

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

)		DOCKET NO. 9357
In the Matter of)		
)		PUBLIC
LabMD, Inc., a corporation.)		
)		

**RESPONDENT LabMD, INC.’S MOTION TO STAY PROCEEDINGS PENDING
REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA**

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Counsel for Respondent LabMD, Inc.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to 16 C.F.R. § 3.22(a), Respondent LabMD, Inc. (LabMD), hereby moves to stay all proceedings before the Administrative Law Judge (ALJ) pursuant to 16 C.F.R. §§ 3.22(b), 3.21(c)(1), and 3.41(b) pending review of this matter by the U.S. Court of Appeals for the Eleventh Circuit and/or the U.S. District Court for the District of Columbia.

INTRODUCTION

A stay of this matter pending Article III review of the Federal Trade Commission's (FTC) disregard for the statutory and constitutional limits on its jurisdiction and conduct is proper.

First, LabMD is likely to prevail on the merits of its constitutional, *ultra vires*, and Administrative Procedure Act (APA) claims. Complaint Counsel admits that FTC has yet to find or name a single victim of the alleged patient-information data-breach. Yet FTC has devoted more than three years, spent hundreds of thousands of taxpayer dollars, and diverted staff resources to serve its obsessive pursuit of a small business providing cancer diagnostic services to doctors.¹

¹ The "logic" of FTC's conduct is captured by Herman Melville's Captain Ahab:

All visible objects, man, are but as pasteboard masks. But in each event—in the living act, the undoubted deed—there, some unknown but still reasoning thing puts forth the mouldings of its features from behind the unreasoning mask. If man will strike, strike through the mask! How can the prisoner reach outside except by thrusting through the wall? To me, the white whale is that wall, shoved near to me. Sometimes I think there's naught beyond. But 'tis enough. He tasks me; he heaps me; I see in him outrageous strength, with an inscrutable malice sinewing it. *That inscrutable thing is chiefly what I hate; and be the white whale agent, or be the white whale principal, I will wreak that hate upon him. Talk not to me of blasphemy, man; I'd strike the sun if it insulted me.*

Herman Melville, *Moby Dick* 157 (8th ed. 1922)(emphasis added).

FTC's predetermination of this matter reflects this obsession. Here and elsewhere the Commission claims authorization to "regulate" patient-information data-security under Section 5 without promulgating rules to do so, a position it is manifestly unwilling to reconsider. FTC wrongly justifies its assault on LabMD by this "authority," consistently rejecting arguments by LabMD and others that both jurisdiction and constitutional standards are missing. Therefore, the administrative process is futile and this matter belongs in the courts. *See Etelson v. Office of Personnel Management*, 684 F.2d 918, 925 (D.C. Cir. 1982)(when an agency has committed itself not to change course unless judicially compelled to do so, made known its general views are contrary to those of the complainant, and has never given an inkling that it would consider a matter afresh, a complainant need not engage in a *pro forma* process); *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996)(futility was shown when agency appeared "wedded to the procedures that it had employed").

Second, a stay prevents irreparable harm to LabMD's business reputation, image, good will, and constitutional rights.

Third, no one is harmed by a stay. FTC admits LabMD complies with all applicable patient-information data-security regulations and has not identified anyone who has been harmed by LabMD's alleged Section 5 violations.

Fourth, a stay to ensure FTC complies with Section 5, the APA, and the Constitution is in the public interest.

PROCEDURAL BACKGROUND

LabMD on November 14, 2013, filed a Verified Complaint in the U.S. District Court for the District of Columbia seeking injunctive and declaratory relief, *LabMD v. FTC et al.*, Dkt. 1, Case No. 1:13-cv-01787-CKK (D.D.C. Nov. 14, 2013), and on November 18, 2013, filed a

petition for review in the U.S. Court of Appeals for the Eleventh Circuit, *LabMD, Inc. v. Federal Trade Commission*, Appeal No. 13-15267 (11th Cir. Nov. 18, 2013).

ARGUMENT

The Commission may stay proceedings and continue hearings for “good cause.” 16 C.F.R. §§ 3.21(c)(1), 3.22(b), 3.41(b). There is good cause to stay this matter for Article III review because LabMD is likely to succeed on the merits of its statutory, *ultra vires*, and constitutional claims (many of which FTC has repeatedly denied and rejected); to suffer irreparable harm in the absence of a stay; and to prevail in a balance of the equities; and because a stay is in the public interest.

I. LabMD IS LIKELY TO SUCCEED ON THE MERITS.

LabMD is likely to succeed on the merits of the claims raised in its Motion to Dismiss Complaint With Prejudice and to Stay Administrative Proceedings (Resp. Mot.), which is incorporated by reference, for the reasons stated therein.

LabMD is likely to succeed on its futility claim because it cannot divorce FTC from its improvident marriage to its patient-information regulatory power-grab or cause FTC to comply with its constitutional and statutory responsibilities. *See Etelson*, 684 F.2d at 925. LabMD is also likely to succeed on its APA claims due to FTC’s failure to promulgate rules and to provide the regulated community with notice and an opportunity to comment on FTC’s newly-discovered Section 5 authority to regulate patient-information data-security as an “unfair” trade practice.

LabMD is also likely to succeed on the merits of its nonstatutory *ultra vires* claims. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). As the Supreme Court has explained:

[A]cts of all [government] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have

jurisdiction to grant relief....*Otherwise, the individual is left to...absolutely uncontrolled and arbitrary action...in violation of the rights of the individual.*

Magnetic Healing v. McAnnulty, 187 U.S. 94, 108, 110 (1902)(emphasis added). Additionally, LabMD is likely to prevail on its claim that FTC has wrongfully retaliated against constitutionally-protected speech. *See Trudeau v. FTC*, 456 F.3d 178, 190-91 nn.22-23 (D.C. Cir. 2006). And, FTC's Rules of Practice are constitutionally infirm. *See In re Murchison*, 349 U.S. 133, 136-37 (1955)("[O]ur system of law has always endeavored to prevent even the probability of unfairness."); *see also Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 590-92 (D.C. Cir. 1970).

II. LabMD WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

A stay is proper here because FTC damages LabMD's business reputation, causing it to lose customer goodwill and market share. *Patriot, Inc. v. HUD*, 963 F. Supp. 1, 5 (D.D.C. 1997)(in a case where the plaintiffs' business reputation was damaged by the agency's characterization of them as "enticing" senior citizens into meetings and "pressuring" them to obtain reverse mortgages "under the guise of sound estate planning," the court found irreparable harm); *Hospital Therapy Serv. v. Shalala*, No. 95-2951, 1997 U.S. Dist. LEXIS 21350, at *27, 30 (N.D. Ga. 1997)(where, as here, the agency "adopted a new construction of an old rule that substantially amends the effect of the previous rule on the public" without notice and comment rule-making and plaintiffs made a "strong showing" that a new agency requirement was "arbitrary and capricious in that, among other things, it is so vague and ambiguous as to defy reasonable efforts to predict how it will or may be applied," the court found irreparable harm because the regulatory action threatened "the very existence of the litigant's business");

Housworth v. Glisson, 485 F. Supp. 29, 35 (N.D. Ga. 1978);² *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991)(“loss of customers and goodwill is an ‘irreparable’ injury”). FTC has hamstrung LabMD’s management’s ability to run the business through the investigative snipe hunt.

Moreover, some of FTC’s actions were apparently designed to chill LabMD’s speech and to send a message to others about the risks of speaking out. And FTC’s failure to provide fair notice or a fair administrative process eviscerated LabMD’s due process rights. This conduct causes irreparable harm. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009)(loss of constitutional freedom for even minimal time “unquestionably” constitutes irreparable injury); *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)(relief against the threatened invasion of a constitutional right does not ordinarily require proof of any other injury).

Finally, without a stay, LabMD will continue to suffer Complaint Counsels’ abusive discovery tactics that apparently are designed to wreck LabMD’s business rather than discover information relevant to the issues in the Complaint. For example, in a three-hour period on October 24, 2013, Complaint Counsel noticed twenty (20) depositions to be taken in various parts of the country, all of which were initially scheduled at the same time on the same day.

² The court said:

In *Berryhill v. Gibson*, a group of optometrists sought to enjoin allegedly unconstitutional administrative proceedings to revoke their licenses. After noting that the revocation would probably not be effective until the plaintiffs had exhausted their rights to seek judicial review, the three-judge district court found that the “inevitable” publicity attendant to the revocation (which, in fact, had not yet taken place when the court ruled) would cause irreparable harm. The same is true in this case except that the revocation has actually occurred and the plaintiffs have proved that the damage is real and not speculative.

Glisson, 485 F. Supp. at 35-36 (citation omitted).

Complaint Counsel also served eleven (11) subpoenas duces tecum and its First Set of Requests for Production and Interrogatories, all at once. Currently, they have noticed depositions of former LabMD employees (one of whom they have already deposed), LabMD's physician customers, police personnel, various IT service providers, individuals who pled no-contest to unauthorized use of personally-identifying information, and many others all over the country: Tennessee, Georgia, Texas, Connecticut, Pennsylvania, California, South Carolina, Florida, Colorado, Idaho, and Washington, D.C. They asked LabMD to somehow identify the percentage of LabMD's referring physicians' patients who are uninsured, who have Medicare or Medicaid, and who have commercial insurance from 2006 to the present. They even asked LabMD to produce *all* financial statements, budgets, operating statements, balance sheets, income statements, profit and loss statements, and the like from 2006 to the present.

Ostensibly, this is a patient-information data-security case involving pre-2010 conduct and standards. Yet Complaint Counsel brazenly subpoenaed drafts of LabMD's CEO's book, all comments on his drafts, all documents related to the source material for drafts of the book, and the like. As the ALJ noted, "the relevance" of these requests to the Complaint's allegations "is not at all apparent" and "the requested materials exceed the scope of permissible discovery." Order on Respondent's Motion for a Protective Order, *In the Matter of LabMD*, Dkt. No. 9357, at 8 (Nov. 22, 2013). Complaint Counsel called this overreach "ordinary, third-party discovery...."³ Response in Opposition to LabMD's Motion to Dismiss Complaint With

³ At a minimum, this is evidence of a constitutionally-unacceptable risk that FTC is retaliating against LabMD for its refusal to sign a consent order and its CEO's criticism in his book, *The Devil Inside the Beltway*. Nothing else explains why FTC would conduct itself this way after its multi-year investigation of LabMD. But, although no court would allow FTC to abuse discovery as it has done here, the game is rigged. Constrained by FTC's Rules of Practice, the ALJ had only limited ability to protect LabMD. In truth, only an Article III court can stop the abuse.

Prejudice and To Stay Administrative Proceedings at 26. Tellingly, Complaint Counsel do not deny that their discovery tactics are banned by Article III courts. *Cf.* Resp. Mot. at 30 n. 23.

II. NO ONE WILL BE INJURED BY A STAY.

A stay of this matter will injure no one at all. Complaint Counsel have admitted⁴ that:

- LabMD’s data-security practices are regulated under the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH). *Cf.* Resp. Mot. at 4.
- The Department of Health and Human Services (HHS), not FTC, exclusively regulates patient-information data-security under these statutes. *See* LabMD’s Mot. to Dismiss 10-14, Nov. 12, 2013.
- LabMD has complied with all relevant HIPAA/HITECH patient-information data-security laws and rules. *Cf.* Resp. Mot. at 4, 8, 13.
- LabMD has not engaged in a “deceptive” trade practice. *Cf.* Resp. Mot. at 1 n.1.
- With the sole exception of LabMD’s alleged but unspecified “unfair” acts or practices under 15 U.S.C. §§ 45(a)(1) and 45(n), LabMD has not violated any data-security statute, rule, or other binding standards with the force of law. *Cf.* Resp. Mot. at 7-8.
- Neither the Complaint nor the notice order prescribe *any* specific data-security practices LabMD *should* or must implement going forward. *Cf.* Resp. Mot. at 8.

Given these facts and admissions, FTC cannot fairly claim that it, or anyone else, is harmed by a stay.

⁴ *See Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 229 (D.D.C. 2009)(“failure to respond to an argument in a Motion to Dismiss acts as a concession”); *accord Fox v. Am. Airlines, Inc.*, 295 F. Supp. 2d 56, 58 (D.D.C. 2003).

III. A STAY IS IN THE PUBLIC INTEREST.

A stay is proper because FTC's compliance with applicable statutory and constitutional limits on its Section 5 jurisdiction, its Rules of Practice, and its enforcement power is in the public interest. *See Gordon v. Holder*, 721 F.3d 638, 652-53 (D.C. Cir. 2013)(government constitutional and statutory violations are always contrary to the public interest); *DynaLantic Corp. v. DOD*, 885 F. Supp. 2d 237, 292 (D.D.C. 2013)(holding that "without question" the public has an interest in ensuring that the government does not violate the Constitution); *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009)(where, as here, an APA claim was made based on the agency's failure to provide notice and comment rulemaking, the court ruled the "public interest is served when administrative agencies comply with their obligations under the APA"); *see also Bayer HealthCare, LLC v. FDA*, No. 13-487, 2013 U.S. Dist. LEXIS 59607, at *22-23 (D.D.C. Apr. 17, 2013)(the "public has an interest in federal agency compliance with its governing statute"); *In re Medicare Reimbursement Litig.*, 309 F. Supp. 2d 89, 99 (D.D.C. 2004)(agency compliance with law is a "compelling public interest"); *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1271-72 (11th Cir. 2006)("[I]t is well established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'").

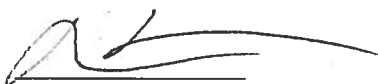
CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Commission GRANT its Motion to Stay Proceedings Pending Review and ORDER that this matter be stayed pending resolution of LabMD's claims by the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the District of Columbia. LabMD further requests that the Commission rule on this Motion by close of business on December 5, 2013.

Respectfully submitted,

/s/ Reed D. Rubinstein

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STATEMENT PURSUANT TO SCHEDULING ORDER

Pursuant to the Additional Provisions set forth in paragraph 4 of the Scheduling Order, Counsel for the moving party, Respondent, LabMD, Inc. (LabMD), hereby certifies that counsel conferred with Complaint Counsel in a good-faith effort to resolve by agreement the issues set forth in LabMD’s Motion to Stay Proceedings in the United States Court of Appeals for the Eleventh Circuit and in the United States District Court for the District of Columbia, but the parties were unable to reach agreement.

Respectfully submitted,

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Dated: November 26, 2013

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

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In the Matter of)	DOCKET NO. 9357
)	
LabMD, Inc.,)	PUBLIC
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_____)	

[PROPOSED] ORDER GRANTING RESPONDENT LabMD, INC.’S MOTION TO STAY PROCEEDINGS PENDING REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

This matter came before the Commission on November 26, 2013, upon a Motion to Stay Proceedings Pending Review in the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the District of Columbia (Motion) filed by Respondent LabMD, Inc. (LabMD) pursuant to Commission Rule 3.22(a), 16 C.F.R. §3.22(a), for an Order staying the proceedings until these Article III courts have had an opportunity to rule on the merits of LabMD’s claims. Having considered LabMD’s Motion and all supporting and opposition papers, and good cause appearing, it is hereby ORDERED that this matter is stayed pending review of this matter by these courts.

ORDERED:

Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright
Commissioners

Date:

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I certify that I delivered via first-class mail twelve paper copies of the foregoing document to the following address: Document Processing Section, Room H-113, Headquarters Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

I also certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Margaret Lassack, Esq.
Ryan Mehm, Esq.
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CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: November 26, 2013

By: /s/ Michael D. Pepson