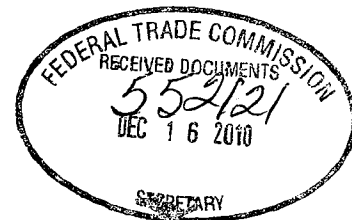


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)

LABORATORY CORPORATION)
OF AMERICA)

and)

LABORATORY CORPORATION)
OF AMERICA HOLDINGS,)
corporations.)

Docket No. 9345

PUBLIC

RESPONDENTS' MOTION TO SET HEARING LOCATION

Pursuant to Rule 3.41 of the Commission's Rules of Practice, 16 C.F.R. § 3.41, Respondents Laboratory Corporation of America and Laboratory Corporation of America Holdings (collectively "LabCorp") respectfully move for an order setting the location of the hearing in the above-captioned matter *in part* in Santa Ana, California, or another reasonably convenient location in Southern California. As explained below, the overwhelming number of potential party and non-party witnesses are located in Southern California. Forty-one of the 46 non-party witnesses identified by the FTC are in California. Most of the parties' witnesses are also in California. Requiring witnesses to drive down the street for a hearing is far different than forcing them to spend days traveling to Washington, D.C. and staying in hotels for a hearing. Moreover, forcing the parties' witnesses, especially those in the failing company being operated as LabWest, to be away for extended periods makes no sense. As a result, both the convenience of those parties and overall judicial economic efficiencies dictate that the hearing be held at least in part in Southern California, instead of the District of Columbia. We would still anticipate that the openings, closings, expert testimony, and a few "East-of-the-Mississippi" witnesses'

testimony would be held in Washington, D.C.

INTRODUCTION

Just two weeks ago, Judge Richard W. Roberts of the United States District Court for the District of Columbia transferred the Commission's federal civil complaint for injunctive relief against Respondents from his court to the United States District Court for the Central District of California, located in Santa Ana. *See FTC v. Laboratory Corporation of America, et al*, Civil Action No. 10-2053 (D.D.C. Dec. 3, 2010 Order), attached as Exhibit A hereto. In so ruling he noted many factors supporting the transfer. Transcript of Proceedings Before the Honorable Richard W. Roberts, United States District Judge, *FTC v. Laboratory Corporation of America, et al*, Civil Action No. 10-2053 (D.D.C. Dec. 3, 2010) at 36:13-41:3, attached as Exhibit B hereto. Those same factors support Respondents' present motion to have at least a portion of the administrative hearing currently set to begin on May 2, 2011 in Southern California. Indeed, the uncontested facts supporting this motion include, but are not limited to, the following:

- both the buyer and seller in the transaction at issue are located in Southern California;
- all material events giving rise to this matter occurred in Southern California;
- the vast majority of the LabCorp and LabWest employees likely to provide testimony or information regarding the acquisition, as well as all relevant documentary evidence, are located in Southern California; and
- almost all of the third party witnesses, including LabCorp's competitors and customers, are located in Southern California.

For all of these reasons, Respondents' present motion should be granted.

ARGUMENT

In cases where the underlying facts bear no relationship to the District of Columbia and where the vast majority of witnesses are in a location outside of, and not reasonably convenient

to, the District of Columbia, this Court has held hearings in more convenient locations. *See, e.g., In re North Texas Specialty Physicians*, No. 9312, available at <http://ftc.gov/os/adjpro/d9312/031016aljschedorder.pdf> (holding hearing in Forth Worth, Texas, Administrative Law Judge D. Michael Chappell presiding). This case fits that description perfectly.

Indeed, in assessing whether transfer is warranted, one need look no further than Judge Roberts's ruling just two weeks ago based on the exact same underlying facts. He found that "this action's ties to [the District of Columbia] are comparatively insubstantial, but the ties to California are significant." Ex. B at 37:21-23. He further noted that the overwhelming majority of the Commission's third-party declarations were from California, and that "none is from Washington, D.C." *Id.* at 38:11-17. As such, Judge Roberts found that the relevant factors "weigh strongly in favor of transfer to the United States District Court in the Central District of California, particularly the Southern Division in Santa Ana." *Id.* at 40:23-41:1.

For the same reasons, this Court should order that the hearing or at least a portion of it be held in Southern California, not the District of Columbia.

First, the Commission's own Complaint makes clear that the only area of the country at issue is Southern California: LabWest, Inc.'s acquisition of substantially all the business assets of Westcliff Medical Laboratories, Inc., "will have the effect of substantially lessening competition for the sale of clinical laboratory testing services to physician groups *in Southern California*." Administrative Complaint at ¶ 1 (emphasis added). Indeed, the Commission has not alleged competitive effects outside Southern California. As the Commission admitted to Judge Roberts: "[w]hen [this dispute] gets to the agency, the issue is going to be the marketplace in Southern California." Ex. B at 6:25-7:2.

Second, all material events giving rise to this matter occurred in Southern California:

- The Asset Purchase Agreement between LabCorp's subsidiary, LabWest, and Westcliff was negotiated, drafted, and executed in Southern California;
- LabWest, the actual acquirer of Westcliff, has its principal place of business in Southern California;
- LabCorp's West Division has its principal place of business in Southern California;
- Westcliff has its principal place of business in Southern California; and
- key competitors and other witnesses, including Quest Diagnostics, Inc., Pathology Laboratories, Inc., Path Logic, Inc., Primex Clinical Laboratories, Inc., Foundation Laboratory, Consolidated Medical Bio-Analysis, Inc., BioData Medical Laboratories, Advanced Medical Analysis Laboratory, Physicians Automated Laboratory, and AC Research Lab, Inc. have offices in Southern California.

In sharp contrast, other than the Commission's investigation of the acquisition, no underlying operative facts occurred in or near the District of Columbia.

Both here and in the context of motions to transfer proceedings in federal court under 28 U.S.C. § 1404(a), the convenience of witnesses is a key factor. Indeed, even in cases where much shorter potential travel distances were at issue, federal courts have granted transfers based, in large part, on witness convenience. *See, e.g., FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 28 (D.D.C. 2008) (finding that the convenience of witnesses weighed in favor of transfer from the District of Columbia to the Eastern District of Pennsylvania); *Schmidt v. Am. Inst. of Physics*, 322 F. Supp. 2d 28, 31-32 (D.D.C. 2004) (transferring matter from the District of Columbia to the District of Maryland based largely on the convenience of witnesses); *SEC v. Ernst & Young*, 775 F. Supp. 411, 414 (D.D.C. 1991) (granting transfer based in part on the fact that "for the majority of witnesses, trial in Texas would be less burdensome than trial [in the District of Columbia]"); *SEC v. Roberts*, 2007 WL 2007504, at *4 (D.D.C. July 10, 2007) (holding that the convenience of parties and witnesses "weighs in favor of transfer" because "more relevant

witnesses reside in Central California than in the District of Columbia.”); accord *In re Apple, Inc.*, 602 F.3d 909, 913 (8th Cir. 2010) (“If Apple’s California witnesses were required to travel to Arkansas, Apple would likely incur expenses for airfare, meals and lodging, and losses in productivity from time spent away from work,” while the “witnesses will suffer the personal costs associated with being away from work, family, and community.”) (quotation and citation omitted); *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (D.C. Cir. 2009) (“Because a substantial number of material witnesses reside within the transferee venue and the state of California, and no witnesses reside within the Eastern District of Texas, the district court clearly erred in not determining this factor to weigh substantially in favor of transfer.”).

In this case, virtually all of the relevant party and third-party witnesses work and reside in Southern California; none are located in or near the District of Columbia. Forty-one of the 46 declarants/witnesses whose declarations the FTC submitted in federal court in support of its motion for a temporary restraining order and preliminary injunction are located in California. The remaining five declarants are not located in or near Washington D.C., but rather in Illinois, New York, Washington (state), and New Mexico. Nine of the ten investigational hearing transcripts on which the Commission relied in its federal court briefing involved individuals located in California, and the tenth involved an individual located in North Carolina. None of those investigational hearings involved witnesses located in or near the District of Columbia. Moreover, nearly all of the LabCorp and LabWest employees likely to provide testimony or information regarding the acquisition, and all relevant documentary evidence, are located in Southern California.

As a result, a hearing in California will impose significantly less travel expense and require shorter periods of absence by virtually all of the witnesses than a hearing in the District

of Columbia. Indeed, because travel time to Washington, DC from California is essentially a full day, witnesses for both the parties and the FTC will at a minimum have to devote three days in travel and testifying time in order to provide any testimony. Moreover, given the inherent unpredictability in the day-to-day witness and hearing schedule, many witnesses are likely not to present testimony on the first expected date meaning that they will be required to stay in Washington, D.C. for an extended period of time. In addition to the inconvenience for the witnesses (especially those scheduled to provide testimony on a Thursday or Friday who might be forced to return to Washington, D.C. the following week), the costs associated with having numerous witnesses staying in hotels for extended days and potentially flying to Washington, D.C. on numerous occasions could be high.¹ A hearing in the District of Columbia would be particularly burdensome on LabWest, given LabWest's current dire financial situation, because minimizing periods of absence by senior managers and other key employees will be critical (regardless of whether a preliminary injunction has been entered by the District Court for the Central District of California).

While having the entire hearing in the District of Columbia would certainly be more convenient for counsel, that should not be a relevant factor. In fact, the Commission acknowledged in arguing the motion to transfer the civil action from the District of Columbia to Southern California that "the convenience of counsel isn't really an issue that weighs in this analysis." Ex. B at 12:25-13:1. Even if convenience of counsel were a factor, the Commission also conceded in that proceeding that the Commission's counsel travels "all the time." Ex. B at

¹ We understand that the FTC opposes this motion at least in part because of the cost of flying its team of lawyers to California. Based on the number of third-party declarants on whom the FTC is currently relying (forty-six), we assume that the costs of flying the FTC's team of lawyers to California would be largely offset by the fact that the FTC would not have to pay for the travel costs of its witnesses.

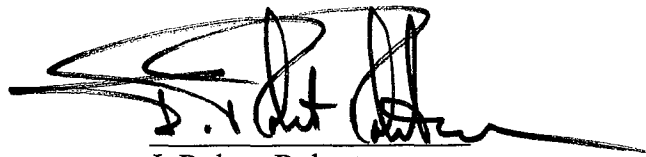
13:6-9. Moreover, any inconvenience to the Commission in holding the hearing in Southern California would be reduced by the fact that the agency has an office located in Los Angeles. *See About the FTC, Offices and Bureaus*, available at <http://www.ftc.gov/ro/western.shtm>; Ex. B at 12:22-23. To that end, just last year the Commission argued that the Central District of California was “convenient for the FTC, which has a Los Angeles office and litigates frequently here.” *See FTC v. Watson Pharm., Inc.*, 611 F. Supp. 2d 1081 (C.D. Cal. 2009), FTC’s Opposition to Motion to Transfer Venue, 2009 WL 1471634 (Mar. 16, 2009).

CONCLUSION

For the foregoing reasons, Respondents respectfully move for an order setting the location of the hearing in whole or in part in Santa Ana, California, or another reasonably convenient location in Southern California. Should the Court grant LabCorp’s motion, counsel for LabCorp will secure courtroom space in Santa Ana, California, or another reasonably convenient location in Southern California, for the relevant timeframe.

Dated: December 16, 2010

Respectfully Submitted,



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

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

LABORATORY CORPORATION)
OF AMERICA)
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and)
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OF AMERICA HOLDINGS,)
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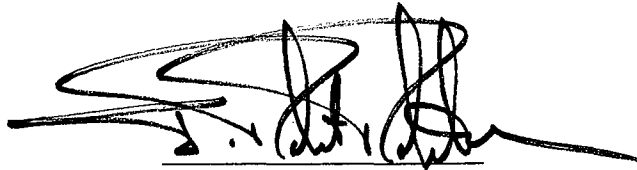
Docket No. 9345

PUBLIC

CERTIFICATE OF CONFERENCE

In accordance with the Court's Scheduling Order, Respondents' Counsel has conferred with Complaint Counsel in an effort in good faith to resolve by agreement the issues raised by Respondents' Motion to Set Hearing Location but has been unable to reach agreement on this issue.

Dated: December 16, 2010



J. Robert Robertson
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*Counsel for Respondents Laboratory
Corporation of America and Laboratory
Corporation of America Holdings*

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

**LABORATORY CORPORATION
OF AMERICA**

and

**LABORATORY CORPORATION
OF AMERICA HOLDINGS,
corporations.**

Docket No. 9345

PUBLIC

[PROPOSED] ORDER

Upon consideration of Respondents' Motion to Set Hearing Location, any opposition thereto, and the Court being fully informed,

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

IT IS FURTHER ORDERED, that those portions of the Hearing involving testimony from witnesses residing or working in or near Southern California shall take place in Santa Ana, California, or another reasonably convenient location in Southern California, with acceptable hearing space to be arranged by counsel for Respondents.

IT IS FURTHER ORDERED, that counsel for Respondents and Complaint Counsel shall confer prior to the commencement of the Hearing to develop a reasonable schedule for appearance of witnesses in Southern California, with the goal of minimizing travel expense, costs, and burden for the parties and maximizing convenience for witnesses.

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed via hand delivery an original with signature and one paper copy and via electronic mail a .PDF copy that is a true and correct copy of the paper original of the foregoing *Motion to Set Hearing Location* 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 copy of the foregoing *Motion to Set Hearing Location* 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 *Motion to Set Hearing Location* to:

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

Date: December 16, 2010

Benjamin F. Holt
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*Counsel for Respondents Laboratory
Corporation of America and Laboratory
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**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

**LABORATORY CORPORATION
OF AMERICA**

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OF AMERICA HOLDINGS,
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Docket No. 9345

PUBLIC

RESPONDENTS' MOTION TO SET HEARING LOCATION

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 10-2053 (RWR)
)	
LABORATORY CORPORATION OF)	
AMERICA, <u>et al.</u> ,)	
)	
Defendants.)	

ORDER

For the reasons set forth on the record orally in the hearing held in this case today, it is hereby

ORDERED that the defendants' motion [#6] to dismiss or to transfer venue be, and hereby is, GRANTED IN PART. The Clerk shall TRANSFER this case to the United States District Court for the Central District of California, Southern Division, FORTHWITH. The remaining pending motions shall be left for decision by the transferee court.

SIGNED this 3rd day of December, 2010.

_____/s/_____
RICHARD W. ROBERTS
United States District Judge

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

**LABORATORY CORPORATION
OF AMERICA**

and

**LABORATORY CORPORATION
OF AMERICA HOLDINGS,
corporations.**

Docket No. 9345

PUBLIC

RESPONDENTS' MOTION TO SET HEARING LOCATION

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,)
Plaintiff,) Civil Action
v.) No. 10-253
LABORATORY CORPORATION OF) December 3, 2010
AMERICA, et al.,) 3:00 p.m.
Defendants.) Washington, D.C.

TRANSCRIPT OF TEMPORARY RESTRAINING ORDER PROCEEDINGS
BEFORE THE HONORABLE RICHARD W. ROBERTS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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03:07PM 1 **AFTERNOON SESSION, DECEMBER 3, 2010**
03:07PM 2 (3:07 p.m.)
03:07PM 3 THE COURT: Good afternoon.
03:07PM 4 ALL PARTIES PRESENT: Good afternoon.
03:07PM 5 THE COURTROOM CLERK: Your Honor, this afternoon, this is
03:07PM 6 In re: Federal Trade Commission versus Laboratory Corporation of
03:07PM 7 America, et al., civil action number 10-2053.
03:07PM 8 I would ask the parties to step forward and identify
03:07PM 9 yourselves for the record, please.
03:07PM 10 MR. ROBERTSON: Good afternoon, Your Honor. My name is
03:07PM 11 Robby Robertson, and I represent LabCorp, LabCorp Holdings. I
03:08PM 12 also happen to represent Labwest, which was not sued here.
03:08PM 13 Also with me is Mike Aicher, who is the vice president of
03:08PM 14 LabCorp, one of my clients. And then back here in the first row
03:08PM 15 is Kathryn Kyle, who is an attorney for LabCorp, with me as well.
03:08PM 16 I have Mr. Corey Roush, and Mr. Ben Holt, also with me at the
03:08PM 17 table as well, sir.
03:08PM 18 THE COURT: Thank you. Good afternoon.
03:08PM 19 MR. GREENE: Good afternoon, Your Honor. Thomas Greene on
03:08PM 20 behalf of the Federal Trade Commission. I'm joined today by
03:08PM 21 Michael Moiseyev, the chief of our Mergers I unit, and by David
03:08PM 22 Sieradzki from our General Counsel's office. I will be handling
03:08PM 23 the TRO portion of this afternoon's activity and Mr. Sieradzki
03:08PM 24 will be handling the portion relating to the 1404 motion.
03:08PM 25 THE COURT: Thank you. Let me start with the motion that
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Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

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03:08PM 1 was filed as a consent motion. It's document number 9 that the
03:09PM 2 defendants filed for leave to file under seal as a consent
03:09PM 3 motion. I'll go ahead and grant that.
03:09PM 4 Mr. Smith, that's document number 9. So that's granted.
03:09PM 5 What remains, then, is essentially three requests that are
03:09PM 6 pending among -- between the parties: The plaintiff's request
03:09PM 7 for a temporary restraining order, then the defendants' request
03:09PM 8 to dismiss the plaintiff's complaint, and then the plaintiff's
03:09PM 9 [sic] request to transfer the case.
03:09PM 10 What I would like to do is to proceed first with the
03:09PM 11 motion by the defendants to transfer the case. What I want to do
03:09PM 12 is, potentially to save time, I'll give 20 minutes to both sides
03:09PM 13 on that issue, and I don't think we need to take up the whole
03:09PM 14 time, but I want to start with that one.
03:09PM 15 And again, to save time, what I think I want to do is turn
03:09PM 16 first to the FTC. I did get through as much as I could get
03:10PM 17 through of the papers that were filed yesterday and today, and,
03:10PM 18 frankly, I think the defendants have made a compelling argument
03:10PM 19 about transfer, and so the battle that the FTC has to fight is a
03:10PM 20 bit more uphill.
03:10PM 21 So to save time, unless you have a serious problem with
03:10PM 22 that, what I would like to do is turn to the FTC to hear the
03:10PM 23 response of the FTC with regard to these factors involving
03:10PM 24 transfer first. I will certainly not prevent the defendants from
03:10PM 25 having some rebuttal time, but I suspect it should be just about
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03:10PM 1 a 20-minute, 20-minute setup. But unless there's an objection to
 03:10PM 2 that, that's how I want to proceed, just to save time.
 03:10PM 3 MR. ROBERTSON: No objection to that.
 03:10PM 4 THE COURT: Let me hear from the FTC.
 03:10PM 5 MR. SIERADZKI: May it please the Court. Let me start by
 03:11PM 6 setting a stage about what kind of case this is. We're not going
 03:11PM 7 to be asking the Court here to try the merits of the case. We're
 03:11PM 8 asking for a preliminary injunction and, today, a TRO solely for
 03:11PM 9 the purpose of allowing an administrative adjudication to
 03:11PM 10 proceed.
 03:11PM 11 The structure of the FTC Act is if the Commission finds
 03:11PM 12 reason to believe that there's a violation of the act, then a
 03:11PM 13 complaint is issued and it's sent to an administrative law judge,
 03:11PM 14 and then there's a process of a trial internally within the
 03:11PM 15 building. And then -- excuse me -- whichever party loses at the
 03:11PM 16 level of the ALJ can appeal to the full Commission, and then that
 03:11PM 17 goes to the Court of Appeals. That's the main event here.
 03:11PM 18 The reason that we're here in front of you is because
 03:11PM 19 we're worried that unless there's some kind of injunctive relief
 03:11PM 20 right away, all of this administrative case is going to be for
 03:12PM 21 naught. There's a long history in antitrust cases of using hold
 03:12PM 22 separate agreements during the pendency of these kinds of trials.
 03:12PM 23 And by "trial," I mean the trial within the FTC to make it
 03:12PM 24 possible to have a remedy of divestiture if, at the end of the
 03:12PM 25 process, the Commission decides there's a problem.

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03:12PM 1 So, I don't know if you want me to start with venue or
 03:12PM 2 talk about the motion to dismiss, but it sounds like venue is the
 03:12PM 3 bigger issue at this point.
 03:12PM 4 THE COURT: I would ask you to address the transfer
 03:12PM 5 question, correct.
 03:12PM 6 MR. SIERADZKI: Sure. So, keeping in mind that the issue
 03:12PM 7 here is not whether or not the FTC is right or whether, even,
 03:12PM 8 we're going to prevail on the merits, but whether there's a
 03:12PM 9 substantial question of fact raised that justifies going to
 03:12PM 10 administrative hearing.
 03:12PM 11 THE COURT: Well, that certainly has to do with the burden
 03:13PM 12 you carry with regard to whether I should grant a TRO.
 03:13PM 13 MR. SIERADZKI: That's correct.
 03:13PM 14 THE COURT: Okay.
 03:13PM 15 MR. SIERADZKI: But it also relates to where the case is
 03:13PM 16 located. The defendants argue pretty strongly that the case is
 03:13PM 17 about a market in Southern California, and there's a lot of facts
 03:13PM 18 that relate to Southern California. And that's true. But what
 03:13PM 19 this is really about is something that's happening down the
 03:13PM 20 block, which is an administrative trial. This is something that
 03:13PM 21 this Court, the District Court here, has done many, many times, a
 03:13PM 22 dozen times in the past decade -- is to look at these kinds of
 03:13PM 23 requests for preliminary injunction.
 03:13PM 24 Why? Because it really relates to administrative law,
 03:13PM 25 relates to the ability of the agency to do its job. When it gets

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03:13PM 1 to the agency, the issue is going to be the marketplace in
 03:13PM 2 Southern California, and that's fine, because the statute says
 03:13PM 3 the agency has authority and responsibility to look at
 03:14PM 4 competitive conditions around the country. But in order for the
 03:14PM 5 agency to do its job, we need the opportunity to look for a
 03:14PM 6 remedy that's going to work.
 03:14PM 7 So, the location of case -- at least you can say there's a
 03:14PM 8 strong connection to the District of Columbia. It's not
 03:14PM 9 exclusively. Of course, there are relevant issues from
 03:14PM 10 California. But then, you go to all of the other factors that
 03:14PM 11 weigh in the balance: The convenience of the parties,
 03:14PM 12 convenience of the witnesses, access to sources of proof. And
 03:14PM 13 frankly, if this were a real trial, those would be very
 03:14PM 14 important. Here, if you're talking about convenience to the
 03:14PM 15 parties, LabCorp is based in North Carolina. The last time I
 03:14PM 16 checked, North Carolina is a lot closer to D.C. than it is to Los
 03:14PM 17 Angeles. Obviously, we're based here. So convenience to the
 03:14PM 18 parties really is not that big of an issue.
 03:15PM 19 Of course, we could try the case in Los Angeles, but as
 03:15PM 20 the plaintiff, we do have at least some presumption of choosing
 03:15PM 21 the forum where it's convenient -- convenient to the witnesses.
 03:15PM 22 We have a suggestion in a filing by LabCorp, I believe in
 03:15PM 23 bankruptcy court, but it might have been in this Court, that this
 03:15PM 24 entire proceeding could be handled on the papers. So, it's not
 03:15PM 25 even necessary that we are going to have a full evidentiary

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03:15PM 1 hearing with witnesses. It may be that the entire case can be
 03:15PM 2 done on the papers in front of you.
 03:15PM 3 But if we do need to have witnesses, it's not just the
 03:15PM 4 convenience for the witnesses; it's the convenience for the
 03:15PM 5 witnesses, and this is from -- it's from the *Cephalon* case that I
 03:15PM 6 quoted, but it's from all the District Court cases that use the
 03:15PM 7 same standard. It's the convenience of witnesses to the extent
 03:15PM 8 that they just wouldn't be available for trial.
 03:15PM 9 Now, we know that these witnesses could be made available.
 03:15PM 10 And again, we're not talking about a trial. We're talking about
 03:16PM 11 what we would hope would be, at most, a truncated hearing process
 03:16PM 12 for this injunction. So --
 03:16PM 13 THE COURT: I guess we're talking about, on that factor,
 03:16PM 14 willingness of witnesses out west to voluntarily appear, not
 03:16PM 15 ability of anyone to subpoena them outside the subpoena power of
 03:16PM 16 this district?
 03:16PM 17 MR. SIERADZKI: Okay.
 03:16PM 18 THE COURT: Is that right? Isn't that what you're talking
 03:16PM 19 about?
 03:16PM 20 MR. SIERADZKI: Well, that would be an aspect of it,
 03:16PM 21 right. But in any case, that factor, I think, is less strong
 03:16PM 22 than the most important factor, which is that the Federal Trade
 03:16PM 23 Commission, as the plaintiff, acting under a specific statute
 03:16PM 24 that has a venue provision that gives us a very wide latitude in
 03:16PM 25 selecting the venue, is entitled to some deference on this issue.

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03:16PM 1 Now, there may be a lot of discussion about the *Cephalon*
 03:17PM 2 case, and I should probably take that on, because it was a
 03:17PM 3 case -- it was a crushing blow that we took a couple of years
 03:17PM 4 ago, but I want to explain why this case is different from
 03:17PM 5 *Cephalon*. And it's in the papers, but it may be worth talking
 03:17PM 6 through for just a minute.
 03:17PM 7 *Cephalon* was a case involving Section 13(b) of the FTC
 03:17PM 8 Act, but it was a different part of 13(b). 13(b) has two prongs.
 03:17PM 9 One prong is where the Commission goes to the court and says, we
 03:17PM 10 want a permanent injunction; we're seeing behavior that violates
 03:17PM 11 the statute, so we want to make it stop. And we use that quite a
 03:17PM 12 bit. We used it sometimes in antitrust cases, as in *Cephalon*.
 03:17PM 13 We use it quite a lot in the consumer protection side.
 03:17PM 14 The other side of 13(b), which has, I guess, a longer
 03:17PM 15 history, is what we're talking about here, which is where there's
 03:17PM 16 a merger, an acquisition, and there's going to be an adjudicatory
 03:18PM 17 proceeding inside the Commission.
 03:18PM 18 Again, the merits are not going to be adjudicated here.
 03:18PM 19 The merits will be adjudicated at the Commission. If these folks
 03:18PM 20 don't like the way it comes out or, for that matter, if complaint
 03:18PM 21 counsel doesn't like the way the administrative law judge comes
 03:18PM 22 out, there is a process of appeal. It ends up in the Court of
 03:18PM 23 Appeals here or in the Court of Appeals wherever these folks
 03:18PM 24 decide to bring it.
 03:18PM 25 That's -- that's the trial --

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03:18PM 1 THE COURT: I think you're talking now about the factor in
 03:18PM 2 transfer analysis that talks about where the claim arose? Is
 03:18PM 3 that what you are addressing your comments to now?
 03:18PM 4 MR. SIERADZKI: Right. But I'm also trying to distinguish
 03:18PM 5 this from Judge Bates' decision in *Cephalon*, where he said this
 03:18PM 6 has nothing to do with the District of Columbia, and maybe that's
 03:18PM 7 a debatable point. But this case is different from that because
 03:18PM 8 we're not talking about necessarily just the conduct that
 03:18PM 9 occurred in California or in North Carolina, where these
 03:19PM 10 executives made their decision; we're talking about whether the
 03:19PM 11 Federal Trade Commission has a significant, substantial basis for
 03:19PM 12 thinking that this is an issue that needs further study. That's
 03:19PM 13 the standard. And so what you're looking at is the
 03:19PM 14 decision-making process at the FTC.
 03:19PM 15 THE COURT: Well, that's the standard for whether or not I
 03:19PM 16 would grant or deny a TRO.
 03:19PM 17 MR. SIERADZKI: Correct.
 03:19PM 18 THE COURT: I want to address the factors that determine
 03:19PM 19 whether the transfer in the interest of justice is appropriate.
 03:19PM 20 I take it you're addressing the factor, at least one
 03:19PM 21 factor, which is where the claim arose. Isn't it the fact that
 03:19PM 22 if there had been no purchase agreement executed about these
 03:19PM 23 California assets, there had been no order from the bankruptcy
 03:19PM 24 judge approving the sale of those assets, you wouldn't even have
 03:19PM 25 an administrative investigation or potential trial here in

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03:19PM 1 Washington?
 03:20PM 2 MR. SIERADZKI: But you could also say that if there had
 03:20PM 3 been no vote by the Commission to -- in an administrative
 03:20PM 4 proceeding, there'd be -- or if we weren't expecting that to take
 03:20PM 5 place, there would be no point in coming in here for an
 03:20PM 6 injunction. The injunction really isn't about forcing
 03:20PM 7 divestiture. It's really about -- it's really about enabling the
 03:20PM 8 Commission to do its job.
 03:20PM 9 THE COURT: But your whole claim, I suppose, in the
 03:20PM 10 subject matter of this case is that there is a likelihood or
 03:20PM 11 probability that the sale and the combination of the assets is
 03:20PM 12 going to create a significant impact on lessening competition.
 03:20PM 13 MR. SIERADZKI: Correct.
 03:20PM 14 THE COURT: That's what you're talking about.
 03:20PM 15 MR. SIERADZKI: Right.
 03:20PM 16 THE COURT: And what it is that's causing or creating what
 03:20PM 17 the FTC says is going to produce a diminution in competition in
 03:20PM 18 the markets you define, I take it, was the sale of these assets
 03:21PM 19 from Westcliff over to the defendants, which, frankly, is why
 03:21PM 20 we're all here, isn't it?
 03:21PM 21 MR. SIERADZKI: That's true, yes. That's true.
 03:21PM 22 THE COURT: When I look, then, at the factor for transfer
 03:21PM 23 of purpose is about where the claim arose, that didn't happen in
 03:21PM 24 Washington.
 03:21PM 25 MR. SIERADZKI: That's right.

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03:21PM 1 THE COURT: Okay.
 03:21PM 2 MR. SIERADZKI: That's right. I mean, let me look at
 03:21PM 3 another factor that was an issue in *Cephalon* and is an issue that
 03:21PM 4 LabCorp has raised, which is the fact that there's another
 03:21PM 5 proceeding pending. In *Cephalon*, that was a big issue for Judge
 03:21PM 6 Bates, because there were plaintiff class action suits going on
 03:21PM 7 in Pennsylvania. And he said, why are you sort of creating a
 03:21PM 8 forum split here, and trying to let those guys go to one circuit
 03:21PM 9 and you're coming to another circuit with the same exact issue?
 03:21PM 10 Here, these folks have talked about this adversary
 03:21PM 11 proceeding in the bankruptcy court. First of all, we couldn't
 03:21PM 12 sue under Section 13(b) in a Bankruptcy Court. The best we could
 03:22PM 13 do is go to the District Court in L.A., but that wouldn't address
 03:22PM 14 the concern that these folks are raising, which is the fact that
 03:22PM 15 there's a bankruptcy proceeding.
 03:22PM 16 THE COURT: Well, back up. Why didn't you go to the
 03:22PM 17 District Court in the Central District. I assume you asked them
 03:22PM 18 to assign it to the Santa Ana Southern Division rather than the
 03:22PM 19 division where L.A. is, but why didn't you go to Central District
 03:22PM 20 of California to file this 13(b) action?
 03:22PM 21 MR. SIERADZKI: Honestly, because the staff that were
 03:22PM 22 doing all the investigation are here. The fact that we have an
 03:22PM 23 L.A. office -- they haven't been involved in this at all. It
 03:22PM 24 just so happens that most of the counsel for the other side is
 03:22PM 25 located here, although the convenience of counsel isn't really an

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03:22PM 1 issue that weighs in this analysis --

03:22PM 2 THE COURT: Right.

03:22PM 3 MR. SIERADZKI: -- but to answer your question, that's why

03:22PM 4 we did it, and because this Court has, as I said, a track record

03:22PM 5 of doing exactly this kind of case time after time.

03:22PM 6 THE COURT: I take it -- you're right that the convenience

03:23PM 7 of counsel is not supposed to be considered, but even if I did,

03:23PM 8 don't FTC counsel travel all the time?

03:23PM 9 MR. SIERADZKI: Of course.

03:23PM 10 THE COURT: And isn't that one of the burdens of the job?

03:23PM 11 MR. SIERADZKI: There's actually a case that says that

03:23PM 12 it's not just the burden on counsel. The fact that all these

03:23PM 13 counsel are -- all these lawyers might have to be on the road is

03:23PM 14 a burden on the agency itself, because it takes them away from

03:23PM 15 everything else that they might have to be doing. So there

03:23PM 16 actually is an inconvenience, not just on the individual lawyers

03:23PM 17 getting on a plane, but the fact that the agency is going to have

03:23PM 18 a tranche of people who aren't available to do other work.

03:23PM 19 THE COURT: Well, I was really just addressing the issue

03:23PM 20 about -- you said the agency lawyers are here who did the

03:23PM 21 investigation as an answer to my question about why you filed

03:23PM 22 here and not in California.

03:23PM 23 But you also raised an issue a few moments ago about

03:23PM 24 appeals. Can't you envision a real thorny situation if I keep

03:23PM 25 this 13(b) case, there is some decision that's adverse to

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03:24PM 1 somebody; an appeal from that is going to go upstairs here in

03:24PM 2 D.C.?

03:24PM 3 MR. SIERADZKI: Right.

03:24PM 4 THE COURT: You have a bankruptcy judge in California,

03:24PM 5 whether we like it or not, who's considering a motion to stop the

03:24PM 6 FTC from doing what it just did, that -- and I can't tell you how

03:24PM 7 that judge is going to rule, but there may be some adverse

03:24PM 8 decision out there, and that could be appealed, either to the

03:24PM 9 District Court or to the Ninth Circuit.

03:24PM 10 MR. SIERADZKI: Right.

03:24PM 11 THE COURT: That's thorny, isn't it?

03:24PM 12 MR. SIERADZKI: Well, I would say that it's thorny, except

03:24PM 13 that I really would not accept the premise. It's thorny because

03:24PM 14 of the cleverness of our colleagues over here, who created a

03:24PM 15 thorny situation. There's no nexus at all between this case and

03:24PM 16 the bankruptcy. And let me explain this.

03:24PM 17 The bankruptcy proceeding is about what to do with the

03:24PM 18 assets of the debtor, how to pay off the creditors.

03:25PM 19 THE COURT: That's not what the pending motion is that the

03:25PM 20 bankruptcy judge has set a hearing for on December 22nd, right?

03:25PM 21 MR. SIERADZKI: The motion is basically the mirror image

03:25PM 22 of the motion for a TRO that's in front of you. They've said,

03:25PM 23 why don't you reach the conclusion that the FTC doesn't have the

03:25PM 24 likelihood of success on the merits, and that the tip of the

03:25PM 25 equities goes the other way? They basically try to bring an

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03:25PM 1 anti-13(b) case in bankruptcy court -- totally inappropriate.

03:25PM 2 And it's just like other cases, where people have said, oh, the

03:25PM 3 government's going to come after me. I'm going beat them to the

03:25PM 4 courthouse, and I'm going create a problem for them. It happened

03:25PM 5 in the *Swish* case, again in front of Judge Bates, and he said,

03:25PM 6 this is ridiculous. Actually, that was a case where the

03:25PM 7 affirmative FTC action was in California and he said, you're

03:25PM 8 coming to me with a declaratory ruling? You know, get out.

03:25PM 9 THE COURT: Well, you'll have a chance to make that

03:25PM 10 argument on December 22nd in front of the bankruptcy judge, or

03:25PM 11 the next date that was set for whatever got set before him. But

03:25PM 12 the fact is, I can't tell you how that bankruptcy judge will

03:26PM 13 rule. The bankruptcy judge may not buy your argument. And if

03:26PM 14 the bankruptcy judge doesn't buy your argument, you've got to

03:26PM 15 take it up somewhere, right?

03:26PM 16 MR. SIERADZKI: Right.

03:26PM 17 THE COURT: Presumably, you'll have to take it up either

03:26PM 18 to the District Court, if the District Court takes cases from the

03:26PM 19 bankruptcy courts like we do, or to the Ninth Circuit.

03:26PM 20 MR. SIERADZKI: And there's also a bankruptcy appeal

03:26PM 21 panel. There's a lot of options there.

03:26PM 22 THE COURT: Okay.

03:26PM 23 MR. SIERADZKI: The reality, though, is we're up

03:26PM 24 against --

03:26PM 25 THE COURT: So I guess what I'm asking you is: If I keep

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03:26PM 1 this here, and the bankruptcy judge says, I'm going to impose an

03:26PM 2 injunction against FTC, somebody may want to take my decision to

03:26PM 3 keep this here and move forward with it and make a ruling on the

03:26PM 4 request for injunctive relief -- at some point, ask for the

03:26PM 5 ability to take it upstairs here, while I take it that any

03:26PM 6 unfavorable decision by the bankruptcy judge against the FTC is

03:27PM 7 going to have to be taken up either to a district judge or the

03:27PM 8 Ninth Circuit, and then we're putting our District Court in

03:27PM 9 California and our circuit here, or the Ninth Circuit there and

03:27PM 10 the D.C. Circuit here, in a very uncomfortable posture.

03:27PM 11 MR. SIERADZKI: That may be.

03:27PM 12 THE COURT: And even though you blame the defendants for

03:27PM 13 doing something that you call inappropriate, FTC still filed this

03:27PM 14 13(b) here, where it could have filed it in California and avoid

03:27PM 15 that awkwardness I just pointed out.

03:27PM 16 MR. SIERADZKI: That's true, although counsel knew that we

03:27PM 17 were thinking about filing here. When they filed that case, the

03:27PM 18 Commission hadn't voted on whether they had reason to believe

03:27PM 19 there was a problem, and they also hadn't voted on whether to

03:27PM 20 authorize this case to start. So we weren't in a position to do

03:27PM 21 anything, but they said, why don't you enjoin them from

03:27PM 22 proceeding in the District of Columbia? They knew that this was

03:27PM 23 going to happen, and they anticipated it.

03:28PM 24 Now, let me offer you --

03:28PM 25 THE COURT: Well, I guess the answer to that is maybe

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03:28PM 1 their clients pay them the big bucks to make judgments like that,
03:28PM 2 but the FTC has very skilled counsel who are nimble and
03:28PM 3 experienced and could easily have said, well, let me take this
03:28PM 4 paper and put a different caption on the top and have it filed in
03:28PM 5 Santa Ana.

03:28PM 6 MR. SIERADZKI: It's possible, but I think that it would
03:28PM 7 be wrong for this Court to defer to a clever litigation tactic as
03:28PM 8 opposed to letting Congress' remedial process play out the way it
03:28PM 9 should, which is that Section 13(b) does give the FTC quite a bit
03:28PM 10 of latitude to select the venue.

03:28PM 11 Now, let me make one other point.

03:28PM 12 THE COURT: Well, some of the latitude it gives you is you
03:28PM 13 could look also to what the factors are under 1391 for venue, and
03:28PM 14 there are some strong arguments in favor of California under
03:28PM 15 1391.

03:28PM 16 MR. SIERADZKI: I think that venue would be proper in
03:28PM 17 either jurisdiction, and it's up to you to weigh the equities and
03:29PM 18 make a decision.

03:29PM 19 One important point that shouldn't get lost in all of
03:29PM 20 this, though, is that tonight at midnight is the deadline that we
03:29PM 21 are up against. The deadline is that they've promised to
03:29PM 22 scramble the assets as of that date. And what that means is
03:29PM 23 they've said, we're going to stop holding these assets separate.
03:29PM 24 We're going to merge them together. Presumably, that means they
03:29PM 25 can reject leases, they can reject contracts, they can basically

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03:29PM 1 take steps to merge the companies together and end the separate
03:29PM 2 existence of Labwest or Westcliff as a potentially divestible
03:29PM 3 entity.

03:29PM 4 And they said they're going to do this. And that's why
03:29PM 5 they're here, and that's why we're here. And that would be a big
03:29PM 6 problem. They are wrong in saying that it would be easy to
03:29PM 7 divest. One of the things that they are very eager to do, and
03:29PM 8 the documents in the record reflect this, is they want to take
03:30PM 9 Labwest or Westcliff's contracts, put them together with legacy
03:30PM 10 LabCorp contracts.

03:30PM 11 Well, the contracts, the relationships with customers,
03:30PM 12 with clients -- that's the value of this business. That's why
03:30PM 13 they paid \$57 million for it. Yes, there are physical
03:30PM 14 facilities, there are blood drawing stations and so on; there's a
03:30PM 15 laboratory. And those are all important assets, too. But the
03:30PM 16 main value as a going concern is the fact that they have
03:30PM 17 relationships with their customers. That's going to be destroyed
03:30PM 18 as of tonight at midnight.

03:30PM 19 What I would suggest is, if you're troubled by this venue
03:30PM 20 issue, it's an issue that perhaps might weigh in favor of, or
03:30PM 21 against, holding a preliminary injunction proceeding here, but at
03:30PM 22 the very least, there's a choice between having venue here or in
03:30PM 23 Los Angeles. And we would suggest that at a minimum, let's have
03:30PM 24 a TRO today to hold the status quo, where you've got the balance
03:31PM 25 of equities on the TRO being, on the one hand, they say they're

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03:31PM 1 losing tons of money every day. Actually, the documents don't
03:31PM 2 support that, but take that as a possibility, that there's a
03:31PM 3 dollar issue on one side.

03:31PM 4 On the other side, you're basically eliminating the case
03:31PM 5 if you allow them to scramble the assets. It makes it extremely
03:31PM 6 difficult to reconstitute the scrambled egg. It makes it very
03:31PM 7 difficult for the Commission to require divestiture if it finds
03:31PM 8 at the end of the adjudication that there's a need to restore
03:31PM 9 competition by forcing LabCorp to sell off that asset.

03:31PM 10 So, at a very minimum, today, it's some time after 3:00;
03:31PM 11 in less than nine hours, the case is going to be taken away from
03:32PM 12 the Commission just by action of business people who are going to
03:32PM 13 start taking apart this asset, and that's really the whole reason
03:32PM 14 that we're here.

03:32PM 15 Now --

03:32PM 16 THE COURT: Can I just ask you to -- you've actually used
03:32PM 17 your 20 minutes and I don't want to impinge upon whatever
03:32PM 18 remaining arguments you have, but can you tell me, essentially,
03:32PM 19 how do you know that whatever actual steps they would take would
03:32PM 20 be completely unscrambleable, if I can create that word? You're
03:32PM 21 telling me that if they scramble assets after midnight tonight,
03:32PM 22 there's nothing that the FTC could do to unscramble. How do you
03:32PM 23 know that and what does that really mean?

03:32PM 24 MR. SIERADZKI: I'm not saying there's nothing that the
03:32PM 25 Commission could do. I mean, in the *Whole Foods* case, the

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03:32PM 1 company started selling off stores and they shut down the brand
03:32PM 2 and they really started taking apart the acquired company with a
03:32PM 3 consummated merger. And the Court of Appeals wrung its hands a
03:32PM 4 little bit and said, this is a real problem. If you don't have a
03:33PM 5 hold separate -- at a minimum, a hold separate, so you can
03:33PM 6 preserve the possibility of divestiture, it's possible that a
03:33PM 7 court of equity could create a remedy, but it's not easy. It
03:33PM 8 makes it a lot harder.

03:33PM 9 How do I know they're going to do it? They've said in
03:33PM 10 their declarations in bankruptcy court and, I believe, here as
03:33PM 11 well -- well, no, they haven't. In the bankruptcy court, they
03:33PM 12 filed declarations -- now, they've said, oh, it will be so easy.
03:33PM 13 Just go out and set up new laboratories.

03:33PM 14 That's a point that maybe we can get into in more detail
03:33PM 15 when we have a PI hearing, but for today's purposes, the real
03:33PM 16 question is: Is that a risk that should be taken, to basically
03:33PM 17 make this a fait accompli and make it very, very difficult to
03:33PM 18 unwind the hands of the clock?

03:33PM 19 THE COURT: All right. Do you want to sum up?

03:33PM 20 MR. SIERADZKI: Why don't I reserve like 60 seconds at the
03:33PM 21 end of the other side's argument and then I'll see if I have
03:34PM 22 anything else to say.

03:34PM 23 THE COURT: I'll give it to you.

03:34PM 24 MR. SIERADZKI: Thank you very much.

03:34PM 25 THE COURT: All right. Who will speak? Mr. Robertson?

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03:34PM 1 MR. ROBERTSON: Yes, Your Honor, if I may.
 03:34PM 2 I do have a few slides, Your Honor, which I think Your
 03:34PM 3 Honor should have copies of, but I'll put them up on the screen.
 03:34PM 4 Not too many.
 03:34PM 5 THE COURT: Do these pertain to the transfer question?
 03:34PM 6 MR. ROBERTSON: Just to the transfer. I have a separate
 03:34PM 7 set if we go beyond that, but that's where we are.
 03:34PM 8 Let me address quickly just a couple things that counsel
 03:34PM 9 said. One, he said there's no jurisdiction for them to file a
 03:34PM 10 13(b) action for a merger in a bankruptcy court. That's actually
 03:34PM 11 not accurate. In the *FNV* case in the Southern District of New
 03:34PM 12 York, which we cited, 126 B.R. 157, actually says the bankruptcy
 03:34PM 13 court is legally competent to resolve antitrust issues raised by
 03:34PM 14 proceedings before it.
 03:34PM 15 Merger case. It was the FTC --
 03:35PM 16 THE COURT: Was that a 13(b) proceeding?
 03:35PM 17 MR. ROBERTSON: Yes, sir. Yes, sir. They claimed the
 03:35PM 18 court didn't have jurisdiction over them to do that, and because
 03:35PM 19 they had actually been involved in the court, the court said yes,
 03:35PM 20 we did have jurisdiction, but the question was whether the
 03:35PM 21 bankruptcy court could do so as a court proceeding. Could it do
 03:35PM 22 so as a related matter in the bankruptcy court? And the court
 03:35PM 23 answered that question yes, it can.
 03:35PM 24 So that -- I would notice counsel didn't have any law to
 03:35PM 25 support that. The law is actually to the contrary.

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03:35PM 1 Let me just focus on some basic facts here. It's obvious
 03:35PM 2 why we have this rule. In the real world, you resolve disputes
 03:35PM 3 where the disputes occur. The disputes occurred in Southern
 03:35PM 4 California, nowhere else. There's no dispute there is a
 03:35PM 5 bankruptcy proceeding there.
 03:35PM 6 You asked counsel, well, you could have just asked to have
 03:35PM 7 it removed up to the District Court. They actually did. They
 03:35PM 8 have a motion on file to do exactly that, to the Central District
 03:36PM 9 in California. That's in California. That's all we're talking
 03:36PM 10 about here today.
 03:36PM 11 THE COURT: It wasn't quite what I asked you, but that's
 03:36PM 12 okay.
 03:36PM 13 MR. ROBERTSON: Yes, sir. And I have on the screen just a
 03:36PM 14 picture -- we know who Labwest is. Labwest owns these assets.
 03:36PM 15 They're not here. They were not sued. They were the acquirer,
 03:36PM 16 not only in the actual sales agreement, but also in the sale
 03:36PM 17 order by the judge, the bankruptcy judge. It was Labwest; it was
 03:36PM 18 not LabCorp who was sued here.
 03:36PM 19 We told them that a long time ago, months ago; told them
 03:36PM 20 that in our proceedings here, now three weeks ago, in California.
 03:36PM 21 They still decided not to sue Labwest, but sue LabCorp because
 03:36PM 22 LabCorp has other businesses here in D.C.
 03:36PM 23 THE COURT: Well, does that make a difference to me with
 03:36PM 24 respect to the transfer issues?
 03:36PM 25 MR. ROBERTSON: Only under 1404, it does, because you

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03:36PM 1 couldn't -- they couldn't get Labwest here at all, and they
 03:36PM 2 mentioned, well, in the 1391, they could do that. Someone tried
 03:36PM 3 to make that argument in an ERISA case, that, well, you can sue
 03:37PM 4 all across the country or serve process all across the country;
 03:37PM 5 why can't you sue anywhere?
 03:37PM 6 And there was a case in Wisconsin; it's 463 F.Supp.2d 921,
 03:37PM 7 which was *Strickland versus Trion Group*, and I can give the Court
 03:37PM 8 a copy of this case, that actually says that's not true because
 03:37PM 9 it would violate due process to take Labwest and try to sue them
 03:37PM 10 here, where they have no business, no contacts, no business here
 03:37PM 11 at all.
 03:37PM 12 Now, let me -- I think our brief sets forth the argument
 03:37PM 13 about the statutory scheme. I don't want to go through that.
 03:37PM 14 Your Honor has already read it. I don't want to waste any time
 03:37PM 15 on that. The idea is they have to sue the one who broke the law
 03:37PM 16 where they can be sued. That's way out west. They're the
 03:37PM 17 acquirer. They're not here. They're in California.
 03:37PM 18 Let me also say that this is an asset purchase. Your
 03:37PM 19 Honor had a case recently, *Kurtz versus Lammers* [sic], where it
 03:38PM 20 was a TRO over an asset purchase, and the assets were in
 03:38PM 21 Wisconsin. That's where the dispute was. And Your Honor said,
 03:38PM 22 well, it wasn't here, it was there. Go there. You shouldn't be
 03:38PM 23 suing here.
 03:38PM 24 I think the same logic applies here.
 03:38PM 25 THE COURT: Can you tell me, by the way, which of these

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03:38PM 1 three I should be looking at?
 03:38PM 2 MR. ROBERTSON: I'm sorry. It's the top one.
 03:38PM 3 THE COURT: This one (indicating)?
 03:38PM 4 MR. ROBERTSON: I should have put a better title on it. I
 03:38PM 5 apologize. It's the first page and they all look the same.
 03:38PM 6 THE COURT: The one that starts with "This"?
 03:38PM 7 MR. ROBERTSON: Yes, sir.
 03:38PM 8 MR. ROUSH: May I approach, Your Honor? I'll give you
 03:38PM 9 another copy.
 03:38PM 10 MR. ROBERTSON: I know all of us, Your Honor, and the
 03:38PM 11 clerks and everybody have been working day and night on this, so
 03:38PM 12 we've made some mistakes here on that, and I apologize.
 03:39PM 13 Let me just go through this, what these private interests
 03:39PM 14 are, and the interests that balance one way or the other.
 03:39PM 15 The FTC's office -- they have one office here, they have
 03:39PM 16 an office in L.A. There was a comment that we had to somehow
 03:39PM 17 protect the administrative process by allowing the FTC to sue
 03:39PM 18 here. Your Honor may not know this, but they only do that about
 03:39PM 19 half the time. I just came from there, as Your Honor may know,
 03:39PM 20 and I sued on behalf of the FTC in merger cases in Texas, in
 03:39PM 21 California, and one in New Mexico, one in Pennsylvania. I did
 03:39PM 22 try -- I did sue the folks at *Cephalon* here and got transferred
 03:39PM 23 by Judge Bates up to Pennsylvania. So I did try that.
 03:39PM 24 I also was the one who went to California, in the Central
 03:39PM 25 District, and made a representation to Judge Pfaelzer that it was

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03:39PM 1 convenient for the FTC to sue in Los Angeles, in the Central
 03:39PM 2 District, and that we sued there all the time, which we have.
 03:39PM 3 There are about 20 cases in the last ten years by the FTC in the
 03:40PM 4 Central District. So, it doesn't make any sense to say that,
 03:40PM 5 well, they should always sue here to protect the administrative
 03:40PM 6 process.
 03:40PM 7 They also don't mention that the administrative process
 03:40PM 8 doesn't necessarily have to be here either. The same judge,
 03:40PM 9 Judge Chappell, who is the administrative law judge, held the
 03:40PM 10 North Texas Doctors case in Ft. Worth. That's where the
 03:40PM 11 administrative hearing was. It wasn't here. There's no reason
 03:40PM 12 why it has to be here. And we're going to ask to have it in
 03:40PM 13 Southern California as well, because that's where everybody is.
 03:40PM 14 But all the -- the purchasers, the division that runs
 03:40PM 15 this, Mr. Aicher, he got in here at 2 this morning from
 03:40PM 16 California, from San Diego, where he works. He's the one who
 03:40PM 17 runs all this -- is in California. The asset purchase agreement
 03:40PM 18 was negotiated, drafted, and signed in California. All the
 03:40PM 19 competitors' witnesses are all in California, except for a few in
 03:40PM 20 odd places like Washington state. None of them are even within
 03:40PM 21 300 miles of here, except North Carolina; the parent company is
 03:41PM 22 in North Carolina, 300 miles from here. They only have one piece
 03:41PM 23 of testimony from the CEO of LabCorp; in all their evidence
 03:41PM 24 they've submitted here, out of 48 different declarations,
 03:41PM 25 something like that -- it's 40 something -- one person, who is

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03:41PM 1 the CEO, who happens to be in North Carolina. Everybody else is
 03:41PM 2 way the heck off the map.
 03:41PM 3 And speaking of maps here, we have a map of Westcliff and
 03:41PM 4 Labwest, where all their facilities are, on the screen, and you
 03:41PM 5 see they're all in California. They're all over California.
 03:41PM 6 They're not just in this -- whatever Southern California is in
 03:41PM 7 terms of their narrow geographic area, but they're only in
 03:41PM 8 California. They don't do business east, in Ohio or anywhere
 03:41PM 9 near the east coast. Not at all.
 03:41PM 10 Now, that's no surprise, then, that when you look at the
 03:41PM 11 actual numbers -- and here, I can remember the numbers of all
 03:41PM 12 these declarants that the FTC came up with -- these declarants
 03:42PM 13 are -- 41 of them are in California, two are in Illinois, one in
 03:42PM 14 New York, and one in Washington state, not D.C., and one in New
 03:42PM 15 Mexico.
 03:42PM 16 Of the investigational hearings that they rely upon -- and
 03:42PM 17 they have to, under local Rule 65, put the evidence in they want
 03:42PM 18 us to rely on -- nine are in California, and that one gentleman,
 03:42PM 19 Dave King, is in North Carolina, the CEO.
 03:42PM 20 In their complaint, they say the competitive effects of
 03:42PM 21 the acquisition is no broader than Southern California. Well,
 03:42PM 22 all the effects are there. There are no effects here in D.C. or
 03:42PM 23 anywhere near D.C. at all.
 03:42PM 24 Now, let me just, rather than go through a bunch of
 03:42PM 25 PowerPoint slides, just go through a few things to address what

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03:42PM 1 counsel said about, apparently, that we knew what they were going
 03:42PM 2 to do. Well, we knew what they were going to do because they
 03:43PM 3 told us. And I told them it was wrong months ago.
 03:43PM 4 Now, they've known about this since last June. The actual
 03:43PM 5 deadline that we're talking about, the actual deadline, Your
 03:43PM 6 Honor, in the bankruptcy court for accepting or rejecting leases
 03:43PM 7 and contracts and renegotiating contracts, all that begins week
 03:43PM 8 after next, on the 13th, 14th and 15th. Those are the real
 03:43PM 9 deadlines. And the main one, on the leases, cannot be changed
 03:43PM 10 unless we get the agreement of every creditor in the case, which
 03:43PM 11 is not likely. And so that's a real problem for us.
 03:43PM 12 THE COURT: But your hold separate agreement is one that
 03:43PM 13 expires at midnight tonight?
 03:43PM 14 MR. ROBERTSON: Yes, sir. But we have to make the
 03:43PM 15 decision -- when a company goes into bankrupt -- the reason you
 03:43PM 16 go into bankruptcy is so that you can then do something about all
 03:43PM 17 these contracts and debts you have. If you don't reject a
 03:43PM 18 contract, you then have to cure it. You have to pay all the back
 03:43PM 19 bills, and there are millions and millions of dollars of back
 03:43PM 20 bills. So if we don't reject a contract, then we have to pay up
 03:44PM 21 on everything. And the FTC, which is -- thinks it wants to run
 03:44PM 22 this company, which the current drug monitor reports to Mr.
 03:44PM 23 Moiseyev here -- he has no choice but to reject everything on
 03:44PM 24 Monday, a week from now.

Well, we wanted to have an educated way to go in there and
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03:44PM 1 have Mr. Aicher be able to decide which things to reject or not
 03:44PM 2 reject, and that's why we told the FTC many months ago what we
 03:44PM 3 were doing and why it needed to be today. And we even got back
 03:44PM 4 from them, in our exhibit LX206, on October 7th, an
 03:44PM 5 acknowledgement that we needed to have this ended by 11:59
 03:44PM 6 eastern time on December 3rd. That was October 7th from the FTC,
 03:44PM 7 acknowledging this.
 03:44PM 8 So it's no surprise that this was coming up. I kept
 03:44PM 9 asking him, why don't you do something? If you want to sue us,
 03:45PM 10 just do it so we can get this resolved. When they didn't do it,
 03:45PM 11 and I knew they had a Commission meeting because it was on the
 03:45PM 12 public calendar, and I'd been there, so I know how it works. I
 03:45PM 13 know they had a meeting about this case. I knew what the
 03:45PM 14 recommendation was because their director, Mr. Feinstein over
 03:45PM 15 here, sent me an e-mail telling me they recommended a complaint,
 03:45PM 16 and the Bureau of Economics recommended a complaint.
 03:45PM 17 So, then we filed our case that next morning, asking the
 03:45PM 18 bankruptcy judge to deal with these issues. And counsel is
 03:45PM 19 right. It's the mirror image of what happens out here, plus a
 03:45PM 20 whole lot more, because we think that they interfered in the
 03:45PM 21 bankruptcy process by soliciting other bidders during the auction
 03:45PM 22 process, and also getting some of these IPAs to meet together and
 03:45PM 23 vote on whether they would go against this deal or not, which
 03:45PM 24 normally would be illegal except for -- the FTC was involved.
 03:45PM 25 Made that argument in front of Your Honor before once.

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03:45PM 1 THE COURT: That's certainly not something that will
 03:45PM 2 affect my consideration of the transfer factors.
 03:45PM 3 MR. ROBERTSON: Yes, sir. They've known about this -- I'm
 03:46PM 4 replying to their point that this is some surprise and we're just
 03:46PM 5 being too cute. They've known about it for six months, and so I
 03:46PM 6 don't think that that makes any sense at all.
 03:46PM 7 In terms of their statement that we said that there should
 03:46PM 8 be a hearing on the papers, they're absolutely wrong. No
 03:46PM 9 district judge in this district, to my knowledge, in the last 20
 03:46PM 10 years has ever done that in an antitrust case for a merger.
 03:46PM 11 Nobody's ever done it. And the reason is there's so much at
 03:46PM 12 stake, and also, these things tend to go up on appeal and most of
 03:46PM 13 the judges in this district want to create a good record.
 03:46PM 14 Judge Collyer held nine days of hearing in *CCC-Mitchell*,
 03:46PM 15 which I tried here just a year and a half ago, and Judge Bates
 03:46PM 16 has held a long hearing in his case. These are not easy cases.
 03:46PM 17 And when they bring all those 41 declarants -- and their remark
 03:46PM 18 to me was, Well, we don't need to bring them out here because, if
 03:47PM 19 you read them what they say [syntax], it's that we're doing this
 03:47PM 20 in lieu of actually coming out here, meaning that I have to go
 03:47PM 21 there to go find them, and I can't bring any of their witnesses
 03:47PM 22 here because none of them reside anywhere close to here. That's
 03:47PM 23 a significant problem for us.
 03:47PM 24 Their theory is we just don't have to defend ourselves.
 03:47PM 25 We have to defend ourselves. We have a right to do that, and the

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03:47PM 1 last time anybody was allowed to do that was back in Sir Walter
 03:47PM 2 Raleigh days, before we had a constitution.
 03:47PM 3 We need to have access to these witnesses, and to have a
 03:47PM 4 real hearing, and they're all out there in California. They're
 03:47PM 5 all subject to coming in there, either in the Central District,
 03:47PM 6 at the District Court level, or at the bankruptcy court level,
 03:47PM 7 but not here. We think it's not appropriate to come here.
 03:47PM 8 I also should just mention -- it's just a small point, but
 03:47PM 9 their lead counsel, Tom Greene, this fellow here, he's been
 03:47PM 10 practicing in California for over 20 years. He's just here now
 03:47PM 11 working for the FTC. He worked for the California AG's office.
 03:48PM 12 That's where I knew him. Very good lawyer. But the idea that
 03:48PM 13 they can't go out there and do this case when they already have
 03:48PM 14 other counsel out there who have made appearances in the case in
 03:48PM 15 the bankruptcy court, and filed two motions and one declaration
 03:48PM 16 already in that case, is beyond me.
 03:48PM 17 THE COURT: Although, as I said to them, that shouldn't
 03:48PM 18 matter to me. I shouldn't be looking at that.
 03:48PM 19 MR. ROBERTSON: You shouldn't. I agree, Your Honor.
 03:48PM 20 THE COURT: So whether he's practiced in California for 20
 03:48PM 21 years, it shouldn't factor into my analysis.
 03:48PM 22 MR. ROBERTSON: That's why I told Judge Pfaelzer I would
 03:48PM 23 love to come out there and do the *Watson* case. She transferred
 03:48PM 24 it back to Atlanta because that's where another court had the
 03:48PM 25 case, and she didn't want to have what you're talking about, Your

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03:48PM 1 Honor, which is having two different courts in two different
 03:48PM 2 appellate systems dealing with the same issue. The FTC wanted to
 03:48PM 3 do that, but that was something that the judge thought was not a
 03:48PM 4 very good idea, and I don't think it's a very good idea here
 03:48PM 5 either.
 03:48PM 6 Your Honor, I looked at all your cases, and Your Honor has
 03:48PM 7 ruled on these kinds of motions quite often in the last few
 03:49PM 8 years. I didn't read all of them. I read about a dozen where
 03:49PM 9 Your Honor transferred cases, and I couldn't find any that had so
 03:49PM 10 many witnesses all in one place, with another case in another
 03:49PM 11 jurisdiction, all there. And all the factors of 1404 are present
 03:49PM 12 and there's no countervailing evidence on the other side. And I
 03:49PM 13 just think that it makes absolutely no sense to have this lawsuit
 03:49PM 14 here.
 03:49PM 15 Now, if I can answer any of your questions that you have,
 03:49PM 16 Your Honor, but this satisfies every element of 1404, and they've
 03:49PM 17 known about this for six months.
 03:49PM 18 As far as the divestiture business, they're right. There
 03:49PM 19 is evidence in the bankruptcy court that a divestiture would be
 03:49PM 20 easy if we ever had to do it. How do we know that? Mr. Edgars
 03:49PM 21 has done it twice. We did it with the Quest-Unilab merger, where
 03:50PM 22 the FTC asked to have a divestiture. He actually did that just a
 03:50PM 23 few years ago. Not a big deal.
 03:50PM 24 But it is a big deal if we have to keep a bankrupt company
 03:50PM 25 bankrupt and to continue the way it is, and that's why we're

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03:50PM 1 fighting so hard. If it wasn't a big deal, I wouldn't be in here
 03:50PM 2 at all on this. I don't fight everything, but I sure think that
 03:50PM 3 if we're going to have a fight over this, they need to get their
 03:50PM 4 papers and get them out to California, or I'm asking Your Honor,
 03:50PM 5 please, to, under 1404 or 1406, either way, to go ahead and get
 03:50PM 6 this case out to California, where it belongs.
 03:50PM 7 Your Honor, do you have any questions I can answer?
 03:50PM 8 THE COURT: All right. If you're finished, I'll call on
 03:50PM 9 counsel for FTC if you want another -- what did you want, 60
 03:50PM 10 seconds?
 03:50PM 11 MR. SIERADZKI: Well, I'm not very good at calculating
 03:50PM 12 time, so I'll leave it to you.
 03:50PM 13 Just a few points. We have not asked to remove the case
 03:51PM 14 to District Court. That's just not true. The *Financial News*
 03:51PM 15 *Network* case out of the Southern District Court in New York, an
 03:51PM 16 important case, and at the very end of that case, the Court says
 03:51PM 17 we're not going intrude at all on the FTC's ability to seek
 03:51PM 18 divestiture of assets in any venue they want to seek, so it
 03:51PM 19 actually reaches the opposite result.
 03:51PM 20 Also, the case from Wisconsin, the court held -- I was
 03:51PM 21 just reading the case and the court held that she wasn't going to
 03:51PM 22 transfer because there was a showing that there was contact with
 03:51PM 23 the district, so that is a puzzling case. She didn't like the
 03:51PM 24 prevailing law on 1391, but she didn't have to reach it.
 03:51PM 25 Let me just make two substantive points. The first one

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03:51PM 1 is, on the issue of Labwest being located out there, it just
 03:52PM 2 doesn't make any sense. Labwest is really a shell. It's a
 03:52PM 3 nonentity. Labwest owns the assets. The whole point of this
 03:52PM 4 case is, you know, to put the companies together. LabCorp
 03:52PM 5 intends to integrate the Westcliff assets into the LabCorp
 03:52PM 6 network immediately, tonight at 11:59. That's what is said in a
 03:52PM 7 filing in bankruptcy court that was made yesterday.
 03:52PM 8 We have LabCorp saying it wants to make a decision on
 03:52PM 9 whether to accept or reject those executory contracts. And
 03:52PM 10 again, now, looking at the motion that they filed last night in
 03:52PM 11 the bankruptcy court, on page 7, you know, they talk about
 03:52PM 12 Labwest's deadlines to assume or reject executory contracts and
 03:52PM 13 unexpired leases; by December 14th and 15th, LabCorp must make a
 03:52PM 14 decision.
 03:52PM 15 Well, how would LabCorp be making a decision if these are
 03:53PM 16 totally separate economic actors? It's one company. It's got
 03:53PM 17 executives who are in North Carolina.
 03:53PM 18 There's another quote in one of these things, in one of
 03:53PM 19 these papers, that corporate is making all the decisions about
 03:53PM 20 prices. In other words, it's a unified operation. And this goes
 03:53PM 21 to the transfer issue because the idea that things are more
 03:53PM 22 convenient in California because Labwest is based out there is
 03:53PM 23 really -- it's a myth. It's a chimera.
 03:53PM 24 On the issue of accepting or rejecting leases, there's no
 03:53PM 25 reason that if it's held separate, the company could accept or

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03:53PM 1 reject those leases, based on whether those leases make sense for
 03:53PM 2 the company as an ongoing, separate business.
 03:53PM 3 Now, they said if they are able to run it as an integrated
 03:53PM 4 company, they're going to reject leases. They're going to shut
 03:53PM 5 down facilities. And I'm looking now at a declaration that they
 03:53PM 6 filed last week, declaration of Daniel Shoemaker. He says until
 03:54PM 7 LabCorp can integrate Labwest's testing facilities and testing
 03:54PM 8 platforms, Labwest cannot reject several of these leases. These
 03:54PM 9 are leases where they have redundancy.
 03:54PM 10 Well, "redundancy" is another word for competition. There
 03:54PM 11 are two different entities who are both trying to do the same
 03:54PM 12 thing. That's a good thing. That's the policy of the Clayton
 03:54PM 13 Act.
 03:54PM 14 So, a lot of this is not very credible. The bankruptcy
 03:54PM 15 court cannot litigate this issue because it has no impact on the
 03:54PM 16 estate, on the creditors. The issue is about an asset that they
 03:54PM 17 already sold off. The estate has already been paid money that --
 03:54PM 18 that it was supposed to be paid, and the bankruptcy process is
 03:54PM 19 just water under the bridge as far as we're concerned and as far
 03:54PM 20 as this company is concerned. Bankruptcy has nothing to do with
 03:54PM 21 what we're dealing with here.
 03:54PM 22 THE COURT: Well, unfortunately, there is a motion pending
 03:54PM 23 before the bankruptcy court filed by the defendants that you all
 03:54PM 24 have responded to, and that judge is going to make some ruling.
 03:55PM 25 So that bankruptcy court is in this case.

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03:55PM 1 MR. SIERADZKI: Well, Your Honor, I think that it's -- I
 03:55PM 2 honestly think it's a disrespect to this Court for them to sort
 03:55PM 3 of try to snatch the case out from under your nose, so to speak,
 03:55PM 4 and pull it out there to a bankruptcy court that really has
 03:55PM 5 nothing to do with it.
 03:55PM 6 I guess what I would suggest is if you are concerned about
 03:55PM 7 the possibility of conflicting rulings between the two courts,
 03:55PM 8 one option to think about would be to issue the TRO that we're
 03:55PM 9 asking about so that we don't have an irrevocable change in the
 03:55PM 10 circumstances and preserve the status quo.
 03:55PM 11 We don't disagree with them that things should be
 03:55PM 12 expedited at the bankruptcy court, so maybe the thing to do is
 03:55PM 13 let's get that process out of the way. We think that the
 03:55PM 14 bankruptcy court is going to kick the case. Once that's done,
 03:55PM 15 you can conduct the PI hearing or you can look again at this
 03:55PM 16 venue issue and make a decision that's not under the threat of,
 03:56PM 17 you know, running into a conflict between circuits.
 03:56PM 18 But at this point, it would be wrong to reject this
 03:56PM 19 government agency's choice of where to prosecute, basically,
 03:56PM 20 where to exercise its prosecutorial discretion to take on this
 03:56PM 21 case, especially where you've got a hearing that's planned to be
 03:56PM 22 taking place here in Washington, D.C. We've given notice that
 03:56PM 23 it's going to be in Washington, D.C., involving a North Carolina
 03:56PM 24 corporation that is accused of committing -- not just by
 03:56PM 25 acquiring something five months ago, but by continuing to own and

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03:56PM 1 by threatening to combine this business that should continue to
 03:56PM 2 be -- or at least arguably, depending on how the adjudication
 03:56PM 3 comes out, there's an argument that competition would be
 03:56PM 4 furthered by keeping it as a separate business, but we won't be
 03:57PM 5 able to find out until the administrative adjudication is done.
 03:57PM 6 And I wouldn't say it's a waste of time, but it's very
 03:57PM 7 difficult to get a good remedy unless we freeze the status quo
 03:57PM 8 now. Then we can go through all these usual litigation steps.
 03:57PM 9 And thanks very much. And I apologize for probably
 03:57PM 10 running over my 60 seconds by a bit.
 03:57PM 11 THE COURT: We'll live.
 03:57PM 12 MR. SIERADZKI: Thank you.
 03:57PM 13 THE COURT: All right. Thank you.
 03:57PM 14 I do want to address first, as I said, the question about
 03:57PM 15 a transfer. The first thing, of course, I need to make a
 03:57PM 16 determination about with regard to the motion to transfer is
 03:57PM 17 whether the case is transferrable. If I agree that the case
 03:57PM 18 ought to be transferred to the Central District of California, it
 03:57PM 19 has to be a place where that could have been brought in the first
 03:57PM 20 place. The 13(b) case has its own venue provision that caused it
 03:57PM 21 to file. The statute there says that any suit may be brought
 03:58PM 22 where the corporation resides or transacts business or wherever
 03:58PM 23 venue is proper under Section 1391.
 03:58PM 24 I think there's no dispute that these defendants do
 03:58PM 25 business in the Central District of California, so I think that

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03:58PM 1 the venue certainly would be appropriate in that district, but
 03:58PM 2 even under 1391, venue could be appropriate in the Central
 03:58PM 3 District of California, where the venue statute requires that a
 03:58PM 4 substantial part of the events or omissions giving rise to the
 03:58PM 5 claim occurred or a substantial part of the property that is the
 03:58PM 6 subject of the action is situated there.
 03:58PM 7 It's certainly true that the bankruptcy judge's order
 03:58PM 8 permitting the sale of these assets occurred and was issued in
 03:58PM 9 the Central District of California, without which there just
 03:58PM 10 would have been no 13(b) action filed here in the first place.
 03:58PM 11 It also appears that many of the Westcliff assets and operations
 03:59PM 12 appear to be situated out there as well.
 03:59PM 13 So the first inquiry is whether we could even send it or
 03:59PM 14 have the case initiated under 13(b) out in the Central District
 03:59PM 15 of California, and I find that that would be a venue that would
 03:59PM 16 be appropriate. But under our cases here in determining a
 03:59PM 17 transfer request, we have to consider and weigh the private
 03:59PM 18 interests and the public interests. With regard to the private
 03:59PM 19 interest, we have to, of course, consider the parties forum
 03:59PM 20 choices and where the claim arose.
 03:59PM 21 It seems to me that this action's ties to this district
 03:59PM 22 are comparatively insubstantial, but the ties to California are
 03:59PM 23 significant. Most of Westcliff's assets and operations are
 03:59PM 24 situated in California. There's no dispute about that. The sale
 04:00PM 25 agreement, the asset purchase agreement was reached in California

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04:00PM 1 and executed out there, and it appears that the discussions and
 04:00PM 2 the analysis that led to that agreement being executed occurred
 04:00PM 3 in California as well. As I said, the order approving the sale
 04:00PM 4 was issued by the bankruptcy judge in Santa Ana in the Central
 04:00PM 5 District of California.
 04:00PM 6 At least the FTC argues, and I don't know that there's a
 04:00PM 7 whole lot of dispute about it, but the FTC argues that the
 04:00PM 8 relevant geographic market that could suffer the anticompetitive
 04:00PM 9 effects is the Southern California area, and that's an area that
 04:00PM 10 comprises the Central District of California.
 04:00PM 11 The other private interests I have to consider involve the
 04:00PM 12 convenience of the parties, not counsel, but the convenience of
 04:01PM 13 the parties and witnesses, and ease of access to sources of
 04:01PM 14 proof. It is notable that over 40 of the 46 third-party
 04:01PM 15 declarations attached to the Federal Trade Commission's motion to
 04:01PM 16 persuade me to grant a temporary restraining order are from
 04:01PM 17 California; none is from Washington, D.C., unless I missed one.
 04:01PM 18 I don't think there's a dispute about LabCorp's witnesses that
 04:01PM 19 they want to rely upon being in California. I concede that
 04:01PM 20 certainly by now, relevant copies of documentary evidence that
 04:01PM 21 might be important are probably equally available both here in
 04:01PM 22 Washington and in California.
 04:01PM 23 But I also have to consider the public interests and,
 04:01PM 24 traditionally, we consider whether the transferee court's
 04:01PM 25 familiarity with the governing laws are, and might exceed those

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04:02PM 1 of the transferor court, but in this instance, both courts, I
 04:02PM 2 think, are presumed to share an equal familiarity with the
 04:02PM 3 governing federal law.
 04:02PM 4 I have to consider the relative congestion of each court.
 04:02PM 5 The papers filed by the defendants suggested that the time
 04:02PM 6 interval between filing a case and disposition of that case is a
 04:02PM 7 bit longer in this district than it is in the Central District of
 04:02PM 8 California, and although that may weigh in favor of transfer, it
 04:02PM 9 weighs only slightly, I think. I'm not sure that the numbers are
 04:02PM 10 so dramatic that it's plainly clear on just that factor.
 04:02PM 11 But another important factor is the local interest in
 04:02PM 12 deciding local controversies at home. As the Federal Trade
 04:02PM 13 Commission concedes, the location in controversy is Southern
 04:02PM 14 California, with regard to where the -- with respect to the
 04:03PM 15 outcome of the case most directly affecting citizens in
 04:03PM 16 California, in Southern California, in part because the relevant
 04:03PM 17 geographic market affected by the sale is in California; it's not
 04:03PM 18 in the District of Columbia.
 04:03PM 19 But I think there's an additional public interest in the
 04:03PM 20 effective resolution of related controversies in a single, and
 04:03PM 21 not multiple forums. LabCorp moved in California to bar the
 04:03PM 22 Federal Trade Commission from doing just what it has done here in
 04:03PM 23 Washington, D.C. The FTC has moved in California to dismiss
 04:03PM 24 LabCorp's proceeding. Both LabCorp's and FTC's motion are still
 04:03PM 25 pending before that court in California and, as I understand it

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04:03PM 1 from the bankruptcy court's docket, there's a hearing set for
 04:04PM 2 December 22nd of this year. But meanwhile, the FTC went ahead
 04:04PM 3 and did precisely what LabCorp's motion asked the bankruptcy
 04:04PM 4 judge to bar, but the FTC did it 3,000 miles away, here in
 04:04PM 5 Washington, D.C. rather than there in California, and I have to
 04:04PM 6 tell you, it feels -- there's something unseemly-feeling about
 04:04PM 7 that. The opportunity for a district judge and a bankruptcy
 04:04PM 8 judge in the same district to achieve some coordination in the
 04:04PM 9 orderly resolution of interrelated and interdependent disputes is
 04:04PM 10 far greater than it would be for a district judge in Washington,
 04:04PM 11 D.C. and a bankruptcy judge 3,000 miles away and three time zones
 04:04PM 12 behind.
 04:04PM 13 I think maintaining this 13(b) action by the FTC here
 04:05PM 14 could, as I said, produce appeals in two different circuits
 04:05PM 15 generated from interrelated cases, which, to me, is a problematic
 04:05PM 16 and disorderly path for the judicial process. If the FTC case
 04:05PM 17 were brought in California, then at least appeals from the two
 04:05PM 18 courts would be in the same circuit. Indeed, an appeal from a
 04:05PM 19 bankruptcy court decision might lie to the District Court in
 04:05PM 20 California, and possibly the same district judge that might get a
 04:05PM 21 case if it's transferred -- the FTC case, if it's transferred out
 04:05PM 22 there.
 04:05PM 23 But overall, I think that the public and private interests
 04:05PM 24 do weigh strongly in favor of transfer to the United States
 04:05PM 25 District Court in the Central District of California,

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04:06PM 1 particularly the Southern Division in Santa Ana. And so I plan
 04:06PM 2 to grant the request and motion of the defendants to transfer
 04:06PM 3 this case to the Central District of California.
 04:06PM 4 Now, we still have this hold separate agreement that
 04:06PM 5 expires at midnight tonight. Mr. Robertson, I'm sure you would
 04:06PM 6 agree that it would be just as unseemly if it looked as if you or
 04:06PM 7 your client engineered a transfer to squeeze just enough delay
 04:06PM 8 into the litigation to allow the agreement to expire. So, don't
 04:06PM 9 you think we should potentially talk about some consent on your
 04:06PM 10 part or your client's part to keep this agreement in effect for
 04:06PM 11 at least long enough time to let the transferee court be able to
 04:07PM 12 properly resolve the motions that I'll transfer with the case?
 04:07PM 13 MR. ROBERTSON: You're talking about a few days, Your
 04:07PM 14 Honor?
 04:07PM 15 THE COURT: Well, the hearing --
 04:07PM 16 MR. ROBERTSON: How long does it take? I haven't tracked
 04:07PM 17 that.
 04:07PM 18 THE COURT: Well, we can transfer this matter forthwith if
 04:07PM 19 I direct the clerk to do that.
 04:07PM 20 MR. ROBERTSON: May I just talk quickly with counsel?
 04:07PM 21 THE COURT: You can, although what I'm anticipating, and
 04:07PM 22 this is a projection -- since there is a hearing at least in the
 04:07PM 23 bankruptcy court already set for December 22nd in connection with
 04:07PM 24 some other matters that you filed before that court, it seems to
 04:07PM 25 me, at minimum, to permit this matter to be transferred, to get

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04:07PM 1 it assigned to a district judge, to have that district judge
 04:07PM 2 appreciate that there's a bankruptcy matter that you all had
 04:07PM 3 initiated, an adversary proceeding that involved these
 04:07PM 4 interrelated and interdependent matters, you ought to consider at
 04:07PM 5 least talking about having this open and in place through the
 04:07PM 6 22nd of December, and if there's some need at that point, to
 04:07PM 7 consider adjusting those dates.
 04:08PM 8 MR. ROBERTSON: Yes, sir. We've actually moved to have
 04:08PM 9 the hearing next week. We did that yesterday --
 04:08PM 10 THE COURT: Well, that's just a motion. That's not been
 04:08PM 11 ruled on yet?
 04:08PM 12 MR. ROBERTSON: Yes, sir.
 04:08PM 13 THE COURT: Correct?
 04:08PM 14 MR. ROBERTSON: I can talk with my client, but maybe
 04:08PM 15 either way, because the hearing -- we asked to have it moved up
 04:08PM 16 because of these dates.
 04:08PM 17 THE COURT: Well, I -- I don't mean to interrupt you, but
 04:08PM 18 I know that there was a request to expedite that was denied, and
 04:08PM 19 at that point, the bankruptcy court said December 22nd.
 04:08PM 20 MR. ROBERTSON: Yes, sir.
 04:08PM 21 THE COURT: So I don't know if you filed something in
 04:08PM 22 addition to that, but what I have from their docket is December
 04:08PM 23 22nd. So that's the only fixed guidepost I have for suggesting a
 04:08PM 24 time period, if that's what you asked me about, time period.
 04:08PM 25 MR. ROBERTSON: Yes, sir.

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04:08PM 1 THE COURT: But if you want to talk to your client, I'd be
 04:08PM 2 happy to let you do that.
 04:08PM 3 MR. ROBERTSON: Yes, sir. Just give me one second just
 04:08PM 4 to --
 04:08PM 5 THE COURT: I don't want to rush you. If you want to
 04:08PM 6 recess, we can recess for five minutes. I can come back when
 04:08PM 7 you're ready.
 04:08PM 8 MR. ROBERTSON: Five minutes will be plenty of time and
 04:08PM 9 that would be helpful.
 04:08PM 10 THE COURT: Any problem with that?
 04:08PM 11 All right. We'll be in recess for five minutes. Please
 04:08PM 12 just let Mr. Smith know when you're ready to have me come back
 04:09PM 13 in.
 04:09PM 14 MR. ROBERTSON: Thank you, Your Honor.
 04:09PM 15 (Thereupon, a break was had from 4:09 p.m. until 4:42
 04:42PM 16 p.m.)
 04:42PM 17 THE COURT: All right, counsel. May I hear from you.
 04:42PM 18 MR. ROBERTSON: Your Honor, we did try to resolve
 04:42PM 19 something, and I was hoping we could, but we did not. I'll tell
 04:42PM 20 you what we did and what we'll still offer.
 04:42PM 21 We have this problem of the 14th being the date we can't
 04:42PM 22 move in the bankruptcy court for accepting or rejecting leases
 04:42PM 23 and contracts. And so first, we offered to extend it through
 04:42PM 24 next Friday at midnight, and that was rejected. We then said,
 04:43PM 25 well, how about the next Monday, the 13th, as long as we can get

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04:43PM 1 somebody in there just for one day to look and see what these
 04:43PM 2 contracts are? And that was rejected.
 04:43PM 3 Because we have to make a decision by the 14th on these
 04:43PM 4 contracts, whether to reject them or accept them or renegotiate
 04:43PM 5 them, I can't really go past midnight on the 13th. And so, we
 04:43PM 6 offered that, and my understanding of counsel's position is that
 04:43PM 7 it's the 22nd or nothing.
 04:43PM 8 MR. GREENE: Your Honor, we -- what we're proposing is
 04:43PM 9 that we will make every effort to get to District Court and a
 04:43PM 10 District Court judge in the Central District. We are presuming
 04:43PM 11 that Your Honor and his staff will expedite the transfer so that
 04:43PM 12 we can make that happen. We are going to try to hit the Friday
 04:43PM 13 date. But insofar as having something through to the 22nd, that
 04:44PM 14 would provide far more in the way of assurance that we'd be able
 04:44PM 15 to actually get to a District Court and seek what we think is an
 04:44PM 16 appropriate TRO to freeze this process at that point. But,
 04:44PM 17 that's where we are.
 04:44PM 18 THE COURT: I can't tell you that I'm up to speed the way
 04:44PM 19 you all are on this issue about acceptance or rejections of
 04:44PM 20 contracts, but did you have any comment that you wanted to offer
 04:44PM 21 with regard to that sort of 14th drop dead date for this contract
 04:44PM 22 acceptance issue?
 04:44PM 23 MR. GREENE: We're still checking on that, Your Honor. I
 04:44PM 24 don't have a bankruptcy person immediately available here. We
 04:44PM 25 can come back on Monday, if that were reasonable, just to sort of

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04:44PM 1 visit about this, but the transfer process -- but at that point,
 04:44PM 2 you would have lost jurisdiction, so let me withdraw that.
 04:44PM 3 If you transfer, then, presumably, the jurisdiction has
 04:44PM 4 gone to the Central District and you wouldn't be able to -- I
 04:44PM 5 presume, right? I suppose we could agree, I guess.
 04:45PM 6 MR. ROBERTSON: Just so I can be clear, I did understand
 04:45PM 7 what Your Honor was saying, and I agree. I don't want to do
 04:45PM 8 something that would be interpreted as being not nice, not good
 04:45PM 9 business relations with these folks, and most of these folks are
 04:45PM 10 actually my friends. I'm not trying to do something personal
 04:45PM 11 here. I'm trying to work it out with them.
 04:45PM 12 We will still have the offer and make it unilaterally and
 04:45PM 13 stipulate to the Court that we're not going to do anything until
 04:45PM 14 the 13th. As I understand it, Your Honor was trying to get us to
 04:45PM 15 do something just between us, and not with the Court's
 04:45PM 16 intervention. But I will stipulate here on the record, and it's
 04:45PM 17 on the transcript, that we're not going to do anything on the
 04:45PM 18 13th, if we can get someone in there just for one day. If not,
 04:45PM 19 then we'll have to stop on midnight on Friday.
 04:45PM 20 And I'll just stipulate that that's what we're going to do
 04:45PM 21 so there is no, tonight, emergency at all. I don't know if that
 04:46PM 22 helps, but I want to try to be helpful here.
 04:46PM 23 THE COURT: It's a quarter of 5 and I'm not confident that
 04:46PM 24 the staff and the Clerk's Office downstairs would be able to make
 04:46PM 25 a forthwith transfer of this case tonight anyway. One option,

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04:46PM 1 then, is for us to not issue the order tonight -- I could sign
 04:46PM 2 the order tonight, but it's not going to be docketed until Monday
 04:46PM 3 at soonest. That might give the FTC some opportunity to look
 04:46PM 4 into the question I raise and to the bankruptcy issues that,
 04:46PM 5 frankly, you all are going to understand far better than I with
 04:46PM 6 regard to this contract acceptance issue -- put into the record
 04:46PM 7 now, and I would ask you all to draft something that we can file,
 04:46PM 8 a stipulation, binding stipulation that reflects the defendants'
 04:46PM 9 agreement to continue and extend the hold separate agreement
 04:46PM 10 through that date, 13th or 14th, whatever it was you said. But
 04:47PM 11 then, perhaps, you can come back Monday if you are available and
 04:47PM 12 we'll look at what's doable after you have explored that issue.
 04:47PM 13 I can tell you, without knowing more about the issue, and
 04:47PM 14 without having any date other than December 22nd that I'm aware
 04:47PM 15 of, having checked the bankruptcy docket, that if we are not able
 04:47PM 16 to find some way to have you all agree to an extension of the
 04:47PM 17 hold separate agreement through the time that the bankruptcy
 04:47PM 18 judge has set for the hearing, my inclination would be then to
 04:47PM 19 hold argument about the TRO and, as I did this time, I would
 04:47PM 20 turn, frankly, to the party that's going to have the more uphill
 04:47PM 21 burden, and that would be the defendants, with regard to the TRO,
 04:47PM 22 and offer you your best shot at it. But if the outcome coincides
 04:48PM 23 with what I see as the more uphill burden on your part,
 04:48PM 24 presumably a TRO would be entered, and if there's no change in
 04:48PM 25 that December 22nd date, that's what would be on the TRO.

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04:48PM 1 But I still think it's going to be far better for us to do
 04:48PM 2 this the easy way rather than the hard way. The easy way would
 04:48PM 3 be for the parties to be able to discuss ways that they can meet
 04:48PM 4 on common ground and not have some order, the hard way, entered
 04:48PM 5 against the defendants on the record that is a restraining order.
 04:48PM 6 So, what I would propose, then, is to follow on your
 04:48PM 7 recommendation; that is, that we come back on Monday. You all
 04:48PM 8 tell me when you think you can come back. The purpose, then,
 04:48PM 9 would be for you to be able to let me know what, if anything,
 04:49PM 10 you've been able to work out in connection with these outstanding
 04:49PM 11 questions about the deadlines for accepting or rejecting
 04:49PM 12 contracts in the bankruptcy proceeding, about which you're going
 04:49PM 13 to know far more than I.
 04:49PM 14 If you have agreed to something, then we can work out an
 04:49PM 15 appropriate transfer order that is accompanied by whatever
 04:49PM 16 stipulation, revised stipulation you may want to have accompany
 04:49PM 17 it. If you haven't been able to work out something, then I'd
 04:49PM 18 want to hear argument on the TRO, and perhaps you'd be able to
 04:49PM 19 persuade me otherwise, but I am just offering you a window on
 04:49PM 20 where I think things might end up going.
 04:49PM 21 So, can you all both come back Monday?
 04:49PM 22 MR. ROBERTSON: Yes, sir. If it could be a little bit
 04:49PM 23 later in the day because of our difference in time with
 04:49PM 24 California in case I need to find out anything on Monday.
 04:49PM 25 THE COURT: I can set it in the afternoon. And frankly,

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04:50PM 1 if you all are able to work out something before that, I would
 04:50PM 2 ask that you let us know and we can take this off the calendar
 04:50PM 3 and not have to bring everybody in.
 04:50PM 4 MR. ROBERTSON: We will try to do that.
 04:50PM 5 MR. GREENE: We will make every effort.
 04:50PM 6 THE COURT: Now, California is not going to open until 12
 04:50PM 7 noon here if you count 9:00. How late do you want to make it
 04:50PM 8 here?
 04:50PM 9 MR. ROBERTSON: Just in case I have a question, so we can
 04:50PM 10 be in here at 1 or 2.
 04:50PM 11 THE COURT: I'll give you until 3.
 04:50PM 12 MR. ROBERTSON: That's great.
 04:50PM 13 THE COURT: Can you come in at 3?
 04:50PM 14 MR. ROBERTSON: Yes, sir.
 04:50PM 15 THE COURT: Does that make sense?
 04:50PM 16 MR. GREENE: Yes. Certainly, Your Honor.
 04:50PM 17 MR. ROBERTSON: Not a problem.
 04:50PM 18 THE COURT: All right. We'll -- let me ask you all to --
 04:50PM 19 perhaps you can go to the lawyers lounge, or you might have
 04:50PM 20 resources right now where you can pound out the stipulation that
 04:50PM 21 we can put on the record extending the hold separate agreement
 04:50PM 22 until the date that you just announced, because I do think it's
 04:50PM 23 important to get that on the record. I can stay here until you
 04:50PM 24 all have that pounded out and we can sign that. Can you do that?
 04:51PM 25 MR. ROBERTSON: Yes, sir.

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04:51PM 1 THE COURT: All right. I'll just wait to hear from you
 04:51PM 2 all. You should -- Mr. Smith might be gone by the time you
 04:51PM 3 finish preparing the document, so why don't you all contact my
 04:51PM 4 chambers directly.
 04:51PM 5 Mr. Smith, correct me if I'm wrong, but I'm trying to make
 04:51PM 6 sure we have a way to get this done. Why don't you all contact
 04:51PM 7 my chambers directly and, when you have the stipulated agreement,
 04:51PM 8 call us up, I'll take it and I'll sign it. We'll make sure it
 04:51PM 9 gets docketed appropriately, but I'll show that it's reflected as
 04:51PM 10 of now through whatever date you fix. I think that will cover,
 04:51PM 11 you know, the stand- -- it will keep everything in the status
 04:51PM 12 quo, in place, and then we'll pick up on Monday and see where we
 04:52PM 13 have to go.
 04:52PM 14 MR. ROBERTSON: All right, sir.
 04:52PM 15 MR. GREENE: All right.
 04:52PM 16 THE COURT: Any clue about how quickly you might be able
 04:52PM 17 to get that stipulation prepared?
 04:52PM 18 MR. ROBERTSON: It's probably simple.
 04:52PM 19 THE COURT: You can probably go in the lawyers lounge and
 04:52PM 20 bang something out together.
 04:52PM 21 MR. ROBERTSON: All right, sir. It shouldn't take too
 04:52PM 22 long. 20, 30 minutes. We'll do it right now.
 04:52PM 23 THE COURT: All right. I'll wait here.
 04:52PM 24 All right. Anything else we need to take up?
 04:52PM 25 I guess I should fix the time. Did I fix it at 3:00

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04:52PM 1 already on Monday?
 04:52PM 2 MR. ROBERTSON: 3 p.m. is your suggestion.
 04:52PM 3 THE COURT: All right. If there's nothing else, thank you
 04:52PM 4 very much. I appreciate your arguments. Thank you for coming
 04:52PM 5 in. You may be excused.
 04:52PM 6 (Proceedings adjourned at 4:52 p.m.)
 04:52PM 7

C E R T I F I C A T E

8
 9 I, Scott L. Wallace, RDR-CRR, certify that the
 10 foregoing is a correct transcript from the record of proceedings
 11 in the above-entitled matter.

11 -----
 12 **Scott L. Wallace, RDR, CRR** **Date**
 13 **Official Court Reporter**

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