[1] *Policy Statement on Administrative Litigation Following the Denial of a Preliminary Injunction* and accompanying statement of the Commission (June 21, 1995), reprinted at 60 Fed. Reg. 39741 (Aug. 3, 1995) (available at http://www.ftc.gov/os/fedreg/1995/august/950803administrativelitigation.pdf).

[2] The first two factors weigh most strongly in favor of continuing the Part 3 litigation, because of the weakness of the district court opinion and the scope of its inquiry. Specifically, the fact that the district court's order contained almost no meaningful analysis of the merits of the Commission's case, and that no significant new facts were presented in the proceeion

administrative litigation. The difficulty of fashioning relief if the Commission were to find a violation significantly limits the potential benefits of proceeding relative to the costs.

I. Background

On June 16, 2010, LabCorp acquired Westcliff in a transaction valued at approximately $57.5 million. This is below the financial reporting threshold of the Hart-Scott-Rodino Act ("HSR Act"), which requires prior notification of acquisitions and mergers above certain thresholds. LabCorp entered into a hold separate agreement with the Commission on June 25, 2010, in which it agreed not to integrate any of the assets it acquired from Westcliff while the FTC Staff performed a full investigation of the acquisition.

On November 30, 2010, the Commission issued an administrative complaint, finding there was reason to believe that LabCorp's acquisition of Westcliff violated Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act, because it may substantially lessen competition for the sale of clinical laboratory testing services to physician groups in Southern California. On December 1, 2010, the Commission filed a complaint in United States district court seeking a court order to maintain the hold separate agreement and bar LabCorp from taking any steps towards integrating the Westcliff assets into its own during the pendency of the administrative litigation.[3]

On February 22, 2011, the United States District Court for the Central District of California denied the Commission's request for preliminary relief, and denied the Commission's request for an injunction pending appeal on February 25, 2011. On March 14, 2011, by a 2-1 vote, the United States Court of Appeals for the Ninth Circuit denied the Commission's emergency motion for an injunction pending appeal.[4] The Commission, at the request of LabCorp, withdrew this matter from administrative litigation on March 23, 2011.

II. Analysis

While we continue to have reason to believe that LabCorp's acquisition of Westcliff will likely have anticompetitive effects, as we did when we issued our administrative complaint in November 2010, the district and appellate court denials of the Commission's request for preliminary relief would make it extremely difficult for the Commission to obtain an effective remedy if it ultimately were to determine, at the conclusion of administrative proceedings, that such a remedy is needed to restore competition.

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[3] The Commission originally filed the case in the District of Columbia, but that Court transferred the matter to the Central District of California.

[4] After the Ninth Circuit denied the Commission's emergency motion, the Commission withdrew its appeal because we concluded that absent interim relief, the primary assets that may have been the subject of an eventual divestiture order would likely have been irrevocably commingled or closed while the appeal was pending.

In general, divestiture of unlawfully acquired assets is the natural remedy for the competitive harm associated with a transaction that violates the antitrust laws.[5] In this instance, the primary assets that would likely be the subject of a divestiture order include clinical laboratories and patient service centers that are likely to be irrevocably commingled or closed during the pendency of the administrative litigation, Westcliff contracts with physician-group customers that will be terminated or replaced with LabCorp contracts, and Westcliff personnel who will be terminated as result of the acquisition. Each of these actions will be exceedingly difficult to undo once they have occurred. In antitrust parlance, the competitive eggs will have been scrambled.

This case highlights a prime reason why Congress required prior notification of mergers and acquisitions when enacting the HSR Act, and why, as a general rule, even though the LabCorp-Westcliff deal did not exceed the premerger notification thresholds, it is easier to craft a remedy before the assets are integrated:

> The government may well file suit, and ultimately win the subsequent litigation on the merits of its Clayton Act case, by gaining a final judicial declaration of the merger's illegality. Yet by the time it wins the victory . . . it is often too late to enforce effectively the Clayton Act, by gaining meaningful relief. During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly its personnel and management are shifted, retrained or simply discharged.

H.R. REP. NO. 94-1373, at *8 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2640-41. Likewise, Section 13(b) of the Federal Trade Commission Act "itself embodies congressional recognition of the fact that [post-integration] divestiture is an inadequate and unsatisfactory remedy in a merger case." *FTC v. H.J Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001).

In this case, the Commission finds that pursuing the administrative litigation now that preliminary relief has been denied is not in the public interest. Competition in healthcare markets is of vital importance to U.S. consumers, and we will continue aggressively to monitor and pursue anticompetitive conduct in this sector of our economy.

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[5] *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972).