IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LabMD, INC., Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	)	Civil Action No.: _____ *Related Case*: FTC v. LabMD et al., 1:12-cv-3005-WSD

VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff LabMD, INC. ("LabMD") hereby states its complaint for declaratory and injunctive relief against the unconstitutional abuse of government power and ultra vires actions by Defendant Federal Trade Commission (the "FTC" or "Commission") as follows:

PARTIES, JURISDICTION, AND VENUE

1. LabMD, 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339, is a small medical cancer diagnostics business.

2. The FTC, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580, is a federal agency for purposes of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq.

3. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 5 U.S.C. § 702. In LabMD v. FTC, Case No. 13-15267-F, at 2 (11th Cir. Feb. 18, 2014), the United States Court of Appeals for the Eleventh Circuit examined whether it had jurisdiction to entertain LabMD's claims against the FTC under the APA, as codified in relevant part at 5 U.S.C. §§ 701-06, under the federal Constitution, and under 28 U.S.C. § 1331, which allows for "nonstatutory" review of ultra vires agency actions. The Court held:

> [J]urisdiction to hear suits under the APA is conferred by 28 U.S.C. § 1331, which provides district courts original jurisdiction of all civil actions arising under the laws of the United States. Any APA, *ultra vires*, and constitutional claims, to the extent they can be asserted [by LabMD] at this stage, first must be asserted and considered in a district court.

(internal citations omitted). A true and correct copy of the foregoing Order is attached hereto as Exhibit 1 and is incorporated herein by reference. See also Sackett v. E.P.A., 132 S. Ct. 1367, 1373 (2012) (". . . the APA provides for judicial review of all *final* agency actions . . . ."); id. at 1374 ("The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question.") (Ginsburg, J. concurring). The grounds for the relief requested include the due process clause of the United States Constitution, 5 U.S.C. §§ 701-706 (APA's judicial review provisions), 28 U.S.C. §

1651 (the All Writs Act), 28 U.S.C. § 2201 (the Declaratory Judgment Act), and 28 U.S.C. § 2202 (further relief).

4. The FTC has finally determined that it has jurisdiction over LabMD and that it has complied with constitutional due process fair-notice requirements: In the Matter of LabMD, Inc., FTC Dkt. No. 9357 (Jan. 16, 2014). A true and correct copy of the foregoing order is attached hereto as Exhibit 2 and is incorporated herein by reference.

5. The FTC claims the foregoing decision marks the consummation of its decisionmaking process, has the force of law, and is entitled to deference under "Chevron." See Supplemental Letter Brief, FTC v. Wyndham Worldwide Corp. et al., Case No. 2:13-cv-01887-ES-JAD, Dkt. 152-1, at 6 (Jan. 21, 2014). A true and correct copy of the foregoing brief is attached hereto as Exhibit 3 and is incorporated herein by reference.

6. Venue is proper under 28 U.S.C. §1391(e).

NATURE OF THE CASE

7. LabMD, at all relevant times a small medical laboratory providing doctors with cancer-detection services, is now on the verge of ceasing all operations after being trapped in a paralyzing web of government investigations, subpoenas, and administrative litigation.

8. At some unknown point between 2005 and August 2013, the FTC, through enforcement activities and/or internet postings on the FTC's website, rather than through administrative rulemaking, guidance or known standards, declared for the first time that certain unspecified patient-information data-security practices employed by LabMD were inadequate and thus an "unfair" trade practice under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("Section 5").

9. The FTC still has yet to issue any rule or statement with legal force and effect describing the specific patient-information data-security practices it believes Section 5 prohibits or permits.

10. Between 2005 and the present, the FTC never specified in a rule or statement with legal force and effect how LabMD's patient-information practices fell short or described what, exactly, it should have done differently at any given point. In fact, the FTC commenced an investigation of LabMD in January 2010, filed its administrative complaint in August 2013, and still today, LabMD has yet to be told what, exactly, it did wrong at any point during the relevant period of years.

11. The FTC's actions and a campaign of disparagement, including conclusory statements by an FTC Commissioner that LabMD had mishandled sensitive patient information made shortly after the administrative complaint had been filed, have eviscerated LabMD's business and destroyed its professional reputation.

12. In October, 2013, LabMD lost its directors and officers (D&O) liability insurance as a result of the pending enforcement action and has been unable to obtain D&O insurance because of the pending action.

13. Further, LabMD and its doctors were denied "tail" medical malpractice insurance because of the FTC's actions, which will, unless this matter is resolved favorably in the near future, severely limit LabMD's prospects for obtaining medical malpractice insurance going forward and thus hiring qualified physicians.

14. The company's insurance carrier has advised that it will not renew LabMD's general liability insurance policy effective May 6, 2014, so that the policy will terminate effective October, 2014. This means that LabMD cannot rent office space.

15. The FTC's actions have forced LabMD, a company that once employed more than forty people and provided diagnostic services to more than one hundred doctors, to stop accepting samples.

16. At all times relevant, LabMD's Protected Health Information ("PHI"), or patient-information, data-security practices were subject to comprehensive regulation by the U.S. Department of Health and Human Services ("HHS") under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 45 U.S.C. § 1320d et seq., and the Health Information Technology for Economic and Clinical Health Act

("HITECH"), 42 U.S.C. §§ 300jj et seq., 17901 et seq. See http://www.healthit.gov/providers-professionals/ehr-privacy-security/practice-integration .

17. Neither the HHS nor the FTC has accused LabMD of violating HIPAA or HITECH. See Complaint, In the Matter of LabMD, Inc., FTC Dkt. No. 9357 (Aug. 28, 2013). A true and correct copy of the foregoing complaint is attached hereto as Exhibit 4.

18. Even if Section 5 does empower the FTC to broadly regulate data-security, which it does not, Congress delegated sole authority to regulate PHI data-security to the HHS. And even if Section 5 does empower the FTC to regulate PHI data-security concurrently with HHS and/or to "overfile" HHS using a "common law" of consent orders and internet posts to impose requirements in excess of those set through HHS rulemaking, which it does not, the Commission's refusal to promulgate rules or regulations and provide the public with proper notice and comment violates LabMD's due process rights by failing to give fair notice of what the FTC believes Section 5 forbids or requires.

19. Not only does the FTC lack the statutory authority to regulate PHI and/or cyber-security, it also lacks the expertise to do so. For example, Executive Order 13636, "Improving Critical Infrastructure Cybersecurity," 78 Fed. Reg. 11739 (Feb.

19, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-02-19/pdf/2013-03915.pdf (accessed Mar. 18, 2014), directed the Department of Commerce to set data-security standards, not the FTC.

20. To stop the abuse, LabMD seeks a declaration that the FTC lacks jurisdiction under Section 5 over PHI data-security practices and that the FTC has violated LabMD's due process and First Amendment rights. It also seeks preliminary and permanent injunctive relief staying the administrative proceedings in In the Matter of LabMD, Inc., FTC Dkt. No. 9357. Finally, LabMD asks that the FTC pay all of LabMD's attorneys' fees and litigation costs.

FACTS

21. Section 5 authorizes the FTC to prohibit "unfair or deceptive acts or practices in or affecting commerce."

22. The FTC in this case claims Section 5 "unfairness" authority to regulate LabMD's PHI data-security practices, even absent a claim of "deception," by way of administrative "common law" established through consent orders and Internet postings.

I. The FTC Targets LabMD.

23. In or about 2008, Tiversa Holding Corp. ("Tiversa"), a self-described "cyber-intelligence company" specializing in searching for and copying medical,

financial, and other sensitive files on peer-to-peer networks using patented technology, obtained a LabMD accounts-receivable computer file containing PHI without LabMD's knowledge or consent.

24. On May 13, 2008, Tiversa contacted LabMD, advised it that Tiversa had taken its property, and refused to provide information on the procurement of the file unless LabMD entered into a contract for Internet security services. LabMD turned down this offer. See Dissenting Statement of Commissioner J. Thomas Rosch, Petitions of LabMD, Inc. and Michael J. Daugherty to Limit or Quash the Civil Investigative Demands, FTC File No. 1023099 (June 21, 2012). A true and correct copy of the foregoing dissent is attached hereto as Exhibit 5 and is incorporated herein by reference.

25. In 2009, Tiversa gave LabMD's PHI accounts-receivable file to the FTC under highly irregular circumstances. See id. Recent deposition testimony of Tiversa's CEO, Robert Boback, suggests the FTC and Tiversa met on multiple occasions and ultimately conspired and agreed to transfer LabMD's file via a FTC civil investigative demand (CID) to a third company (the "Privacy Institute") that, upon information and belief, is a company that has a relationship with a Tiversa advisory board member.

26. Beginning in January 2010, the FTC requested and LabMD voluntarily provided thousands of pages of documents and submitted to multiple meetings and interviews.

27. Then, on December 21, 2011, the FTC issued formal civil investigative demands (the "CIDs") to LabMD.

28. LabMD filed a Petition to Limit or Quash the CIDs on January 10, 2012, explaining, among other things, that LabMD's PHI data security was exclusively regulated by HHS and solely subject to HHS rules and regulations establishing data-security standards for PHI under HIPAA and HITECH.

29. Commissioner Julie Brill denied LabMD's petition on April 20, 2012. Commission Letter Denying LabMD, Inc.'s Petition to Limit or Quash the Civil Investigative Demand and Michael J. Daugherty's Petition to Limit or Quash the Civil Investigative Demand, in File No. 1023099, at 13 (April 20, 2012). A true and correct copy of the foregoing correspondence is attached hereto as Exhibit 6 and is incorporated herein by reference.

30. Commissioner Brill acknowledged that LabMD's PHI accounts-receivable spreadsheet file "can be considered" protected health information regulated under HIPAA and HITECH but claimed that the FTC jurisdiction under Section 5 was "overlapping and concurrent." Id.

31. On April 25, 2012, LabMD appealed Commissioner Brill's ruling, arguing, as the Commission recently admitted, that the FTC "does not enforce HIPAA or HITECH." See Ex. 2 at 12 & n.19. LabMD also challenged the FTC's reliance on the PHI accounts-receivable file obtained from Tiversa.

32. Nonetheless, on June 21, 2012, three Commissioners (including Commissioner Brill) affirmed Commission Brill's ruling, "finding its conclusions to be valid and correct." See Commission Letter Affirming the Ruling, By Commissioner Brill, Denying the Petitions To Limit or Quash Filed by LabMD and Michael J. Daugherty (June 21, 2012). A true and correct copy of the foregoing order is attached hereto as Exhibit 7 and is incorporated herein by reference. Then-Commissioner Thomas Rosch dissented. Ex. 5.

33. The FTC then filed a petition to enforce the CIDs in this Court. LabMD opposed the petition, arguing, among other things, that the FTC lacked jurisdiction to regulate data-security.

34. The Hon. William S. Duffey upheld the CIDs, but said "there is significant merit" to LabMD's argument that Section 5 does not justify an investigation into data-security practices and consumer privacy issues. See Opinion and Order, FTC v. LabMD et al., 1:12-cv-3005-WSD, Dkt. No. 23, at 4 (N.D. Ga.

Nov. 26, 2012) (Duffy, J.). A true and correct copy of the foregoing order is attached hereto as Exhibit 8.

II. LabMD Publicly Criticizes The FTC And The FTC Retaliates.

35. LabMD's owner, Michael Daugherty decided to warn the public about the FTC's abuses through the press, social media, and a book. Mr. Daugherty used, and continues to use, his website, http://michaeljdaugherty.com/, to criticize the government.

36. For example, Mr. Daugherty was quoted in a September 7, 2012, Atlanta Business Chronicle article as follows: "'We are guilty until proven innocent with these people . . . . They are on a fishing expedition. We feel like they are beating up on small business.'" Amy Wenk, "Atlanta Medical Lab Facing Off Against FTC," Atlanta Business Chronicle (September 5, 2012). Ms. Wenk wrote that "Daugherty contends his company is being unreasonably persecuted by FTC. He said he's already spent about $500,000 fighting the investigation." Id.

37. On information and belief, FTC attorney Alain Sheer, who would later serve as lead counsel for the FTC in an enforcement action against Plaintiff, monitored Mr. Daugherty's political speech and retaliated against him for it.

38. For example, on July 19, 2013, Mr. Daugherty posted the trailer to his book, "The Devil Inside the Beltway," on his website,

http://michaeljdaugherty.com/2013/07/19/the-devil-inside-the-beltway-book-trailer/. The trailer called the FTC's actions against LabMD an "abusive government shakedown" and explained that his book would "blow the whistle" about how "the Federal Trade Commission began overwhelming . . . [LabMD, a] small business, a cancer detection center, with their abusive beltway tactics." It criticized Commission staff, including Mr. Sheer.

39. On July 22, 2013, Mr. Sheer told LabMD that Commission staff had recommended that the FTC commence enforcement proceedings against LabMD.

40. On July 30, 2013, Janis Claire Kestenbaum, the Senior Legal Advisor to the Chairwoman of the FTC, provided LabMD a draft complaint.

41. On August 28, 2013, the Commission commenced an enforcement action (the "Enforcement Action") by issuing a complaint and notice order. The gravamen of its claim at that time was about the PHI accounts-receivable file purloined by Tiversa. Mr. Sheer, who met with Tiversa and who was responsible for the shell-game through which the FTC obtained the file, is lead Complaint Counsel.

42. The FTC's Complaint in the Enforcement Action makes clear that LabMD was a "health care provider" and subject to HIPAA, which comprehensively regulates patient-information data-security, among other things.

43. The FTC did not allege that LabMD violated PHI data-security standards and breach-notification requirements established by HIPAA and HITECH and HHS regulations implementing those statutes.

44. Instead, the FTC's Complaint solely alleged that LabMD violated Section 5's proscription against "unfair" trade practices. It said LabMD's "information security program" was not "comprehensive" and that LabMD did not use "readily available measures" or "adequate measures" but did not specify what those terms actually mean. See Ex. 4 ¶¶ 10-11.

45. The FTC did not name an individual complainant or allege direct harm to any person.

46. The FTC did not cite any regulations, guidance, or standards for what was "adequate," "readily available," "reasonably foreseeable," "commonly known," or "relatively low cost."

47. The FTC did not cite any regulations, guidance, or standards that LabMD supposedly failed to comply with, or specify the combination of LabMD's alleged failures to meet the unspecified regulations, guidance, or standards that, "taken together," allegedly violated Section 5.

48. The FTC did not allege that LabMD's data-security practices fell short of meeting medical-industry data-security standards, such as those established by HIPAA and HITECH for PHI data security.

49. Mr. Sheer of the FTC has admitted that "[n]either the complaint nor the notice order prescribes specific security practices that LabMD should implement going forward." Initial Pretrial Conference Transcript, In the Matter of LabMD, Inc., Dkt. No. 9357, 10:11-15 (Sept. 25, 2013) ("Initial Pretrial Conf. Trans."). He also acknowledged that the FTC brought this action without any complaining witnesses who say their data was released or disclosed. Id. 33:3-5. A true and correct copy of that transcript is attached hereto as Exhibit 9.

50. No court has ever held the FTC may require firms to adopt information-practice policies under Section 5's "unfairness" prong. Hearing Trans. 16: 22-25, FTC v. LabMD, Inc. et al., Case No. 1:12-cv-3005-WSD (Sept. 19, 2012) (Duffy, J.) (emphasis added). A true and correct copy is attached hereto as Exhibit 10.

51. On September 17, 2013, LabMD filed an answer challenging the FTC's jurisdiction and violations of LabMD's federal constitutional due process rights, among other things.

52. In September 2013, HHS said that it decided against even investigating LabMD's alleged PHI data-security practices, noting that it had not received any complaints.

53. On October 24, 2013, Mr. Sheer of the FTC served a subpoena duces tecum on Mr. Daugherty, LabMD's CEO and President, requesting the following documents concerning Mr. Daugherty's book:

- "All drafts of . . . [Mr. Daugherty's book about the FTC] that were reviewed by any third party prior to the Manuscript's publication."
- "All comments received on drafts of" Mr. Daugherty's book about the FTC.
- "All documents related to the source material for drafts of" Mr. Daugherty's book about the FTC, "including documents referenced or quoted in the" book.
- "All promotional materials related to" Mr. Daugherty's book criticizing the FTC, "including, but not limited to, documents posted on social media, commercials featuring . . . [Mr. Daugherty], and presentations or interviews given by" Mr. Daugherty.

54. After over four years of investigation and litigation, LabMD still does not know when or what it did "wrong" and cannot even determine what the elements of a data-security "unfairness" offense are in this case.

55. For example, FTC enforcement staff have refused to substantively respond to LabMD's interrogatories regarding PHI data-security standards—including "data-security standards, regulations, and guidelines the FTC seeks to enforce against LabMD"—except to cross-reference their response to LabMD's request that they produce "[a]ll documents sufficient to show the standards or criteria the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act from 2005 to the present."

56. Indeed, Complaint Counsel even objected to LabMD's interrogatory inquiring what "data-security standards, regulations, and guidelines the FTC will use to determine whether LabMD's data-security practices were not reasonable and appropriate" on the ground that it seeks opinions by undisclosed nontestifying experts and "calls for expert opinions."

57. The thousands of pages of materials that FTC enforcement staff have produced to LabMD in response to the foregoing document request (most of which was produced on March 3, 2014, two days before the close of fact discovery) consist almost exclusively of: Power Point presentations; FTC staff reports; emails; FTC Consumer Alerts, OnGuard posts, Guides for Business, FTC Office of Public Affairs blog posts, and assorted other Internet postings; materials FTC staff employees apparently use to prepare for presentations, including handwritten notes; copies of

FTC administrative complaints, draft administrative complaints, consent orders, and related documents; letters the FTC has sent to various companies; documents related to various FTC workshops; speeches given by various FTC Commissioners; assorted congressional testimony; and other miscellaneous materials. Some of these materials are of very recent vintage and dated after the events described in the FTC's August 2013 administrative complaint allegedly occurred. Some of these materials are dated after August 28, 2013, when the FTC issued this complaint. The only regulations that FTC enforcement staff produced to LabMD do not apply to LabMD and implement statutes that also do not apply to LabMD.

58. On March 3, 2014, FTC enforcement staff refused to admit, among other things, that the FTC's administrative complaint does not specifically reference any industry standards for data-security practices, hardware or software necessary to avoid a violation of Section 5, instead claiming that LabMD was asking for "an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside of the scope of discovery" and, in the alternative, denying that they were required to allege this.

59. FTC enforcement staff have even argued that "STANDARDS USED TO ENFORCE SECTION 5 ARE OUTSIDE THE SCOPE OF DISCOVERY," saying that "[t]he orders and opinions of the Commission and of th[e ALJ] …

preclude such discovery." Complaint Counsel's Motion for Protective Order Regarding Rule 3.33 Notice of Deposition, *In the Matter of LabMD*, FTC Dkt. No. 9357, at 7 (Feb. 14, 2014).

60. More recently, on March 18, 2014, FTC enforcement staff produced an expert witness report that for the first time—after more than four years of investigation and litigation—gave LabMD some notice as to what a FTC expert thinks LabMD did wrong. But that report did not even purport to assess LabMD's PHI data-security practices against any objective, applicable medical-industry data-security statute, regulation, custom, or standard.

III. LabMD Challenges The FTC's Jurisdiction.

61. On November 12, 2013, LabMD filed a dispositive Motion to Dismiss raising pure issues of law and questions of statutory interpretation in the FTC's administrative case. A true and correct copy is attached hereto as Exhibit 11. LabMD requested oral argument. Under the FTC's Rules of Practice, Commissioners (and not the ALJ) rule on dispositive motions to dismiss complaints they recently voted to issue in the first instance.

62. On November 14, 2014, LabMD also filed a Verified Complaint in the U.S. District Court for the District of Columbia seeking solely injunctive and

declaratory relief. LabMD v. FTC et al., Case No. 1:13-cv-01787-CKK, Dkt. No. 1 (D.D.C. Nov. 14, 2013).

63. On November 18, 2013, LabMD filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit, LabMD, Inc. v. FTC, Case No. 13-14267-F (11th Cir. Nov. 18, 2013). Ex. 1.

64. On November 25, 2013, LabMD filed an administrative stay motion in the FTC enforcement action.

65. On December 2, 2013, LabMD filed a reply in support of its administrative motion to dismiss. A true and correct copy is attached hereto as Exhibit 12.

66. On December 13, 2013, the FTC issued an order denying LabMD's stay motion ("December 13 Order"). A true and correct copy is attached hereto as Exhibit 13. The December 13 Order states that no Article III court has jurisdiction over LabMD's claims until the FTC gives its permission.

67. On December 16, 2013, the Eleventh Circuit issued two jurisdictional questions to the parties. Jurisdictional Questions, LabMD v. FTC, Case No. 13-15267-F (Dec. 16, 2013).

68. On December 23, 2013, LabMD filed a stay motion in in the Eleventh Circuit. Petitioner's Motion for Stay Pending Review, LabMD v. FTC, Case No. 13-15267-F (Dec. 23, 2013).

69. On January 16, 2014, the FTC denied LabMD's administrative Motion to Dismiss, rejecting LabMD's jurisdictional and fair-notice due process challenges without oral argument, thereby denying LabMD an opportunity to create a record (the "January 16 Order"). Ex. 2.

70. On January 17, 2014, the FTC submitted the January 16 Order to the Eleventh Circuit, via what it called a "notice of supplemental authority."

71. FTC did the exact same thing on the exact same day in FTC v. Wyndham Worldwide Corp. et al., Case No. 2:13-cv-01887-ES-SCM, Dkt. No. 151 (D. N.J. Jan. 17, 2014). The FTC claimed its order had the force of law and should be given deference under "Chevron." Ex. 3 at 6.

72. The FTC admits that it cannot and does not enforce HIPAA or HITECH. Ex. 2 at 12 & n.19.

73. The FTC admits that its case against LabMD solely alleges statutory Section 5 statutory "unfairness" violations, not "violations of the FTC's Health Breach Notification Rule." Id. at 20 n.20.

74. The FTC admits that it has failed to establish any data-security standards with the force of law that give notice as to what PHI data-security practices the Commission and its enforcement staff believes Section 5 forbids or requires. Ex. 2 at 15.

75. The FTC admits that it did not claim data-security regulatory authority until years after 1994, when Section 5 was last amended to add subsection (n). 15 U.S.C. § 45(n). Ex. 2 at 4, 8-9. Subsection (n) does not mention "data security," let alone explain what data-security practices the FTC believes Section 5 to forbid or require.

76. Yet the FTC claims subsection (n) gives fair notice: "Here, the three-part statutory standard governing whether an act or practice is 'unfair,' set forth in Section 5(n) [15 U.S.C. § 45], should dispel LabMD's concern about whether the statutory prohibition of 'unfair . . . acts or practices' is sufficient to give fair notice of what conduct is prohibited." Ex. 2 at 16.

77. The FTC's January 16 Order essentially asserts that constitutional fair-notice due process requirements are somehow inapplicable here because, according to the Defendant, the FTC is not pursuing "criminal punishment or civil penalties for past conduct." Ex. 2 at 16.

78. The FTC also claims it is not obligated to provide any fair notice at all of the PHI data-security practices it believes Section 5 to forbid or require because agencies have broad "discretion" to "address an issue by rulemaking or adjudication." Ex. 2 at 15.

79. For that matter, the FTC effectively claims that the standard for Section 5 "unfairness" PHI data-security liability is whether a company's practices are "unreasonable" according to it, while acknowledging that this is a case of first impression as to what is "unreasonable."

80. Elsewhere, the FTC admitted that there is no process through which businesses could have obtained guidance or an advisory opinion from the Commission regarding data-security practices. See Hearing Trans., FTC v. Wyndham et al., Case No. 2:13-cv-01887-ES-SCM, 52:10-11 (Nov. 7, 2012). A true and correct copy of an excerpt of the foregoing transcript is attached hereto as Exhibit 14 and is incorporated herein by reference.

81. On February 18, 2014, the Eleventh Circuit dismissed LabMD's Petition for Review and denied all pending motions as moot because there was no cease and desist order reviewable under 15 U.S.C. § 45(c). Instead, it ruled this Court has original jurisdiction over LabMD's ultra vires, statutory, and constitutional claims to

the extent that such claims could be asserted before a cease and desist order is entered. Ex. 1.

82. Therefore, on February 19, 2014, LabMD filed a Notice of Voluntary Dismissal Without Prejudice of LabMD v. FTC et al., Case No. 1:13-cv-01787-CKK, Dkt. No. 20 (D.D.C.), because under D.C. Circuit law, which is different from the law of this Circuit, only the U.S. Court of Appeals for the D.C. Circuit has jurisdiction over those claims, yet the D.C. Circuit will never have jurisdiction under 15 U.S.C. § 45(c) because LabMD has not done business there.

83. The FTC has issued a final agency decision regarding jurisdiction, and LabMD has exhausted all administrative remedies with respect to its jurisdictional and constitutional fair-notice due process arguments.

IV. The FTC Denies LabMD Procedural Due Process.

84. To begin with, the FTC has never specified the PHI data-security standards LabMD failed to meet, thereby denying LabMD an opportunity to effectively defend itself and granting the Commission, Mr. Sheer, and other federal bureaucrats unlimited discretion to decide what is "unreasonable" after the fact and to regulate the entire health care industry based on their idiosyncratic whim, caprice, and fancy.

85. In 2009, the FTC modified its Rules of Practice to deny respondents a fair defense and to render motion practice futile. 74 Fed. Reg. 20,205 (May 1, 2009).

86. At the initial pretrial conference, the ALJ told LabMD's counsel:

> [L]et me talk about dispositive motions . . . . There is a rule that covers that, if you intend to file a summary judgment, and if you don't know, I'll tell you. Summary judgments will be ruled on by the Commission, the same body that voted to issue the complaint in this case. With respect to motion to dismiss or other substantive motion, the rules provide that if they are filed before the start of the evidentiary hearing, they will be ruled on by that same Commission . . . .

Ex. 9 at 18:11-15. The ALJ lacks power to even grant a continuance of the evidentiary hearing or stay the proceedings pending adjudication of dispositive motions before the Commission. See 16 C.F.R. §§ 3.22(b), 3.41(b).

87. The FTC was extensively warned about the constitutional implications of its power-grab during the comment period.

88. The American Bar Association (ABA) Section of Antitrust Law ("Antitrust Section") said the revisions forced respondents to address prehearing issues to the FTC without the benefit of a prior opinion authored by a party who was not involved in crafting and approving a complaint. Comments of the ABA Section of Antitrust Law in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rulemaking—P072194, at 4 (Nov. 6, 2008).

89. The Antitrust Section explained that its "primary concern is that by 'codifying' the Commission's right to interject itself into prehearing case management, it may undermine the integrity of the process, compromise the ALJ, and create an appearance of unfairness." Id. at 12. The Antitrust Section also said the FTC's amendments "could reduce the quality of decision making, and may color the perception of the fairness and impartiality of Commission proceedings—a particularly important issue considering that when hearing an appeal, federal courts will give deference to a final FTC decision." Id. at 11.

90. The U.S. Chamber of Commerce added that "it appears that the proposed changes are being rushed into place and for the purpose of giving the FTC material, tactical, and procedural advantage . . . ." U.S. Chamber of Commerce, Comment, Re: Parts 3 and 4 Rules of Practice Rulemaking—P072104, at 1 (Nov. 6, 2008). In fact:

> The FTC's proposed regulations work to effectively eliminate the role of the independent Administrative Law Judge (ALJ) to manage and prepare an initial decision for a case. This results in the elimination of a vital check on potential unfairness inherent in the FTC's administrative procedure. Under the FTC's process, the Commissioners act as both prosecutor and judge in administrative trials. Thus, the same individuals who decide to issue the complaint also decide the final appeal of the administrative trial. With such a clear potential for unfairness or conflict of interest at the forefront of FTC administrative adjudication, it is necessary to preserve some sort of fairness check.

Id. at 2.

91. Under current Commission Rule 3.22(a), "[m]otions to dismiss filed before the evidentiary hearing, motions to strike, and motions for summary decision shall be directly referred to the Commission and shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge."

92. In excess of their authority and in violation of the Constitution's guarantee of due process, the FTC has assumed for itself the power to legislate, to prosecute, and to judge LabMD without even specifying in advance the elements of the data-security offense LabMD has allegedly committed.

93. The empirical evidence demonstrates that the FTC's administrative process is a rigged exercise in futility for LabMD and others similarly situated.

94. According to Commissioner Wright:

> The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges ("ALJs") in the past nearly twenty years. In each of those cases, after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed.

Joshua D. Wright, Comm'r, Fed. Trade Comm., Recalibrating Section 5: A Response to the CPI Symposium, CPI Antitrust Symposium, at 4 (November 2013), available at

http://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-section-5-response-cpi-symposium/1311section5.pdf (last visited Mar. 18, 2014).

95. Further administrative proceedings are exhausted and futile.

V. The Irreparable Harm Done By The FTC To LabMD.

96. FTC's power-grab has destroyed LabMD's customer relationships and, in large measure, driven LabMD to cease accepting new specimen samples. But for all of the time, attention, and money LabMD has been forced to devote to addressing the FTC's actions, the company would almost certainly be accepting new specimen samples and providing cancer-diagnostic services to doctors to this day.

97. LabMD, and its doctors, have been denied insurance coverage as a direct result of the FTC's ongoing persecution of the company. For example, One Beacon (a medical malpractice insurance company) recently denied LabMD, and its doctors, coverage, saying: "[W]e are unable to offer ERP terms for the entity [LabMD], and as a result, the individual physicians so I will be closing the file. The potential volatility due to the FTC investigation is something we want to stay away from particularly because it pertains to medical records."

98. LabMD's general liability insurance carrier is planning to non-renew its insurance policy effective May 6, 2014.

99. The FTC's personnel have intentionally interfered with LabMD's customer relationships and effectively engaged in a campaign of commercial disparagement.

100. The FTC's actions have caused, and continue to cause, irreparable injury to LabMD's business reputation and good will in the marketplace.

101. The FTC, Mr. Sheer, and other FTC employees have intentionally set out to destroy LabMD's commercial brand, reputation, and good will.

102. The FTC, Mr. Sheer, and others have caused and continue to cause LabMD irreparable harm far beyond mere litigation expenses and threaten the viability of LabMD's business operations. Much of this harm cannot be quantified in monetary terms, and cannot be remedied by monetary damages. For example, on January 6, 2014, LabMD notified its customers that it would no longer be accepting new specimen samples for testing for the foreseeable future, effective January 11, 2014.

CLAIMS FOR RELIEF

First Claim for Relief
(For Violation of the APA)

103. LabMD repeats paragraphs 4-5, 8-10, 16-19, 21-22, 27-32, 41-50, 54-61, 64-66, 69-81, 84, and 93-95.

104. The FTC's action against LabMD is arbitrary, capricious, an abuse of discretion and power, in excess of statutory authority and short of statutory right, and contrary to law and constitutional right, in violation of 5 U.S.C. § 706.

105. The FTC does not have jurisdiction to regulate LabMD's patient-information data-security and thus its actions are ultra vires.

106. The Commission's orders denying the jurisdictional, ultra vires, and due process claims raised in LabMD's motion to dismiss and LabMD's motion for a stay are both "final agency actions" within the meaning of 5 U.S.C. § 704 and thus LabMD's APA claims are ripe and reviewable now. TVA v. Whitman, 336 F.3d 1236, 1248 (11th Cir. 2004); see, e.g., CSI Aviation Servs. v. DOT, 637 F.3d 408, 411-14 (D.C. Cir. 2011); see Sackett, 132 S. Ct. at 1371-72; see also Athlone Indus., Inc. v. CPSC, 707 F.2d 1485, 1487-88 (D.C. Cir. 1983).

107. LabMD has exhausted all administrative remedies with respect to its jurisdictional and constitutional due-process arguments, which the Commission formally rejected on January 16, 2014.

108. In addition, only administrative remedies providing a genuine opportunity for adequate relief need be exhausted, and here exhaustion is also independently not required because the administrative process is futile and inadequate and LabMD will continue to suffer irreparable harm unless its claims are reviewed by

an Article III Court now. See N.B. by D.G. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996); Porter v. Schweiker, 692 F.2d 740, 742-43 (11th Cir. 1982); Randolph-Sheppard Vendors of Am. v. Weinberger, 795 F.2d 90, 107-08 (D.C. Cir. 1986) (irreparable harm excuses exhaustion).

109. Therefore, the FTC's enforcement action against LabMD should be enjoined and a declaration issued that it lacks authority to regulate patient information data-security.

Second Claim for Relief
(For Ultra Vires Agency Action)

110. LabMD repeats paragraphs 4-5, 8-10, 16-19, 21-22, 27-32, 41-50, 61, 70-81, and 93-96.

111. Regardless of the presence vel non of "final agency action" under 5 U.S.C. § 704, this Court has jurisdiction to adjudicate LabMD's nonstatutory ultra vires and constitutional claims, for the presence or absence of "final agency action" has no jurisdictional effect. See, e.g., Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006); Muniz-Muniz v. U.S. Border Patrol, No. 12-4419, 2013 U.S. App. LEXIS 25400, at *11 (6th Cir. Dec. 20, 2013) (noting that "all of our sister circuits" have concluded 5 U.S.C. § 704 has no effect on a federal-question jurisdiction to adjudicate non-APA claims); see also Arbaugh v. Y & H Corp., 546 U.S. 500, 511, 516-17 (2006).

112. Thus, the FTC's ultra vires actions are ripe for judicial review now regardless of the reviewability of LabMD's APA claims.

113. Exhaustion is not required for these claims under any circumstances. See XYZ Law Firm v. FTC, 525 F. Supp. 1235, 1237 (N.D. Ga. 1981).

114. The FTC's actions against LabMD exceed the power given to it in Section 5 and are thus ultra vires.

115. Judicial review of this claim is available because the Defendant's ultra vires actions exceed the authority conferred on it by Congress and the United States Constitution.

116. Moreover, inter alia, the FTC has effectively violated three specific and mandatory restraints on its Section 5 "unfairness" power.

117. First, the FTC's abuse exceeds its delegated powers and is contrary to specific the FTC Act's prohibitions on the use of consent orders and speeches to create a binding "common law" of data security. 15 U.S.C. § 45(m)(1)(B).

118. Second, in addition to the fact that Congress has not given the FTC Section 5 "unfairness" authority to regulate data security, let alone authority to over-file HHS and regulate PHI data security, the FTC has also independently violated 15 U.S.C. § 45(n)'s specific limits on its Section 5 "unfairness" authority. 15 U.S.C. § 45(n) explicitly states that the Defendant "shall have no authority under this section

or section 18 [15 U.S.C. § 57a] to declare unlawful an act or practice on the grounds that such act or practice is unfair" under the circumstances of this case. 15 U.S.C. § 45(n) further explicitly bars the FTC from using its public policy views as a primary basis for exercising its unfairness authority.

119. Third, the FTC's sworn responses to LabMD's discovery requests demonstrate it is seeking to enforce against LabMD random Internet postings, e-mail alerts, Commission staff reports, and congressional testimony they say establish data-security standards LabMD should have followed, even those these documents do not have the force of law and were not even published in the Federal Register, and they do not allege that LabMD had actual knowledge of any of these Internet postings and other materials. 5 U.S.C. § 552(a)(1).

120. FTC's unauthorized actions are the direct and proximate cause of LabMD's injuries, as described above. Therefore, LabMD is entitled to the declaratory and injunctive relief requested herein.

Third Claim for Relief
(For Fair-Notice Due Process Violations)

121. LabMD repeats paragraphs 4-5, 7-10, 46-49, 74-80, 84-85, and 118-119.

122. This Court has jurisdiction over LabMD's fair-notice due process claim now. Exhaustion is not required for these claims under any circumstances.

123. The Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

124. The draft notice order ("Commission Notice Order") if made effective, will be in place for twenty (20) years and, inter alia, require LabMD to (1) "establish and implement, and thereafter maintain, a . . . security program"; (2) "obtain initial and biennial assessment and reports" from third parties for a period of twenty (20) years; (3) provide Commission-approved notice to the individuals listed in the accounts-receivable file and their health insurance companies of Tiversa's actions via first-class mail; (4) deliver copies of the Commission Notice Order to "current and future principals, officers, directors, and mangers," as well as deliver copies to many current and future employees, agents, representatives, and business entities; (5) notify the FTC in writing at least thirty (30) days before making numerous changes, such as change in corporate name or address; and (6) prepare and file detailed reports with the FTC.

125. Additionally, the FTC has reserved the right to order such other relief as it finds necessary and appropriate if it decides that the Commission Notice Order is insufficient, including seeking "restitution" and other types of relief authorized by Section 19 of the Federal Trade Commission Act, 15 U.S.C. § 57b (civil actions for

violations of rules and cease and desist orders respecting unfair or deceptive acts or practices), including but not limited to rescission or reformation of contracts and payment of monetary damages.

126. Under 15 U.S.C. § 45(l), each violation of the FTC cease and desist orders carries up to a $10,000 civil penalty.

127. FTC's actions, January 16 Order, December 13 Order, and the Commission Complaint and Notice Order, thus implicate LabMD's property rights, which are protected by the Due Process Clause of the Fifth Amendment.

128. FTC's refusal to promulgate any regulations or to issue any other guidelines clarifying and providing any notice, let alone constitutionally adequate notice, of what data-security practices they believe Section 5 forbids or requires, or to otherwise establish any meaningful standards, violates LabMD's due process rights.

129. Due process requires that laws that regulate persons or entities must give fair notice of conduct that is forbidden or required. FCC v. Fox TV Stations, Inc., 132 S. Ct. 2307, 2317 (2012); Connally v. Gen. Constr. Co., 269 U.S. 385, 391-95 (1926).

130. This constitutional fair-notice requirement has been thoroughly incorporated into administrative law to limit agencies' ability to regulate past conduct through after-the-fact enforcement actions. Georgia Pac. Corp. v. OSHRC, 25 F.3d 999, 1005 (11th Cir. 1994). Fair-notice due process requirements thus apply to the

FTC administrative enforcement actions seeking to impose cease and desist orders for alleged violations of Section 5.

131. The FTC has failed to meet its burden of establishing reasonably ascertainable standards for what data-security practices it believes Section 5 to either forbid or to require. See Georgia Pac. Corp., 25 F.3d at 1005; Trinity Broad. of Fla., Inc. v. FCC, 211 F.3d 618, 628-32 (D.C. Cir. 2000).

132. Basic principles of due process limit the FTC's "discretion" to enforce Section 5 through administrative adjudications; specifically, the FTC can proceed by adjudication only if it has already provided the baseline level of fair notice that the Constitution requires. The FTC has failed to provide LabMD the baseline level of fair notice of the data-security practices it believes to be required or forbidden by Section 5's "unfairness" language.

133. Because the FTC's Section 5 PHI data-security regulatory scheme forbids or requires the doing of an act in terms so vague that men and women of common intelligence must necessarily guess at its meaning and differ as to its application, it violates due process.

134. In addition, even if the FTC's "reasonableness" standard for PHI data security otherwise passed constitutional muster, the FTC's failure to link its data-security standards to medical-industry standards independently violates due process.

135. FTC's pattern and practice of fair-notice due process violations, as applied to LabMD and all similarly situated, including the defendants in FTC v. Wyndham, violates due process.

Fourth Claim for Relief
(For Facial, Structural Due Process Violations)

136. LabMD repeats paragraphs 4-5, 7-10, 17-19, 23-34, and 84-96.

137. Exhaustion of administrative remedies is not required for facial and structural due process challenges. See, e.g., Matthews v. Eldridge, 424 U.S. 319, 329-32 (1976); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1963).

138. The substantial private interests affected by the FTC's actions, the high risk of erroneous deprivation of LabMD's property interests, and the high value of additional procedural safeguards outweigh the FTC's de minimis interest in the existing procedures. Therefore, LabMD has not been provided the procedural safeguards that it is constitutionally entitled to have.

139. Due process minimally requires a fair trial in a fair tribunal and "this applies to administrative agencies which adjudicate as well as to courts." Withrow v. Larkin, 421 U.S. 35, 46-47 (1975).

140. FTC's modifications to its Rules of Practices transgress constitutional limits on blending of prosecutorial, legislative, and adjudicative functions and deprive

all respondents of a fair administrative hearing. Therefore, the Commission's Rules facially and structurally violate due process.

141. Furthermore, the FTC's ex post facto enforcement action against LabMD for alleged violations of unspecified data-security standards in a proceeding in which the FTC acts in a legislative, prosecutorial, and adjudicative capacity further violates due process.

142. Finally, the FTC has predetermined this matter, denying LabMD its right to a fair and level review, including a fair hearing on its Motion to Dismiss before an impartial ALJ.

143. FTC's intentional violations of LabMD's due process rights has caused LabMD hundreds of thousands of dollars in actual damages, harmed its business reputation, caused it to lose good will and business opportunities, and brought the company to the brink of ruin.

Fifth Claim for Relief

(For Retaliation Against LabMD for Protected First Amendment Speech)

144. LabMD repeats paragraphs 4-5, 7-11, 23-49, and 53.

145. The First Amendment to the United States Constitution guarantees LabMD freedom of speech.

146. Mr. Daugherty's book, his webpage about the book, and his speeches and statements about the FTC's actions are political speech and speech about matters of public concern and thus protected by the First Amendment.

147. On information and belief, the FTC's actions against LabMD were retaliation for protected speech by Mr. Daugherty.

148. The FTC's actions against LabMD, as set forth herein, will likely chill a person of ordinary firmness from engaging in the protected First Amendment activity.

149. On information and belief, the FTC's conduct herein was precisely intended and designed, at least in part, to punish LabMD and chill government criticism by LabMD and others targeted by the government.

150. Even if the FTC, Complaint Counsel, and other FTC employees disagree with and find Mr. Daugherty's statements about their actions to be patently offensive, they are not allowed retaliate by bringing an enforcement action against LabMD.

RELIEF REQUESTED

WHEREFORE LabMD requests the following relief:

A. That the Court enter a declaratory judgment that (1) the FTC lacks statutory authority to regulate patient-information data-security practices under Section 5; (2) the FTC's efforts to regulate patient information are ultra vires; (3) the FTC violated LabMD's due process rights by failing to provide constitutionally

adequate notice of what data-security practices the Commission believed Section 5 to forbid or require before the Complaint was filed; (4) the FTC violated LabMD's due process rights by unconstitutionally combining legislative, prosecutorial, investigative, and adjudicatory functions by, among other things, allowing FTC Commissioners to rule on dispositive motions concerning complaints they recently voted to issue; and (5) the FTC unconstitutionally retaliated against LabMD for engaging in constitutionally protected speech.

B. That the Court enter preliminary and permanent injunctive relief providing that the FTC, its agents, servants, employees, and attorneys, and anyone who is in active concert or participation with any of them, shall take no further actions in connection with administrative proceedings known as In the Matter of LabMD, FTC Dkt. No. 9357, including but not limited to issuing orders, holding hearings, taking discovery, and filing motions.

C. That the Court enter preliminary and permanent injunctive relief providing that the FTC, its agents, servants, employees, and attorneys, and anyone who is in active concert or participation with any of them, shall not (1) initiate any civil or administrative enforcement action against LabMD or any other person on the ground that their patient information data-security practices are "unfair" in violation of Section 5; (2) investigate whether LabMD's or any other person's patient

information data-security practices violate Section 5 for "unfairness"; (3) attempt to establish substantive data-security standards under Section 5 and/or enforce Section 5 in civil or administrative proceedings; or (4) undertake or pursue any administrative enforcement proceedings until the Commission amends its Rules of Practice to provide constitutionally adequate due process.

D. That the Court award LabMD its attorneys' fees and litigation costs under the Equal Access to Justice Act and/or such other applicable law.

E. Such other and further relief as this Court deems just and proper.

Respectfully submitted, this 20th day of March, 2014.

/s/ Ronald L. Raider

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Dated: March 20, 2014

Verification

I am Michael Daugherty, owner and CEO of LabMD, Inc., which is the plaintiff in this action.

I have read the foregoing Complaint and verify and declare on behalf of LabMD, Inc., under penalty of perjury, that its factual allegations are true, except to those matters stated on information and belief, and as to those matters I believe them to be true to the best of my knowledge.

LabMD, Inc.

By: _____ Date: 3/19/14
Michael Daugherty

LOCAL RULE 7.1 CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing pleading filed with the Clerk of Court has been prepared in 14 point Times New Roman font in accordance with Local Rule 5.1(C).

Dated: March 20, 2014.

/s/ Ronald L. Raider
Ronald L. Raider