specific types of information. *See* 15 U.S.C. § 1681s(a) (FCRA); 15 U.S.C. §§ 6801(b), 6805(a)(7) (GLBA); 15 U.S.C. § 6505(d) (COPPA).

2. The Commission Has Consistently Maintained Its Authority to Protect Consumers from Unfair Practices Affecting Consumers' Sensitive Personal Information

The FTC has consistently maintained its authority to protect consumers from unfair practices affecting consumers' sensitive personal information. A contrary conclusion requires a tortured application of *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Resp. Mot. 16-20. In that case, the Supreme Court rejected the Food and Drug Administration's ("FDA") assertion of authority over tobacco because a decades-old comprehensive regulatory regime, which had developed against the backdrop of the FDA's persistent denial that it possessed such authority, irreconcilably conflicted with the FDA's reversal of its position. 529 U.S. at 137, 159-60. This case has none of the hallmarks of *Brown & Williamson*.

a. The Commission has never disclaimed its authority.

Since 2000, the FTC has brought nearly fifty data security cases, more than eighteen of which alleged that unreasonable security is an unfair act or practice.[9] The FTC has routinely

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[9] The unfairness cases include: *In re TRENDnet, Inc.*, FTC File No. 122 3090 (Sept. 4, 2013) (consent order approved for public comment); *In re HTC America Inc.*, FTC Docket No. C-4406, FTC File No. 122-3049 (June 25, 2013) (consent order); *In re Compete, Inc.*, FTC Docket No. C-4384, FTC File No. 102-3155 (Feb. 20, 2013) (consent order); *In re EPN, Inc.*, FTC Docket No. C-4370, FTC File No. 112-3143 (Oct. 3, 2012) (consent order); *FTC v. Wyndham Worldwide Corp.*, No. 2:13-CV-01887 (D.N.J.) (pending litigation); *In re Upromise, Inc.*, FTC Docket No. C-4351, FTC File No. 102-3116 (Mar. 27, 2012) (consent order); *In re Lookout Servs., Inc.*, FTC Docket No. C-4326, FTC File No. 102-3076 (June 15, 2011) (consent order); *In re Ceridian Corp.*, FTC Docket No. C-4325, FTC File No. 102-3160 (June 8, 2011) (consent order); *In re Rite Aid Corp.*, FTC Docket No. C-4308, FTC File No. 072-3121 (Nov. 12, 2010 (consent order); *In re Dave & Buster's, Inc.*, FTC Docket No. C-4291, FTC File No. 082-3153 (May 20, 2010) (consent order); *United States v. Rental Research Servs.*, No. 0:09-CV-00524 (D. Minn. Mar. 6, 2009) (stipulated order); *In re CVS Caremark Corp.*, FTC Docket No. C-4259, FTC File

reported and publicized its data security program, including these enforcement activities, to Congress, consumers, and industry.[10] *See, e.g.*, *Identity Theft: Innovative Solutions for an Evolving Problem: Hearing before the Subcomm. on Terrorism, Technology, and Homeland Security of the S. Comm. on the Judiciary*, 110th Cong. at 5-6 (Mar. 21, 2007) (Prepared Statement of the Federal Trade Commission) ("[I]n several of the cases, the alleged security inadequacies led to breaches that caused substantial consumer injury and were challenged as unfair practices under the FTC Act"). The FTC has never disclaimed its authority over data security practices.

b. The Commission's requests for additional authority do not constitute disclaimers.

The FTC's requests for additional authority showcase the reach of the FTC's unfairness authority. For example, in testimony cited in Respondent's Motion (Resp. Mot. 17 n.13), former Director of the Bureau of Consumer Protection, David C. Vladeck, explained:

> [T]he Commission enforces the FTC Act's proscription against unfair or deceptive acts or practices in cases where a business

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No. 072-3119 (Jun. 18, 2009) (consent order); *In re The TJX Cos.*, FTC Docket No. C-4227, FTC File No. 072-3055 (July 29, 2008) (consent order); *In re Reed Elsevier Inc.*, FTC File No. 052-3094 (July 29, 2008) (consent order); *In re CardSystems Solutions, Inc.*, FTC Docket No. C-4168, FTC File No. 052-3148 (Sept. 5, 2006) (consent order); *In re DSW, Inc.*, FTC Docket No. C-4157, FTC File No. 052-3096 (Mar. 7, 2006) (consent order); *United States v. ChoicePoint, Inc.*, FTC File No. 052-3069, No. 06-CV-0198 (N.D. Ga. Jan. 30, 2006) (stipulated final judgment); *In re BJ's Wholesale Club, Inc.*, FTC Docket No. C-4148, FTC File No. 042-3160 (Sept. 20, 2005) (consent order).

[10] The FTC has never suggested that its unfairness authority does not apply where these practices cause substantial injury. For example, Respondent quotes the testimony of former Commissioner Orson Swindle (Resp. Mot. 16-17 n.12), but omits the footnote to that very same sentence, which reads: "The Commission *also* has authority to challenge practices as unfair if they cause consumers substantial injury that is neither reasonably avoidable nor offset by countervailing benefits." *Protecting Information Security and Preventing Identity Theft: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations, and the Census of the H. Comm. on Gov't Reform*, 108th Cong. (Sep. 22, 2004) (emphasis added).

> makes false or misleading claims about its data security procedures, or *where its failure to employ reasonable security measures causes or is likely to cause substantial consumer injury*.

The Threat of Data Theft to American Consumers: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy and Commerce, 112th Cong. 2 (May 4, 2011) (emphasis added). The FTC's requests for additional authority cannot be construed as admissions of a prior lack of authority.

Even if the FTC had originally disavowed its authority, which it did not, that fact would not be controlling. *See Smiley v. Citibank*, 517 U.S. 735, 742 (1996) ("[T]he mere fact that an agency interpretation contradicts a prior agency position is not fatal"). Unlike *Brown & Williamson*, where the FDA disavowed its authority to regulate tobacco for more than 70 years (529 U.S. at 159), here Respondent misinterprets a few isolated statements to claim disavowal.

c. Proposed legislation, if relevant at all, supports the Commission's authority.

While Congress has proposed a number of legislative initiatives relating to data security, the circumstances of the Congressional debate regarding data security affirm the FTC's authority in this area. For example, four of the data security bills Respondent cites in support of its argument included savings clauses to preserve the FTC's existing data security authority. *See* S. 1207, 112th Cong. § 6(d) (1st Sess. 2011); H.R. 2577, 112 Cong. § 6(d) (1st Sess. 2011); H.R. 1841, 112 Cong. § 6(d) (1st Sess. 2011); H.R. 1707, 112 Cong. § 6(d) (1st Sess. 2011). Preservation clauses would be unnecessary if the FTC lacked existing authority.[11] Thus, there is

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[11] Similarly, Chairman John D. (Jay) Rockefeller, who co-sponsored Senate Bill 1207, asked an FTC representative: "Can you talk about how Senator Pryor's and my bill will complement ***your existing enforcement efforts***?" *Privacy and Data Security: Protecting Consumers in the Modern World: Hearing on S.B. 1207 Before the S. Comm. on Commerce, Science, and*

no support for Respondent's argument that by proposing legislation, Congress somehow believes the FTC lacks unfairness authority over practices affecting consumers' personal information. Resp. Mot. 17-18.

d. Caselaw supports the Commission's position.

To the extent that Respondent's strained interpretation of *Brown v. Williamson* may be applicable, which it is not, the Supreme Court's subsequent holding in *Massachusetts v. EPA* requires that the Commission reject Respondent's argument. 549 U.S. 497, 531-32 (2007). In *EPA*, faced with states petitioning the Environmental Protection Agency to regulate greenhouse gases under the Clean Air Act ("CAA"), the Court rejected the EPA's efforts to make the same claims that Respondent makes in this action: that Congress did not contemplate greenhouse gases as a pollutant when it passed the CAA, *id*. at 512; that later Congressional action contemplated other mechanisms to address greenhouse gases, *id*.; that the classification of carbon dioxide would create overlapping regulatory jurisdiction between the EPA and the Department of Transportation, *id*. at 513; and that the interpretation of pollutant to carbon dioxide had vast "economic and political consequences" that were far too significant to impute to Congress without an express delegation, *id*. at 512.

The Court held that greenhouse gases "fit well within" the relevant statutory definition and, that short of an "extreme" result that "clashed with . . . 'common sense[,]'" the agency should regulate the gases under the Act. *Id*. at 531-32. The Court also explained that the EPA, like Respondent in this matter, had "not identified any Congressional action that conflicts in any way" with the contested interpretation. *Id*. Finally, the Court dismissed the notion that

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Transportation, 112th Cong. 32 (June 29, 2011) (emphasis added).

overlapping jurisdiction between the Department of Transportation and the EPA was somehow improper: "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *Id.* at 532.

Here, Respondent is unable to point to any "extreme" result stemming from the Commission proceeding with its administrative action in this case or in any other data security case. Accordingly, the FTC's exercise of its unfairness authority regarding unreasonable data security practices is appropriate, and Respondent's argument fails.

C. The Commission's Attempt to Extend GLBA Authority to Attorneys is Irrelevant to the Commission's Ability to Protect Consumers from Unfair Practices Affecting Consumers' Sensitive Personal Information

Respondent's reliance on *American Bar Ass'n v. FTC*, 430 F.3d 457 (D.C. Cir. 2005) is misplaced. Resp. Mot. 20. In *ABA*, the FTC had construed the GLBA's defined term "financial institution" to include attorneys engaged in the practice of law, an interpretation that the court found contrary to the meaning of the term. *Id.* at 470-71. In contrast, here, there is no debate about the meaning of the term "unfairness." 15 U.S.C. § 45(n). Congress established a specific test to determine whether a practice is unfair, and the Complaint pleads facts sufficient to state a claim that the practices at issue meet the statutory test for unfairness. Unlike in *ABA*, The Commission's authority to bring this case rests not on its own interpretation of a statutory term, but instead on the application of well-pled facts to the unambiguous unfairness test enacted by Congress.

II. FTC ACT PROVIDES SUFFICIENT NOTICE OF BUSINESSES' OBLIGATIONS

If the Commission were to hold that it may not apply its unfairness authority to LabMD's conduct because the Commission somehow failed to provide Respondent with sufficient notice of what constitutes unfairness, it would vitiate many of the Commission's consumer protection unfairness actions. Whenever the Commission brings an unfairness case, it provides the same

notice: The notice provided by the statute. 15 U.S.C. § 45(n). Neither the Commission nor any court has ever found that Section 5's definition of unfairness fails to provide sufficient notice.

A. LabMD Has Fair Notice of the Commission's Reasonableness Standard

The codification of unfairness established a cost-benefit analysis to evaluate unfair practices. 15 U.S.C. § 45(n) (requiring evaluation of the likelihood of "substantial injury" and of "countervailing benefits"); J. Howard Beales, III, Director, Bureau of Consumer Protection, Federal Trade Comm'n Remarks at the Marketing and Public Policy Conference: The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (May 30, 2003) ("[C]odification of those principles in 1994 re-established a cost/benefit analysis (injury to consumers not outweighed by countervailing benefits) as the test for unfairness").

In order to avoid unfair practices that violate Section 5 of the FTC Act, a company must first determine whether its practices cause or are likely to cause substantial injury to consumers that is not reasonably avoidable. 15 U.S.C. § 45(n). If a company's practices are likely to cause consumer injury, Section 5 requires the company to employ measures to prevent the injury when the injury is not outweighed by countervailing benefits to consumers or competition. *Id.* In other words, a company must employ reasonable measures to prevent consumer injury that its practices would otherwise likely cause. *See id.*

Applying this Section 5 analysis to a company that maintains consumers' sensitive personal information, the unauthorized disclosure of which would cause substantial consumer injury, the company must assess whether its security practices are likely to result in the unauthorized disclosure of consumers' personal information. Section 5 requires that the company employ data security measures that would prevent the injury when the injury is not outweighed by countervailing benefits to consumers or competition. In other words, the company must employ reasonable data security practices designed to prevent consumer injury

that its practices would otherwise likely cause.

The FTC has expressly applied this test in data security matters to require "reasonable and appropriate" practices. *See* n.9, *supra*. Through the statute and FTC enforcement actions applying the statutory elements of unfairness, Respondent has ample notice of the requirement to employ reasonable, cost-effective data security practices to avoid the likelihood of substantial injury.

B. Reasonableness Standard Is Unremarkable and Applied in a Variety of Contexts

It is difficult to reconcile Respondent's argument that the standard of reasonableness based on Section 5's definition of unfair practices is "vague" (Resp. Mot. 23) and "meaningless" (*id.* 24) with the hundreds of years of Anglo-American jurisprudence predicated on the premise that standards of care are legitimate methods for evaluating parties' legal liabilities. Reasonableness provides adequate notice as to how regulated entities must behave. Data security practices are not exceptional in the field of jurisprudence nor somehow immune to an ordinary cost-benefit analysis.

1. Reasonableness Standard is Not Vague

Courts routinely find statutes and regulations premised on objective standards of care, such as reasonableness, to provide fair notice, including in contexts in which the relief available far exceeds the equitable relief available in an FTC action. For example, in criminal actions against physicians for illegally prescribing narcotics, the standard is "whether the physician prescribes medicine 'in accordance with a standard of medical practice generally recognized and accepted in the United States.'" *United States v. Merrill*, 513 F.3d 1293, 1306 (11th Cir. 2008) (citation omitted). In General Duty Clause actions under the Occupational Safety and Health Act ("OSHA"), "reasonableness" has been found to be an objective standard that provides regulated

entities with fair notice.[12] *Voegele Co., Inc. v. Occupational Safety & Health Review Comm'n*, 625 F.2d 1075, 1078-79 (3d Cir. 1980). Finally, even in tort actions for negligent data security practices, where plaintiffs can seek punitive damages, courts rely on the "reasonable and prudent person" under the circumstances standard. *In re Zappos.com, Inc.*, No. 12-00325, 2013 WL 4830497, at *3-4 (D. Nev. Sept. 9, 2013) ("Plaintiffs have sufficiently alleged that Zappos negligently failed to protect Plaintiffs' private data from electronic theft with sufficient electronic safeguards. Plaintiffs need not rely on any special duty of care. In the context of a simple negligence claim, Zappos owed Plaintiffs the duty of care owed by all persons to all other persons as a general matter: the duty to act as a reasonable and prudent person under the same or similar circumstances"); *see also Loschiavo v. City of Dearborn*, 33 F.3d 548, 552-53 (6th Cir. 1994) ("A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of 'reasonableness'").

In an FTC context analogous to the Complaint's allegations here, a court in the Northern District of Georgia rejected a defendant's assertion that the term "substantiation" was unconstitutionally vague for the purpose of deception actions under Section 5:

> [The] definition [of substantiation] is context specific and permits different variations on "competent and reliable scientific evidence" depending on what pertinent professionals would require for the particular claim made. Thus, the size, duration or protocol of a scientific study, the number or type of scientific studies required to substantiate a claim, and the proper mechanism for extrapolating

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[12] The enforcement of OSHA's General Duty Clause in Department of Labor administrative courts may provide the best analogy to a data security administrative hearing under Section 5 of the FTC Act. *See, e.g.*, *Fabi Construction Co. v. Secretary of Labor,* 508 F.3d 1077, 1088 (D.C. Cir. 2007) (considering a number of factors to determine whether defendant met its "general duty," including whether defendant followed third-party technical drawings, whether defendant complied with industry standards, and expert opinion).

> results from studies will obviously vary from circumstance to circumstance depending upon the expert evidence presented. However, the standard by which these issues of fact are resolved is clear, and an advertiser can be reasonably certain of what substantiation will be required *by conferring with appropriate professionals or experts*. The fact that different scientific evidence is required for different claims impacting different products does not mean that the FTC can enforce its act arbitrarily; instead, it simply means that different claims require different substantiation. As Judge Dimock wrote in his concurring opinion in *United States v. Shackney,* 333 F.2d 475, 488 (2d Cir. 1964), "Statutes are not . . . void for vagueness because they raise difficult questions of fact. They are void for vagueness only where they fail to articulate a definite standard." *Here the FTC has articulated a definite standard; accordingly, the issues of fact that it generates do not render it unconstitutionally vague*.

FTC v. Nat'l Urological Grp., Inc., 645 F. Supp. 2d 1167, 1186-87 (N.D. Ga. 2008) (emphasis supplied), *aff'd*, 356 F. App'x 358 (11th Cir. 2009). Similarly, the FTC has articulated a definite standard for companies' data security practices: Section 5 demands that a company act when the likelihood of consumer injury resulting from its poor data security practices is not outweighed by countervailing benefits of forgoing improved security practices.

Respondent's demand for "ascertainable certainty" is a red herring. Resp. Mot. 23. First, as described in Part II.A, LabMD and similarly situated companies *do know*, with ascertainable certainty, that reasonableness is the standard for enforcement of Section 5 of the FTC Act. Second, ascertainable certainty does not require agencies to provide prescriptive guidance at the level of detail that Respondent seems to think appropriate. *See*, *e.g.*, *United States v. Lachman*, 387 F.3d 42, 56-7 (1st Cir. 2004) ("The mere fact that a statute or regulation requires interpretation does not render it unconstitutionally vague"). The FTC has been consistent and clear about how it enforces Section 5 of the FTC Act against companies for their business practices related to the security of consumer data and, as a result, Respondent has received fair notice.

2. Reasonableness in Data Security is No More Complicated Than Reasonableness in Any Other Field

Data security practices are not immune from cost-benefit analyses. Section 5 requires evaluating potential injury, the likelihood of that injury, and the cost of taking precautions to prevent that injury. It is no more challenging to apply that balancing test in the context of companies' data security practices than it is in the context of companies' duties of care related to other business practices. Indeed, negligence law already imposes the same standard of care, including for data security practices. *See Zappos*, 2013 WL 4830497, at *3.

As with the application of the reasonableness standard of care in any other circumstance, what constitutes reasonable data security practices for a company that maintains consumers' sensitive personal information will vary depending on the facts of the case and a company's circumstances. This analysis includes: the sensitivity of the information the company handles (going to the magnitude of injury from unauthorized access to information); the nature and scope of the firm's activities (going to the structure of the firm's network, how the network operates, the types of security vulnerabilities and risks it faces, and feasible protections); and the firm's size and complexity (going to, among other things, the cost of implementing feasible protections).

Companies maintaining sensitive personal information have robust guidance available to assess whether their data security practices are reasonable under their circumstances. Companies may review FTC complaints and consent decrees, which concern fundamental security elements, including: conducting risk assessments to identify reasonably foreseeable risks; assessing the effectiveness of existing security measures and adopting additional measures in light thereof; testing and monitoring security measures for effectiveness; and adjusting the measures appropriately. For example, the complaints in a number of FTC actions allege that the

respondent failed to conduct adequate risk assessments and, as a result, failed to adopt easily implemented measures to address reasonably foreseeable risks that an appropriate risk assessment would have revealed.[13] The consent decrees approved by the Commission impose the same substantive relief: The Commission requires respondents to implement a comprehensive information security program that includes and reflects these same basic security elements.[14] These security elements are well known in the information technology field, and are regularly and routinely published in training and continuing education materials for network administrators and in free information technology materials.[15] Similarly, the SANS Institute has

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[13] *See*, *e.g.*, *In re Card Systems, Inc.*, FTC File No. 052-3148, Compl. ¶ 6(2) (Feb. 23, 2006) (proposed complaint approved by Commission); *In re Reed Elsevier Inc.*, FTC File No. 052-3094, Compl. ¶ 10(h) (March 27, 2008) (proposed complaint approved by Commission).

[14] *See*, *e.g.*, *In re The TJX Cos.*, FTC Docket No. C-4227, FTC File No. 072-3055 (July 29, 2008) (consent order) (requiring TJX to implement a written information security program; designate an employee accountable for its information security program; to identify risks; to design and implement safeguards to address risks; to only retain service providers capable of providing adequate safeguards; and evaluate and adjust the program regularly).

[15] Since 1990, NIST has published and updated a series of Special Publications ("SP-800") on information security topics. *See*, *e.g.*, NIST Special Publication 800-12, An Introduction to Computer Security: The NIST Handbook (Oct. 1995), *available at* http://csrc.nist.gov/publications/nistpubs/800-12/800-12-html/; NIST Special Publication 800-30, Risk Management Guide for Information Technology Systems (July 2002; updated September 2012), *available at* http://csrc.nist.gov/publications/nistpubs/800-30/sp800-30.pdf and http://csrc.nist.gov/publications/nistpubs/800-30-rev1/sp800_30_r1.pdf. Although prepared for government computer systems, these publications also provide guidance to the private sector. For example, HHS published guidance to entities subject to HIPAA, such as LabMD, that incorporates content from NIST Special Publications. *See*, *e.g.*, Department of Health and Human Services, HIPAA Security Series 6: Basics of Risk Analysis and Risk Management (June 2005, revised March 2007) at 3, *available at* http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/riskassessment.pdf (although the HIPAA "Security Rule does not prescribe a specific risk analysis or risk management methodology" or require covered entities to follow NIST documents, "much of the content" of HIPAA Security Series 6 "is adapted from government sources such as the NIST 800 Series of Special Publications, specifically SP-800-30 – Risk Management Guide for Information Technology Systems").

since 2001 annually published and updated a free, easily accessible compilation of the most critical security vulnerabilities confronting firms, security professionals, and law enforcement. *See*, *e.g.*, SANS Institute, The Top 20 Most Critical Internet Security Vulnerabilities (Updated) (November 2005), *available at* https://files.sans.org/top20/top20_2005.pdf (identifying file sharing applications as a critical vulnerability). The compilation includes reference materials, information about new vulnerabilities, security measures that companies may use to defend against attacks, and links to free security tools.

The FTC has pleaded, and will prove at trial, that based on these widely known and readily available resources, the measures LabMD employed to prevent unauthorized access to consumers' personal information fell well short of the reasonableness standard of care. That is, LabMD's practices created a likelihood of substantial consumer injury that was not outweighed by countervailing benefits of forgoing improved security practices.

C. FTC Is Not Obligated to Proceed by Rulemaking

The FTC is not obligated to engage in rulemaking to enforce the FTC Act. The FTC's decision to enforce the FTC Act's prohibition of unfair practices through individual enforcement action, or adjudication, rather than rulemaking "lies [within its] informed discretion." *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 732 (3d Cir. 1973) ("The courts have consistently held that where an agency, as in this case, is given an option to proceed by rulemaking or by individual adjudication the choice is one that lies in the informed discretion of the administrative agency") (citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 772 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). "If the agency affords the party a 'full opportunity to be heard before the [agency] makes its determination' [*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)], we cannot second-guess the agency decision whether to interpret a standard by rulemaking or by adjudication. [*Chenery*, 332 U.S. at 203]." *Beazer E., Inc. v. EPA*, 963 F.2d 603, 609-10 (3d Cir.

1992).

Proceeding through case-by-case adjudication of data security matters is appropriate because the cost-benefit analysis of reasonableness is necessarily a fact-driven inquiry. Certain fields are "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 203. The Supreme Court articulated the importance of case-by-case adjudication in similar circumstances:

> [The National Labor Relations Board] is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act, nothing in the present case would justify such a conclusion. Indeed, there is ample indication that adjudication is especially appropriate in the instant context. As the Court of Appeals noted, "(t)here must be tens of thousands of manufacturing, wholesale and retail units which employ buyers, and hundreds of thousands of the latter." [*Bell Aerospace v. NLRB*, 475 F.2d 485, 496 (2d Cir. 1973)]. Moreover, duties of buyers vary widely depending on the company or industry. It is doubtful whether any generalized standard could be framed which would have more than marginal utility.

Bell Aerospace, 416 U.S. at 294 (permitting NLRB to evaluate the definition of "managerial employees" for the purpose of collective bargaining on a case-by-case basis).

III. LABMD'S ACTS AND PRACTICES AFFECT INTERSTATE COMMERCE

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). The act defines "Commerce" as, *inter alia*, "commerce among the several States." *Id.* § 44. This definition captures Respondent's business practices, as they are alleged to include testing of "specimen samples from consumers and reporting test results to consumers' health care providers" and the consumers are "located throughout the United States." Compl. ¶¶ 1-5. *See P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 271 (6th Cir. 1970) (holding that the nationwide scope of operations imparted the requisite interstate character). Accordingly,

Respondent's suggestion that its practices do not affect interstate commerce is specious.

IV. COMPLAINT COMPLIES WITH PLEADING REQUIREMENTS

The pleading standard articulated in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), is inapplicable to complaints filed before the Federal Trade Commission's Office of the Administrative Law Judges.[16] *Cf.* 16 C.F.R. § 3.11(b)(2) ("The Commission's complaint shall contain . . . [a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law . . . ."). Even if the *Twombly/Iqbal* standard were applicable, the Complaint alleges facts sufficient to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 570).

V. MATTER SHOULD NOT BE STAYED

The Commission should deny Respondent's request that these proceedings be stayed. Commission Rule 3.22(b) provides that, absent an order, "[a] motion under consideration shall not stay the proceedings before the Administrative Law Judge . . . ." 16 C.F.R. § 3.22(b). In promulgating the Rules of Practice applicable in this matter, the Commission stated that the

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[16] *See In re Egan-Jones Ratings Co.*, Exchange Act Release No. APR-716, 2012 WL 8718369, at *2 (ALJ Aug. 8, 2012) (rejecting *Twombly* application to affirmative defenses because Commission's pleading rules only require sufficient detail "as will permit a specific response thereto"); *United States v. Mar-Jac Poultry, Inc.*, 10 OCAHO 1148, 2012 WL 2950407, at *8 (Dep't of Justice Mar. 15, 2012) (rejecting *Twombly* pleading, reasoning prior administrative process provides notice); *United States v. Split Rail Fence Co.*, 10 OCAHO 1181, 2013 WL 2154637, at *4 (Dep't of Justice May 13, 2013) (distinguishing agency's rules from *Twombly* because they lack "entitlement to relief" requirement); *Evans v. EPA*, ARB Case No. 08-059, 2012 WL 3164358, at *4 (Dep't of Labor Admin. Review Bd. July 31, 2012). *But cf.*, *e.g.*, *In re Hanson's Window & Construction, Inc.*, 2010 WL 5093890, at *3 (EPA ALJ Dec. 1, 2010) (applying *Twombly* where agency explicitly supplements its rules with Federal Rules of Civil Procedure); *Totes-Isotoner Corp. v. United States*, 569 F. Supp. 2d 1315, 1325-26 (Ct. Int'l Trade 2008) (applying *Twombly* where agency's pleading rules are identical to Federal Rules of Civil Procedure).

purpose of Rule 3.22(b) "was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over" dispositive motions, such as Respondent's Motion to Dismiss. Fed. Trade Comm'n Rules and Regulations, 16 C.F.R. Parts 3 and 4, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2010). Indeed, the Commission anticipated that the amended Rules of Practice would "expedite cases by providing that proceedings before the ALJ [would] not be stayed while the Commission considers a motion . . . ." Fed. Trade Comm'n Rules of Practice, 16 C.F.R. Parts 3 and 4, 73 Fed. Reg. 58,832, 58,836 (Oct. 7, 2008). Except to rehash arguments pending before the Administrative Law Judge regarding Complaint Counsel's ordinary, third-party discovery, Respondent has provided no rationale that could possibly justify a stay pending determination of this Motion. Accordingly, the Commission should deny Respondent's request to stay the proceedings pending resolution of its Motion.

CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Commission deny Respondent's Motion to Dismiss and deny Respondent's request to stay the administrative proceedings.

Dated: November 22, 2013

Respectfully submitted,

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Exhibit A

63D CONGRESS, 2d Session. | SENATE. | REPORT No. 597.

FEDERAL TRADE COMMISSION.

JUNE 13, 1914.—Ordered to be printed.

Mr. NEWLANDS, from the Committee on Interstate Commerce, submitted the following

REPORT.

[To accompany H. R. 15613.]

The Senate Committee on Interstate Commerce, to which was referred H. R. 15613, a bill to create an interstate trade commission, etc., passed by the House of Representatives on the 5th day of June, 1914, reports as a substitute therefor Senate bill No. 4160, reported favorably to the Senate on the 5th day of June (calendar day, June 6), 1914, to which latter bill have been added provisions regarding unfair competition and the investigation of foreign trade practices.

The substituted bill is as follows:

[Senate substitute for H. R. 15613.]

Be it enacted, etc., That a commission is hereby created and established, to be known as the Federal Trade Commission, composed of five members, not more than three of whom shall be members of the same political party, and the said Federal Trade Commission is referred to hereinafter as "the commission."

The words defined in this section shall have the following meaning when found in this act, to wit:

"Commerce" means such commerce as Congress has the power to regulate under the Constitution.

The term "corporation" or "corporations" shall include joint stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit.

"Antitrust acts" means the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; also sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August twenty-seventh, eighteen hundred and ninety-four; and also the act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen.

ORGANIZATION.

SEC. 2. Upon the organization of the commission, the Bureau of Corporations, and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist, and the employees of said bureau shall become employees of the commission in such capacity as it may designate. The commission shall take over all the records, furniture, and equipment of said bureau. All work and proceedings pending before the bureau, may be continued by the commission free from the direction or control of the Secretary of Commerce. All appropriations heretofore made for the support and maintenance of the bureau and its work are hereby authorized to be expended by the commission for said purposes.

Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commissioners shall be appointed by the President, by and with the advice and consent of the Senate. The terms of office of the commissioners shall be seven years each. The terms of those first appointed by the President shall date from the taking effect of this act, and shall be as follows:

One shall be appointed for a term of three years, one for a term of four years, one for a term of five years, one for a term of six years, and one for a term of seven years; and after said commissioners shall have been so first appointed all appointments, except to fill vacancies, shall be for terms of seven years each. The commission shall elect one of its members chairman for such period as it may determine. The commission shall elect a secretary and may elect an assistant secretary. Said secretary and assistant secretary shall hold their offices or connection with the commission at the pleasure of the commission. Each commissioner shall receive a salary of $10,000 per annum. The secretary of the commission shall receive a salary of $5,000 per annum. The assistant secretary shall receive a salary of $4,000 per annum. In case of a vacancy in the office of any commissioner during his term, an appointment shall be made by the President, by and with the advice and consent of the Senate, to fill such vacancy, for the unexpired term. The office of the commission shall be in the city of Washington, but the commission may at its pleasure meet and exercise all its powers at any other place, and may authorize one or more of its members to prosecute any investigation, and for the purposes thereof to exercise the powers herein given the commission.

The commission shall have such attorneys, accountants, experts, examiners, special agents, and other employees as may, from time to time, be appropriated for by Congress, and shall have authority to audit their bills and fix their compensation. With the exception of the secretary and assistant secretary and one clerk to each of the commissioners, and such attorneys and experts as may be employed, all employees of the commission shall be a part of the classified civil service. The commission shall also have the power to adopt a seal, which shall be judicially noticed, and to rent suitable rooms for the conduct of its work.

All the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders in making any investigation or upon official business in any other place than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor, approved by the commission.

The Auditor for the State and other departments shall receive and examine all accounts of expenditures of the commission.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

POWERS OF COMMISSION.

SEC. 3. The commission shall have power among others—

(a) To investigate from time to time, and as often as the commission may deem advisable, the organization, business, financial condition, conduct, practices, and management, of any corporation engaged in commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require any corporation subject to the provisions of this act which the commission may designate to furnish to the commission from time to time information, statements, and records concerning its organization, business, financial condition, conduct, practices, management, and relation to other corpo-

rations, or to individuals, associations, or partnerships, and to require the production for examination of all books, documents, correspondence, coutracts, memoranda, or other papers relating to or in any way affecting the commerce in which such corporation under inquiry is engaged or concerning its relations to any individual, association, or partnership, and to make copies of the same.

(c) To prescribe as near as may be a uniform system of annual reports from such corporations or classes of corporations subject to the provisions of this act, as the commission may designate, and to fix the time for the filing of such reports, and to require such reports, or any special report, to be made under oath, or otherwise in the discretion of the commission.

(d) To make public, in the discretion of the commission, any information obtained by it in the exercise of the powers, authority, and duties conferred upon it by this act, except so far as may be necessary to protect trade processes, names of customers, and such other matters as the commission may deem not to be of public importance, and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation.

(e) In any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust acts if the court finds for the complainant it may, upon its own motion or the motion of any party to such suit, refer the matter of the form of the decree to be entered to the commission as a master in chancery; whereupon the commission shall proceed in that capacity upon such notice to the parties and upon such hearing as the court may prescribe, and shall as speedily as practicable make report with its findings to the court, which report and findings having been made and filed shall be subject to the judicial procedure established for the consideration and disposition of a master's report and findings in equity cases.

(f) Wherever a restraining order or an interlocutory or final decree has heretofore been entered or shall hereafter be entered against any defendant or defendants in any suit brought by the United States to prevent and restrain any violation of the antitrust acts, the commission shall have power, and it shall be its duty, upon the application of the Attorney General, to make investigation of the manner in which the order or decree has been or is being carried out, and as to whether the same has been or is being violated, and what, if any, further order, decree, or relief is advisable. It shall transmit to the Attorney General a report embodying its findings as a result of any such investigation with such recommendations for further action as it may deem advisable and the report shall be made public in the discretion of the commission.

(g) If the commission believes from its inquiries and investigations, instituted upon its own initiative or at the suggestion of the President, the Attorney General, or either House of Congress that any corporation, individual, association, or partnership has violated any law of the United States regulating commerce, it shall report its findings and the evidence in relation thereto to the Attorney General with its recommendations.

For the purpose of prosecuting any investigation or proceding authorized by this section the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documents or writings of any corporation being investigated or proceeded against.

(*h*) The commission is hereby directed to investigate, as expeditiously as may be, trade conditions in foreign countries where associations, combinations, or practices of buyers, dealers, or traders may injuriously affect the export trade of the United States, and also to investigate whether American exporters have combined with each other or with foreign producers or dealers to control prices abroad, and to report to Congress thereon from time to time.

SEC. 4. The powers and jurisdiction herein conferred upon the commission shall extend over all trade associations, corporate combinations, and corporations as hereinbefore defined engaged in or affecting commerce, except banks and common carriers.

UNFAIR COMPETITION.

SEC. 5. That unfair competition in commerce is hereby declared unlawful.

The commission is hereby empowered and directed to prevent corporations from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any corporation has been or is using any unfair method of competition in commerce, it shall issue and serve upon such corporation a written order, at least thirty days in advance of the time set therein for hearing, directing it to appear before the

commission and show cause why an order shall not be issued by the commission restraining and prohibiting it from using such method of competition, and if upon such hearing the commission shall find that the method of competition in question is prohibited by this act it shall thereupon issue an order restraining and prohibiting the use of the same. The commission may at any time modify or set aside, in whole or in part, any order issued by it under this act.

Whenever the commission, after the issuance of such order, shall find that such corporation has not complied therewith, the commission may petition the district court of the United States, within any district where the method in question was used or where such corporation is located or carries on business, praying the court to issue an injunction to enforce such order of the commission; and the court is hereby authorized to issue such injunction.

SEC. 6. That if any corporation subject to this act shall fail to file any annual or special report, as provided in subdivision (b) of section three hereof, within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

PENALTIES.

SEC. 7. Any person who shall willfully destroy, alter, mutilate, or remove out of the jurisdiction of the United States or authorize, assist in, or be privy to the willful destruction, alteration, mutilation, or removal out of the jurisdiction of the United States of any book, letter, paper, or document containing an entry or memorandum relating to commerce, the production of which the commission may require under this act, or who shall willfully make any false entry relating to commerce in any book of accounts or record of any trade association, corporate combination, or corporation, subject to the provisions of this act, or who shall willfully make or furnish to said commission or to its agent any false statement, return, or record, knowing the same to be false in any material particular, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Any employee of the commission who divulges any fact or information which may come to his knowledge during the course of his employment by the commission, except in so far as it has been made public by the commission, or as he may be directed by the commission or by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

TESTIMONY AND IMMUNITY.

SEC. 8. The commission shall have and exercise the powers possessed by the Interstate Commerce Commission to subpœna and compel the attendance and testimony of witnesses and the production of evidence, and to administer oaths. All the powers, requirements, obligations, liabilities, and immunities imposed or conferred by the act to regulate commerce, as amended in relation to testimony before the Interstate Commerce Commission, shall apply to witnesses, testimony, and evidence before the commission.

SEC. 9. The district courts of the United States, upon the application of the commission alleging a failure by any corporation, or by any of its officers or employees, or by any witness, to comply with any order of the commission for the furnishing of information, shall have jurisdiction to issue such writs, orders, or other process as may be necessary to enforce any order of the commission and to punish the disobedience thereof.

SEC. 10. The several departments and bureaus of the Government, when directed by the President, shall furnish the commission, upon its request, all

records, papers, and information in their possession relating to any trade association, corporate combination, or corporation, subject to any of the provisions of this act.

Amend the title so as to read: "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

THE TAFT ADMINISTRATION.

The Senate Committee on Interstate Commerce has had under consideration for many years the organization of a trade commission, with powers over trade analogous to those exercised by the Interstate Commerce Commission over transportation.

Under President Taft's administration, Senate resolution No. 98, Sixty-second Congress, first session, authorizing the Senate Committee on Interstate Commerce to report to the Senate what changes were necessary or desirable in the laws relating to the control of corporations, persons, or firms engaged in interstate commerce, was presented by Mr. Clapp, the chairman of the committee, and was adopted by the Senate on the 26th day of July, 1911. Under this resolution exhaustive hearings were held, during which 103 persons gave their views on every phase of suggested trust legislation, filling nearly 3,000 pages of hearings.

At the first hearing, on the 4th day of August, 1911, the Senate Committee on Interstate Commerce took up Senate bill 2941, introduced by Mr. Newlands, for the organization of a trade commission, and Mr. Newslands made a statement regarding it. The bill and statement appear in the appendix to this report, at pages 15 to 33.

Later on, as a result of the additional light shed upon this subject by the hearings, Mr. Newlands introduced in the Senate, on February 26, 1912, Senate bill 5485, Sixty-second Congress, second session, entitled "A bill to create an interstate trade commission." This bill was tentatively taken up by the committee and amended in many particulars, but the committee took no final action upon it. The bill as tentatively amended by the Senate Committee on Interstate Commerce (appendix, p. 39) was reintroduced by Mr. Newlands on the 12th day of April, 1913, as Senate bill 829.

THE CUMMINS REPORT.

The Senate committee, after long-continued hearings under Senate resolution 98, made a report, through Mr. Cummins, on the 26th day of February, 1913 (S. Rept. 1326, 62d Cong., 3d sess.), in which were included the additional views of Messrs. Pomerene, Tillman, Gore, Newlands, Crane, Brandegee, Oliver, and Lippitt.

The report of Mr. Cummins consisted mainly of a discussion of the decisions of the Supreme Court in the various trust cases, from the Knight case down to and including the Standard Oil and Tobacco cases; but it also took up the question of the desirability of legislation supplementary to the Sherman Act, and considered the question, among others, of a trade commission, declaring "that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be vastly more effectual than through the courts alone, which in most cases will take no cognizance of violations of the law for months or years after the violations occurred, and when the difficulty of awarding reparation

for the wrong is almost insurmountable"; and also, with reference to the disintegration of combinations and the reconstruction of the associated corporations upon lawful lines, "It can not be gainsaid that a commission, the members of which are in close touch with business affairs, and who are intimately acquainted with the commercial situation, might be extremely helpful in the required adjustment."

In the additional views of Mr. Newlands, appended to the Cummins report, Mr. Newlands declared himself in favor of the immediate organization of a trade commission and urged the passage of the trade-commission bill which he appended to his views. He quoted from previous utterances in the Senate, on January 11, 1911, as follows:

> Mr. NEWLANDS. The railroad commission bill furnishes a model for the action of Congress upon matters involving minute and scientific investigation. Had we followed the same method regarding the trusts that we followed regarding railroads, we would have made much better progress in trust regulation. The antitrust act was passed 23 years ago, about the same time that the railroad commission was organized. The railroad question is practically settled; the settlement of the trust question has hardly been commenced. Had we submitted the administration of the antitrust act to an impartial quasi judicial tribunal similar to the Interstate Commerce Commission instead of to the Attorney General's Office, with its shifting officials, its varying policies, its lack of tradition, record, and precedent, we would by this time have made gratifying progress in the regulation and control of trusts, through the quasi judicial investigations of a competent commission and through legislation based upon its recommendations. As it is, with the evasive and shifting incumbency and administration of the Attorney General's Office, oftentimes purely political in character, we find that the trusts are more powerful to-day than when the antitrust act was passed, and that evils have grown up so interwoven with the general business of the country as to make men tremble at the consequence of their disruption.

No bill was reported under the Clapp resolution and no additional action was taken by the Senate, under President Taft's administration, regarding trust legislation.

PRESIDENT WILSON'S ADMINISTRATION.

Under President Wilson's administration, after the passage of the tariff and banking laws at the extra session, the question of trust legislation came up at the regular session commencing in December, 1913. President Wilson, assuming that the Judiciary Committee of the House and the Interstate Commerce Committee of the Senate had jurisdiction over the entire subject, conferred with the chairmen of these two committees, Mr. Clayton and Mr. Newlands, with reference to framing the tentative measures which would be submitted to the committees for consideration. Meanwhile the President delivered his message of January 20, 1914, regarding antitrust legislation, in which, after recommending legislation as to interlocking directorates, holding companies, and other matters, he took up the question of a trade commission, as follows:

> The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under the condemnation of the law before it can make sure just what the law is. Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful

restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case.

Producing industries, for example, which have passed the point up to which combination may be consistent with the public interest and the freedom of trade, can not always be dissected into their component units as readily as railroad companies or similar organizations can be. Their dissolution by ordinary legal process may oftentimes involve financial consequences likely to overwhelm the security market and bring upon it breakdown and confusion. There ought to be an administrative commission capable of directing and shaping such corrective processes, not only in aid of the courts but also by independent suggestion, if necessary.

TENTATIVE BILLS.

Later on, as the result of an understanding between Mr. Clayton, chairman of the House Committee on the Judiciary, and Mr. Newlands, chairman of the Senate Committee on Interstate Commerce, a bill was introduced on the same day, by Mr. Clayton in the House and by Mr. Newlands in the Senate—H. R. 12120 and S. 4160.

With reference to this bill, Mr. Clayton caused to be published in the Congressional Record on the 22d day of January, 1914, the following press dispatch:

Representative Clayton this afternoon gave to the press the full text of the tentative bill as agreed upon by a subcommittee of the Judiciary Committee of the House (Messrs. Clayton, Carlin, and Floyd of Arkansas) and the majority members of the Senate Committee on Interstate Commerce, and said:

"The bill will be introduced at the same time by Reprsentative Clayton and Senator Newlands. The bill is modeled after the lines of what is commonly known as the Newlands bill, which was introduced in the Senate by Senator Newlands, and involves the fundamental idea that a trade commission shall be created, consisting of five members, with full inquisitorial powers into the operation and organization of all corporations engaged in interstate commerce, other than common carriers. It provides for a commission of five members, makes the Commissioner of Corporations chairman of the board, and transfers all the existing powers of that bureau to the commission. Its relation to the Attorney General's office and to the courts is advisory. Its principal and most important duty, besides conducting investigations, will be to aid the courts, when requested, in the formation of decrees of dissolution, and with this end in view it empowers the courts to refer any part of pending litigation to the commission, including the proposed decree, for information and advice."

Senator Newlands, being interviewed, said:

"The trade-commission bill and several other bills limiting the debatable ground of the Sherman Act have been the subject of laborious consideration by a subcommittee of the Judiciary Committee of the House (consisting of Mr. Clayton, chairman, and Messrs. Carlin and Floyd of Arkansas) during the holidays and before. The majority members of the Interstate Commerce Committee of the Senate have been brought into consultation with them of late.

"The trade-commission bill preserves the essential features of the bill which I have been urging for some time, but contains amendments and additions of value and is, in my judgment, an improvement upon the bill as it was considered and improved by the Interstate Commerce Committee of the Senate during the last Congress. As a whole, I should say that the trade-commission bill ought to be satisfactory to members of all parties, for it is distinctively progressive, and we have endeavored to frame it in harmony with the President's views, presented in an admirable message, which has received the approval of the entire country, regardless of party. While these bills represent at present the best thought of the participants in the shaping of this legislation, they are presented simply as tentative measures, upon which the judgment of the proper committees of the House and Senate and of the country is invoked."

THE HOUSE BILL.

The House bill, H. R. 12120, introduced by Mr. Clayton, was not referred, however, to the Judiciary Committee, but to the Committee on Interstate and Foreign Commerce. The Senate bill, S. 4160, introduced by Mr. Newlands, was referred to the Interstate Commerce Committee of the Senate.

Later on a bill was introduced by Mr. Covington, of the House Committee on Interstate and Foreign Commerce (H. R. 15613) for the creation of an interstate trade commission, on the 13th day of April, 1914, covering in substance the same lines as the Clayton bill, but differing in detail and method. This bill was taken up for consideration by the House Committee on Interstate and Foreign Commerce, and after amendment by the committee was reported favorably and passed by the House on the 5th day of June, 1914.

THE SENATE BILL.

Meanwhile, however, the Senate Committee on Interstate Commerce had been considering Senate bill 4160, introduced by Mr. Newlands, and had, on the 5th day of June (calendar day June 6), 1914, after amending this measure, reported it favorably to the Senate. Later on the House bill, H. R. 15613, came over to the Senate and was referred to the Committee on Interstate Commerce.

The Senate committee reports the House bill with the recommendation that Senate bill 4160, as amended, be substituted for it, adding thereto amendments regarding the investigation of foreign trade practices and unfair competition.

AN ADMINISTRATIVE TRIBUNAL NEEDED.

Recent decisions of the Supreme Court make clear that all combinations in restraint of trade and monopolies are contrary to the law. All agree that while the Sherman law is the foundation stone of our policy on this question, additional legislation is necessary.

Experience in the execution of the law, however, as shown in the Standard Oil and American Tobacco decrees of dissolution, and in the frequent efforts of combinations to make voluntary adjustment with the Department of Justice, establishes that the question involved is administrative as well as legislative and judicial.

It is generally conceded that the peculiar character and importance of this question make it indispensable that some of the administrative functions should be lodged in a body specially competent to deal

with them, by reason of information, experience, and careful study of the business and economic conditions of the industry affected. The knowledge of the law and the information as to the facts which are essential to prove that a combination is repugnant to the law are not likely to be entirely adequate for the determination of the best form of dissolution, and this has been recognized both by the Supreme Court and by the Department of Justice. Preliminary to the judicial determination of such questions as arise, for example, in the examination of proposals for a voluntary dissolution of a combination or in testing the lawfulness of existing business arrangements, a vast mass of information in numerous branches of industry, as well as expert knowledge, is indispensable. The proper enforcement of the Sherman law also requires vigilant supervision which is most effectively obtained by a body in continual touch with the business organizations in the various industries.

The value of such administrative oversight and control has been recognized in the banking and transportation business, and we have in the Comptroller of the Currency, the newly created Federal Reserve Board, and the Interstate Commerce Commission practical illustrations of the operation of such organizations and frequent examples of the beneficial effects of their activity. As the general realization of these facts is widespread and confined to no one particular party, the introduction of this bill for a trade commission simply responds to a general need.

THE BUREAU OF CORPORATIONS.

While the Bureau of Corporations, which was established by an act of February 14, 1903, provided in some measure for the needs now generally recognized and has been of great value and public benefit in describing in detail the conditions in particular industries, and the organization, operation, and conduct of particular companies, the field which has been covered has necessarily been restricted and its organization as a division of an executive department under a single head, reporting only to the President, has not given to it either the authority or prestige which attaches to an independent commission, such as the Interstate Commerce Commission. Yet the need of such a position is quite as necessary in the governmental supervision of industrial activities as of railroads.

The establishment of a trade commission at the same time that the Interstate Commerce Commission was established would have prevented the extraordinary development of monopolistic organizations in industry. If this commission had been in existence during this period, we would not now have to deal with such organizations as the United States Steel Corporation, the International Harvester Co., or the American Sugar Refining Co.; the American Tobacco Co. would never have been organized, and even the Standard Oil Co. would not have survived the dissolution of the original Standard Oil Trust in 1892. Such a commission would have at least kept within limited bounds the activities of a multitude of price-fixing associations in different branches of business, which, together with the great trusts, have been potent causes of the present high cost of living.

OPPOSING THEORIES REGARDING A TRADE COMMISSION.

With the development of public sentiment on the subject of a trade commission, points of view have naturally changed with respect to particular provisions, and differences have also appeared with respect to the extent of the power to be lodged with such a commission. Some would found such a commission upon the theory that monopolistic industry is the ultimate result of economic evolution and that it should be so recognized and declared to be vested with a public interest and as such regulated by a commission. This contemplates even the regulation of prices. Others hold that private monopoly is intolerable, unscientific, and abnormal, but recognize that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law. The functions of such commissions would be as distinct and different as the ideas upon which they are founded.

The commission which is proposed by your committee in the bill submitted is founded upon the latter purpose and idea. It certainly would appear to be the part of wisdom in so important a situation to proceed carefully, and with that end in view the committee has aimed to provide a body which will have sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law and to aid the business public as well, and, incidentally, to build up a comprehensive body of information for the use and advantage of the Government and the business world. Its subsequent recommendations to Congress will be fortified with actual knowledge of practical conditions, both from the point of view of business desirability and economic tendency, and will furnish to Congress an analysis of conditions that will give other and further legislation the certainty and security of foundation commensurate with the vast interests of the public and of the business world which are at stake. If conditions demonstrate and warrant, there will be a natural growth in the power of this body. At the same time the bill clothes it with sufficient power to be, we believe, of material assistance to the Department of Justice in the enforcement of the Sherman law, and of material aid to the business world in building up a body of precedent in the matter of business practices.

Proceeding now to a brief consideration of the principal provisions of the present bill and some of the more important considerations which have determined its form, it is necessary to consider the constitution of the commission; the corporations, etc., placed under its jurisdiction; the powers of inquiry, etc., of the commission, and other powers.

CONSTITUTION OF COMMISSION.

It is provided that the commission shall be composed of five commissioners with a regular term of seven years, but the terms are so arranged that the whole membership will not be subject to a complete change at any one time. The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commis-

sioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience. The terms of the commissioners should expire in different years, in order that such changes as may be made from time to time shall not leave the commission deprived of men of experience in such questions.

One of the chief advantages of the proposed commission over the Bureau of Corporations lies in the fact that it will have greater prestige and independence, and its decisions, coming from a board of several persons, will be more readily accepted as impartial and well considered. For this reason also it is essential that it should not be open to the suspicion of partisan direction, and this bill provides, therefore, that not more than three members of the commission shall belong to any one political party.

The salary proposed for each commissioner is $10,000 per annum, which is the same salary as is provided for the Interstate Commerce Commission, and $2,000 per annum less than that of the members of the Federal Reserve Board under the currency law recently enacted. It would seem desirable that the salaries of the two commissions should be made equal to those of the reserve board. It is of paramount importance that men of the first order of ability should be attracted to these positions, and that service on this body should not entail too great a sacrifice to those who would serve thereon. A commission of this kind requires an unusual combination of qualifications. It requires not only a conversant knowledge with finance and transportation, but also a very comprehensive knowledge of the practical economic and legal aspects of the whole field of industry of the country, and exceptional experience, training, and judgment.

The absorption of the Bureau of Corporations by the commission, already alluded to, is a matter of such obvious desirability that it does not require any extended discussion. The work done by that bureau has demonstrated the ability of its staff, while its 10 years' experience in work along this line will be of great value to the proposed commission.

POWERS OF INVESTIGATION AND REPORTS.

Specifically subject to the jurisdiction of this commission are all corporations, trade associations, and corporate combinations engaged in interstate and foreign commerce, excepting banks and common carriers.

The commission has power to investigate the organization, business, financial condition, conduct, practices, and management of any corporation subject to the act which it may designate, and its relation to other corporations and to individuals, associations, and partnerships, and in aid thereof to require the production of information, statements, and records and the examination of books, documents, correspondence, contracts, etc., affecting the commerce in which such corporation is engaged, and to require annual or special reports from such corporations or classes of corporations as the commission may designate. The commission may make public any information obtained by it except as to trade processes, names of customers, and other matters not deemed to be of public importance;

and may also make annual and special reports to Congress, including recommendations for additional legislation.

It will be seen that while large powers of investigation are given, they are not greatly in excess of those possessed and for years exercised by the Bureau of Corporations. Reports are required only from such corporations or classes of corporations as may be designated by the commission. There are over 350,000 corporations in this country, of which perhaps a large proportion may be engaged in interstate trade, but it must be realized that the number affected by the proposed legislation will not exceed 1,000. The powers, of course, must be large, but the exercise of the powers will not be against law-abiding business, but against lawless business. It will be persuasive and corrective rather than punitive so far as well-intentioned business is concerned. Although the commission is given a wide discretion, experience has proved that governmental administrative bodies seldom abuse such authority. To attempt to make precise limits between what they may and what they may not do would often seriously hamper their successful administration. To almost every inquiry it might be possible to make specious objections which, while lacking any real merit, might effectually clog the conduct of the inquiry. The committee carefully considered the question as to whether it should limit the powers of the commission to the conduct of the large corporations, but it was deemed important that the commission should be able to get information from the small concerns as well as from the large ones, inasmuch as a corporation of small capital might be made the instrumentality of large monopolistic control.

POWER TO AID THE COURTS.

The commission is also authorized to aid the courts in the form of the decree to be entered in suits under the antitrust acts and to make investigation as to the manner in which such decrees are being carried out, as to whether they are being violated, and what, if any, further order, decree, or relief is advisable, reporting its findings on these subjects to the Attorney General. It is also authorized, if it believes from its inquiries that any corporation has violated any law of the United States regulating commerce, to report its findings and the evidence relating thereto to the Attorney General.

These powers, partly administrative and partly quasi judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient.

With the exception of the Knight case, the Supreme Court has never failed to condemn and to break up any organization formed in violation of the Sherman law which has been brought to its attention; but the decrees of the court, while declaring the law satisfactorily as to the dissolution of the combinations, have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary to be applied to the dissolution of the combinations and the reassembling of the divided elements in harmony with the spirit of the law.

TRADE CONDITIONS ABROAD.

The commission is also authorized to investigate trade conditions in foreign countries injuriously affecting the export trade of the United States, as well as whether American exporters have combined with each other or with foreign producers or dealers to control prices abroad.

UNFAIR COMPETITION.

One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforceable in the courts.

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.

It may be stated that representatives of the National Implement and Vehicle Manufacturers' Association, the Ohio Manufacturers' Association, and the Illinois Manufacturers' Association approved the passage of a trade commission bill and a provision regarding the inquiry into and condemnation of unfair practices in trade.

It is believed that the term "unfair competition" has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.

SUBPŒNA AND IMMUNITY.

In verifying the returns made by a corporation or in the conduct of such special investigations as the commission may deem necessary, it is indispensable that it should have extensive powers of inquiry, with the right to subpœna witnesses and to require the production of books and papers. The powers which, according to this bill, are granted to the commission, are practically the same as those now granted to the Interstate Commerce Commission or the Bureau of Corporations, while the same constitutional protection is given to witnesses who testify as to matters which might incriminate them.

The history of this legislation is given with particularity, so that Members of the Senate may have before them the gradual evolution

of the measure and may consult the records referred to at any stage of the proceedings.

It demonstrates that legislation regarding the organization of a trade commission has been the subject of consideration in the Senate Committee on Interstate Commerce for over three years, and in two important committees of the House for a period of over six months, during which period exhaustive hearings were had.

The legislation proposed is in line with the constantly increasing popular sentiment, as is demonstrated by the recent poll of the Chamber of Commerce of the United States, which declared overwhelmingly for such action. No contention can be made that the work of Congress on this subject has been hasty or immature. It has not been in advance of public sentiment, but rather has lagged behind.

APPENDIX.

HEARING BEFORE THE SENATE COMMITTEE ON INTERSTATE COMMERCE.

[Friday, August 4, 1911.]

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

A TRADE COMMISSION—MR. NEWLANDS'S STATEMENT.

The committee met at 10 o'clock a. m. for the purpose of considering Senate bill No. 2941, Sixty-second Congress, second session, introduced by Mr. Newlands on the 5th day of July, 1911, entitled "A bill to create an interstate trade commission, to define its powers and duties, and for other purposes."

Present: Senators Clapp (chairman), Crane, Cummins, Brandegee, Oliver, Lippitt, Townsend, Newlands, Clarke, Watson, and Pomerene.

The CHAIRMAN. The secretary will read the authority under which the committee acts.

(The secretary read as follows:)

IN THE SENATE OF THE UNITED STATES,
July 26, 1911.

Resolved, That the Committee on Interstate Commerce is hereby authorized and directed, by subcommittee or otherwise, to inquire into and report to the Senate at the earliest date practicable what changes are necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce, and what changes are necessary or desirable in the laws of the United States relating to persons or firms engaged in interstate commerce, and for this purpose they are authorized to sit during the sessions or recesses of Congress, at such times and places as they may deem desirable or practicable; to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses, to conduct hearings and have reports of same printed for use, and to employ such clerks, stenographers, and other assistants as shall be necessary, and any expense in connection with such inquiry shall be paid out of the contingent fund of the Senate upon vouchers to be approved by the chairman of the committee.

Attest:

CHARLES G. BENNETT, *Secretary.*

The CHAIRMAN. You may proceed, Senator Newlands. What is the number of your original bill?

Mr. NEWLANDS. No. 2941, introduced July 5, 1911.

NOTE.—Since the date of this hearing Mr. Newlands withdrew the bill in its original form, and on August 21, 1911, introduced a substitute therefor, bearing

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the same number (S. 2941), with the same title and purpose. The said substitute bill is as follows:

[S. 2941, Sixty-second Congress, first session.]

A BILL To create an interstate trade commission, to define its powers and duties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United State of America in Congress assembled, That this act shall be referred to and cited as the interstate trade commission act. Corporations a majority of whose voting securities is held or owned by any corporation subject to the terms of sections four or sixteen of this act are referred to herein as subsidiaries of such holding or owning corporation.

SEC. 2. That on and after day of , nineteen hundred and twelve, the Bureau of Corporations shall be separated from the Department of Commerce and Labor, and shall be thereafter known as the Interstate Trade Commission; and all of the powers, duties, and funds belonging or pertaining to the Bureau of Corporations shall thereafter belong and pertain to the Interstate Trade Commission. And all the officials and employees of said bureau shall be thereupon transferred to the Interstate Trade Commission. The said commission shall also have a secretary, a chief clerk, and such other and additional employees as shall be provided by law.

SEC. 3. That the Interstate Trade Commission shall consist of five members, of whom no more than three shall belong to the same political party. The Commissioner of Corporations holding the office on the said day of , nineteen hundred and twelve, shall be ex officio a member of the commission for the first two years of its existence, and shall also be chairman of the commission for the first year of its existence, and thereafter the chairman shall be selected annually by the commission from its membership; and the then Deputy Commissioner of Corporations shall be the secretary of the commission for the first year of its existence, and thereafter the secretary shall be selected by the commission; and after the organization of the commission the titles and offices of Commissioner of Corporations and Deputy Commissioner of Corporations, respectively, shall cease to exist. The remaining four members of the commission shall be appointed by the President, by and with the advice and consent of the Senate, and the terms of such commissiners so first appointed shall be four, six, eight, and ten years, respectively, and shall be so designated by the President in making such appointments; and thereafter all the commissioners shall hold office for the term of ten years, and shall be appointed by the President, by and with the advice and consent of the Senate. Each member of said commission shall receive a salary of ten thousand dollars a year. The secretary shall receive a salary of thousand dollars a year.

SEC. 4. That every corporation heretofore or hereafter organized within the United States or doing business therein whose annual gross receipts, inclusive of the annual gross receipts of its subsidiaries, if any, exceed five million dollars, and engaged in commerce among the several States or with foreign nations, excepting corporations subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended, but including pipe-line companies, shall within four months after this act takes effect, or, if organized or otherwise becoming subject to this act subsequent to such taking effect hereof, then within two months after so becoming subject to this act furnish to the commission in writing statements showing such facts as to its organization, financial condition, and operations as may be prescribed by regulations to be made in pursuance of this act. Similar statements shall be made by its subsidiaries. Such statements shall be made as of such date as may be prescribed by such regulations and shall be verified under oath by such officers of such corporation as may be prescribed by the said regulations. Failure or neglect on the part of any corporation subject to this section to comply with the terms hereof within sixty days after written demand shall have been made upon such corporation by the commission, requiring such compliance, shall constitute a misdemeanor, and upon conviction such corporation shall be subject to a fine of not more than one thousand dollars for every day of such failure or neglect.

SEC. 5. That the said commission, upon finding that said statements comply with such regulations so far as applicable to such statements, shall enter such corporation for United States registration upon books to be kept by it for that purpose, and shall also record the statements so filed.

SEC. 6. That all corporations so admitted to registration shall be known as "United States registered" companies, and shall have the sole and exclusive right to use, in connection with their corporate title, their securities, their operations, and by way of advertisement of their business, the title "United States registered," or any convenient abbreviation thereof, so long as such registration shall remain in force.

SEC. 7. That any person, corporation, or company willfully using or publishing such title of "United States registered," or any title or form of words or letters reasonably indicative thereof, in connection with the business or securities or name of any corporation, with intent to represent thereby that such corporation is at that time registered as provided in this act, shall, unless such corporation be at that time duly registered under the terms of this act, be guilty of a misdemeanor, and upon the conviction thereof shall be subject to a fine of not more than one thousand dollars, and each day of such use or publication shall constitute a separate offense.

SEC. 8. That all corporations subject to this act and their respective subsidiaries shall from time to time furnish to the commission such information, statements, and records of their organization, business, financial condition, conduct, and management, at such times, to such degree and extent, and in such form as may be prescribed by the said regulations to be made under this act, and shall at all reasonable times grant to the commission, or its duly authorized agent or agents, complete access to all their records, accounts, minutes, books, and papers, including the records of any of their executive or other committees.

SEC. 9. That the commission shall from time to time make public the information received under this act, in such form and to such extent as shall be prescribed by the said regulations: *Provided, however*, That said regulations shall so far as possible, distinguish between information which is purely private, and the publication of which can serve no public interest, and such information as is not so private and is of importance to the public.

SEC. 10. The said commission may at any time, upon complaint of any person, corporation, or body, or upon its own initiative, revoke and cancel the registration of any corporation registered under this act upon the ground of either violation of any operative judicial decree rendered under an act to protect trade and commerce against unlawful restraints and monopolies, approved July second, eighteen hundred and ninety, or under sections seventy-three to seventy-seven, inclusive, of an act to reduce taxation, to provide revenue for the Government, and for other purposes, which became a law August twenty-seventh, eighteen hundred and ninety-four, or of the use of materially unfair or oppressive methods of competition, or of the acceseptance of discriminations, rebates, and concessions from the lawful tariff rates of common carriers, or on the ground of refusal or neglect to allow the commission access to its records or papers as provided in section eight therof. The commission shall also carefully investigate the capitalization and assets of the corporations registered under this act, and after due consideration of the information so obtained and otherwise secured, and after allowing reasonable time for the readjustment of corporate organization and security issues in any given case or class of cases, may revoke the registration of any such corporation upon the ground of overcapitalization; that is to say, upon the ground that the par value of the total securities, including shares of stock and all obligations running for a term of years or more, of such corporation, issued and outstanding at any time clearly exceeds the true value of the property of the corporation at that time. In determining such true value the said commission shall consider the original cost of such property, its present replacement cost, its present market value, including the good will of the corporation's business and the market value of the said securities issued by the corporation, and the fair value of the services rendered in the organization of such corporation, but the said commission shall also, as far as possible, segregate and disallow from such determination all value attaching to such property or business due solely to monopolistic power (other than patent rights or other legal franchises, the true value of which shall be considered by the commission). The said commission in considering revocation of registration under this section shall give such notice and have power to take such evidence and hold such hearings as may be prescribed by the regulations issued under this act: *Provided*, That if any subsidiary of a corporation so registered shall be guilty of conduct hereinbefore specified in this section as ground for cancellation of registration, such conduct on the part of such sub-