prevent some of the "leakage" that has been occurring where some of our physicians have sent work to Westcliff that is already covered under LabCorp's capitated contract. Westcliff then bills us for this work, which adds to our costs. The acquisition will address that problem.

8. I am also not worried about having alternatives to LabCorp. I always could look at Quest or other labs again. And it is also possible that another lab company could seek to service our capitated business. I have heard that Jeff Glenn who used to work at LabCorp may be opening his own labs.

9. This statement reflects my own personal opinions and is not intended to represent the views of HCMG or its various physicians.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Mary Dempsey
Vice-President of Network Management
Hemet Community Medical Group
Hemet, California
Signed this 31 day of August, 2010

Exhibit EE

DECLARATION OF HELENE BEILMAN-WERNER

I, Helene Beilman-Werner, declare:

1. I am the former Executive Vice President and Chief Operating Officer of Vantage Medical Group (Vantage). I served in this position from March 17, 1998 until December 2007. From January 2008 through December 2008, I served as a health care consultant in California. From January 2009 until July 2010, I was responsible for contracting with vendors for Arcadian Health, a health care services company and MSO that managed Citrus Valley IPA in Los Angeles and CalNet IPA in San Diego. I am currently the President of Platinum Standard Consulting, and I am working on the managed care strategy for Avanti Health Systems in Manhattan Beach, California.

2. In 2007, Vantage was a managed service organization (MSO) and an independent practice association (IPA). Today, Vantage is an IPA but no longer performs MSO services. Vantage is located at 3880 Lemon Street, Suite 310, Riverside, CA 92501. In 2007, Vantage Medical Group, under the direction of [redacted] managed five IPAs: (1) Alpha Care IPA which had about [redacted] lives, largely in San Bernardino County; (2) Vantage IPA, which serves Riverside, San Bernardino, and San Diego and had about [redacted] lives; (3) Mission IPA, which serves Riverside and Moreno Valley and had about [redacted] lives; (4) Desert Family Physicians Association, which serves Victorville, Apple Valley, and Hesperia and had about [redacted] lives; and (5) Empire Physicians Medical Group which had about [redacted] lives. Since 2007, Vantage has acquired [redacted] IPAs and rolled them into the Vantage IPA.

3. Vantage was one of Westcliff's earliest capitated IPA customers. I had previously worked with Westcliff's Senior Vice President of Sales and Marketing, Kip Vernaglia, when Kip was at Quest and Unilab. Vantage was originally contracted with Unilab, approximately thirteen years ago. At that time, Vantage had about [redacted] capitated lives in Riverside and San Bernardino. When Quest acquired Unilab, the Vantage contract was assigned to Quest.

4. Initially, Vantage had no service issues with Quest. Eventually, Quest exhibited some medical quality issues, including, for example, lost or botched samples. The final straw, however, was that Vantage received complaints relating to the Quest phlebotomists and their lack of skill relating to pediatric draws. This caused Vantage physicians to send pediatric patients to the local hospitals in order to have draws performed by more skilled phlebotomists. As a result, Vantage was paying twice for these tests because we had to submit payments to hospitals for their services while continuing to pay Quest the capitated rate under our contract. By that time, Kip had left Quest and I no longer had a good contact at Quest on whom I could rely to address these types of service issues. Quest was completely unresponsive to my concerns. Even after receiving Vantage's threat to walk away from its contract, Quest refused to take any action to address my concerns. Vantage was in an untenable position and I began to seek

out a reliable lab provider to quickly replace Quest.

5. I approached Kip at his new organization, Westcliff, about contracting for lab services. Initially, I agreed to try Westcliff for a small portion of my business on a capitated basis – approximately [redacted] lives. I negotiated a [redacted] per member per month rate from Westcliff [redacted] Upon learning that I had transitioned a small portion of Vantage's business to Westcliff, Quest terminated its contracts with all but one of the Vantage IPAs, which (excluding Empire IPA) had grown to [redacted] Empire IPA, although connected to Vantage at the time, had its own contracting team and remained with Quest. Quest gave thirty (30) days notice of its termination. Once I received the Quest termination notice, I immediately called Kip to see whether Westcliff could take on the entire Vantage membership and not just the originally discussed [redacted] lives. Westcliff agreed to expand the contract to cover all Vantage lives, other than Empire.

6. In order to ensure that Westcliff would be able to serve all [redacted] of our customers (excluding Empire) in Riverside, San Bernardino, and San Diego counties, Vantage and Westcliff worked hand in hand to expand Westcliff's network and complete the transition from Quest before the Quest contract terminated. At the end of the 30 days, 80% of Westcliff's expanded network was in place. Between 60-90 days from Quest's termination of the Vantage contract, 100% of Westcliff's network was in place. To the extent that there were network gaps during that timeframe, Westcliff made arrangements with interim service providers until it could build up its capabilities. Westcliff needed to open new facilities to accommodate Vantage membership in certain areas. In other areas, Westcliff's preexisting PSCs were adequate, but Westcliff still had to work to set up doctors for the Westcliff systems and to get them in the habit of sending specimens to Westcliff rather than Quest.

7. Westcliff and Vantage worked as a team to ensure the transition resulted in seamless service to Vantage's membership. Westcliff and Kip were responsive to Vantage's requests and addressed any concerns promptly, which was crucial to the effort's success. Although we could have split our business among more than one lab services provider, I had confidence based on my prior relationship with Kip that Westcliff could get the job done in the required amount of time.

8. In terms of electronic connectivity and Encounter data, Vantage did not experience any substantial hiccups during the transition to Westcliff. More importantly, any issues were addressed by Westcliff in a timely manner. [redacted]

9. After leaving Vantage, I went on to work for Arcadian Health. When I went to Arcadian, the IPAs that Arcadian managed, Citrus Valley IPA and CalNet IPA, were contracted with Quest for lab services. Because of my experience with Westcliff at Vantage, I facilitated switching lab services providers from Quest to Westcliff in 2009.

10. As someone who has contracted with Westcliff for lab services on behalf of six different IPAs and who currently works as a consultant in the managed care area in California, LabCorp's acquisition of Westcliff does not raise competitive concerns. The ease with which Westcliff expanded its network and substantially ramped up its capabilities in response to Vantage's needs proves that a small independent lab can quickly expand to provide lab services under capitated contracts in the same way that Westcliff did.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Helene Beilman-Werner
President Platinum Standard Consulting
Signed this 4 day of September, 2010.

Exhibit FF

DECLARATION OF JILL MARTIN

1. I am the Vice-President of Finance for Cedars-Sinai Medical Care Foundation, a California non profit public benefit corporation (CSMCF), which is headquartered at 200 N. Robertson Boulevard, Suite 101, Beverly Hills, California.

2. CSMCF contracts with Cedars-Sinai Medical Group (CSMG) and Cedars-Sinai Health Associate (CSHA). CSMG is a multi-specialty medical group which includes about 35 primary care physicians and 65 specialists, all of whom are members of the Medical Staff of Cedars-Sinai Medical Center in Los Angeles. CSHA is an independent physicians' association (IPA) and includes about 490 physicians (about 90 primary care physicians and 400 specialists) who also are also members of the Medical Staff of Cedars-Sinai Medical Center. CSHA contracts to provide medical services to about 30,000 lives on a capitated basis.

3. While the physicians in CSMG practice exclusively at CSMG, the affiliated physicians in CSHA are not exclusive and can belong to other IPAs.

4. My responsibilities include contracting for lab services for the CSMG and CSHA to cover its capitated business.

5. While the CSHA physicians only use CSHA's contracted laboratory for their CSHA capitated patients, they use other labs for their fee-for-service patients. Physicians who belong to another IPA will use whatever laboratory that has a contract with that IPA. These laboratories include LabCorp, Quest, the Cedars-Sinai hospital laboratory, Primex, and others.

6. [redacted]

7. [redacted]

8. I am not concerned about LabCorp's acquisition of Westcliff. We never considered Westcliff as a possible lab partner, so the transaction will not eliminate a realistic alternative for us. [redacted]

[redacted]

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Jill Martin
Vice-President of Finance
Cedars-Sinai Medical Care Foundation
Beverly Hills, California
Signed this 12th day of October, 2010

Exhibit GG

DECLARATION OF MARK MARTEN

I, Mark Marten, declare:

1. I am the Vice-President of Contracting at Prospect Medical Systems ("Prospect"), which is headquartered at 1920 East 17th Street, Suite 200, Santa Ana, CA 92705. Prospect is a management company that manages Prospect Medical Group, Inc. and its subsidiaries, which includes 10 IPAs in Los Angeles, Orange and San Bernardino counties that have been acquired in recent years. My job includes being responsible for contracting for clinical lab services for Prospect.

2. Prospect entered into a contract with Laboratory Corporation of America ("LabCorp") in June 2010 to provide clinical laboratory services for its IPA enrollees commencing on October 1, 2010. At the time that Prospect contracted with LabCorp, Propsect understood that LabCorp had entered into an asset purchase agreement to acquire the assets of Westcliff Medical Laboratories. As a result of that acquisition, Prospect understood that it would have access to the combined network of the LabCorp and former Westcliff (now LabWest Inc.) patient service centers ("PSCs"). In addition, Prospect anticipated having the benefit of the combined companies' sales and service people and STAT laboratory facilities.

3. I understand that because of the Hold Separate Agreement entered into between LabCorp and the Federal Trade Commission ("FTC"), LabCorp was not able to take operational control of LabWest until December 4, 2010. As a result, except in limited circumstances, Prospect IPA enrollees have not been able to utilize the combined LabCorp and LabWest network of PSCs. In addition, Prospect has not been able to utilize the combined resources of LabCorp and LabWest sales and service personnel and STAT laboratory facilities.

4. As a direct result of the Hold Separate Agreement, wait-times for Prospect IPA enrollees are far longer than they would be if enrollees had access to the combined network of PSCs. For this same reason, PSCs are overcrowded, forcing patients to stand or sit on the floor while they wait. At the same time, Prospect does not have the benefit of the combined network of STAT laboratories and sales and service people that a combined LabCorp and LabWest would offer. These issues will persist as long as LabCorp is required to hold LabWest as a separate entity. Until LabCorp is able to take operational control of LabWest and able to offer Prospect enrollees the full complement of PSCs, sales and service personnel, and STAT laboratories that I anticipated having access to when I contracted with LabCorp, my patient-enrollees will be harmed. It would be better for Prospect if LabCorp was able to take operational control of LabWest.

5. If the Hold Separate Agreement continues any longer, I will request that LabCorp open additional PSCs to service my IPA enrollees. I understand that these PSCs will be redundant with existing LabWest PSCs. Ultimately, I understand that when LabCorp is able to take operational control of LabWest, these additional PSCs and phlebotomists hired to staff these PSCs would be redundant.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Mark Marten
Vice President for Contracting
Prospect Medical Group
Santa Ana, California
Signed this 7 day of December, 2010

Exhibit HH

Exhibit Under Seal Pursuant to Protective Order –

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Exhibit II

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