DISSENTING STATEMENT OF COMMISSIONER JULIE BRILL
ON THE COMMISSION'S DECISION TO WITHDRAW ITS APPEAL IN *FTC V. LABCORP*
MARCH 23, 2011

Three-and-a-half months ago, I concluded, along with all of my fellow Commissioners, that there was reason to believe that LabCorp's acquisition of Westcliff may substantially lessen competition for clinical laboratory testing services in Southern California.[1] Since then, I believe that the Commission has raised "serious, substantial, difficult and doubtful" questions in the federal courts about the likely effects of the acquisition. *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984); *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1035 (D.C. Cir. 2008). While the district court's conclusion to the contrary is disappointing, there are important principles in this Section 13(b) case that merit an appeal.[2]

As an initial matter, this case would benefit from the considered judgment of the Court of Appeals. The district court opinion, while lengthy, lacks the analysis required to explain to the Commission – and the consumers whose interests we represent – why preliminary relief is not warranted. The opinion sets forth a list of applicable legal principles, but explains in only the most cursory terms how those principles apply to the acquisition at issue. This is legal error and precisely the type of decision the Commission should appeal.

An appeal would also allow the Court of Appeals to consider at least three important principles of merger law. First, as the Commission argued in its preliminary injunction papers, there is substantial direct evidence raising serious questions about the acquisition's effect on competition. Among other things, those papers cited internal LabCorp documents highlighting significant head-to-head competition with Westcliff and post-acquisition plans to increase prices. While case law and the antitrust agencies' merger guidelines recognize the importance of this type of direct evidence, *see Whole Foods*, 548 F.3d at 1036-37; *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1082-83 (D.D.C. 1997); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines §§ 2.2.1, 4.0 (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf, the district court ignored it. The Court of Appeals should have the opportunity to review this legal error and determine its effect on the outcome of the Commission's request for preliminary relief.

Second, the district court violated another important principle of merger law when it credited private over public equities in denying a preliminary injunction. The court

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[1] Commissioner Rosch dissented from the Commission's decision to issue a complaint based on concerns about the appropriate definition of the relevant product market, but agreed that "there is reason to believe that this transaction will have anticompetitive effects." Dissenting Statement of Comm'r Rosch, *In re Lab. Corp. of Am.*, Nov. 30, 2010, *available at* http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdisstatement.pdf.

[2] Although the Commission has withdrawn related administrative litigation from adjudicative status, my views are informed solely by information the Commission has filed in federal court. In addition, all information set forth in this statement is publicly available.

appropriately cited the widely accepted legal principle that "public equities receive far greater weight" in a Section 13(b) proceeding. *FTC v. Lab. Corp. of Am.*, No. 10-1873, 2011 U.S. Dist. LEXIS 20354, at *58 (C.D. Cal. Feb. 22, 2011). But the court never even mentioned potential harm to consumers, in the form of price increases and other anticompetitive effects, as a public equity that should be weighed. Rather, the district court seemed concerned principally with the fact that LabCorp – a company with nearly $1 billion in annual operating income[3] – had incurred about $3 million in operating losses from holding the Westcliff assets separate. *Id.* at *26. These losses, which LabCorp did not deem sufficiently material to mention in its most recent SEC filings, should have been accorded minimal weight, particularly since LabCorp incurred them after closing the transaction in the midst of an FTC investigation. An appeal would allow the Court of Appeals to review this second significant legal error and clarify principles that district courts should apply in weighing public and private equities.

Third, the district court gave only lip service to yet another important principle: that pre-integration relief is often far more likely to remedy competitive problems than post-integration divestiture. As the Ninth Circuit has stated, if merging parties contemplate "dismantl[ing] [the] distribution operations [of one of the parties], it would be exceedingly difficult . . . to revive the operations to comply with a divestiture order." *Warner Commc'ns*, 742 F.2d at 1165. The Commission presented substantial evidence to the district court that LabCorp plans to do exactly that. While the court's failure to preserve the Westcliff business for possible later divestiture may lead to some irreversible consequences as a practical matter, its legal error can be addressed through an appeal to the Ninth Circuit. In contrast, withdrawing the appeal will leave both the practical effects and the legal implications of the district court's decision in place.

In addition to allowing the Court of Appeals to consider these important principles of merger law, an appeal in this case is worth the expenditure of resources because of the industry in which it arises. Health care costs continue to rise dramatically in this country, and there is considerable debate over how best to contain them. In my view, vigorous antitrust enforcement plays an important role in ensuring that prices charged to health care plans, employers, and other purchasers remain competitive. The Commission should be particularly vigilant in enforcing the antitrust laws against conduct that could lead to higher prices in important health care markets like the one at issue here.

For these reasons, I respectfully dissent from the Commission's decision to withdraw its appeal to the Ninth Circuit of the district court's decision denying a preliminary injunction.

[3] *See* LabCorp's Annual Report for 2010, filed under Form 10-K on March 1, 2011.