IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LABMD, INC., **Plaintiff-Appellant,** **v.** **FEDERAL TRADE COMMISSION,** **Defendant-Appellee.**	**No. 14-12144**

OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR STAY PENDING REVIEW AND FOR EXPEDITED BRIEFING SCHEDULE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1-1, Appellee, Federal Trade Commission, certifies that the following individuals and entities, in addition to those listed in Appellant's Motion for Stay Pending Review, have an interest in this case:

Abby C. Wright, U.S. Department of Justice

Mark B. Stern, U.S. Department of Justice

INTRODUCTION AND SUMMARY

Plaintiff, LabMD, asks this Court to enjoin an evidentiary hearing before an Administrative Law Judge ("ALJ") that is scheduled to begin on May 20, 2014, after months of discovery and pretrial proceedings. The hearing will address the Federal Trade Commission's ("FTC") claims that plaintiff—a medical laboratory based in Atlanta—failed to safeguard the security of patient information. LabMD claims that its alleged conduct falls outside the scope of the FTC's regulatory authority and that the administrative complaint should therefore have been dismissed by the agency. It also asserts that it was not on notice of the data protections required to safeguard patient information and that the FTC commenced the administrative action to retaliate for criticism of the agency by LabMD's president.

The district court correctly denied plaintiff's motion for a preliminary injunction and dismissed the complaint for lack of jurisdiction. Order of May 12, 2014 ("Order"). As the court explained, it is black letter law that a court lacks jurisdiction to enjoin ongoing agency proceedings. *See American Gen. Ins. Co. v. FTC*, 496 F.2d 197, 199 (5th Cir. 1974) (affirming dismissal of suit that sought to enjoin an FTC proceeding on the ground that the agency had exceeded its statutory

jurisdiction);[1] Order at 11 (courts to address the issue "have universally [held] that a direct attack on the agency's statutory or constitutional authority to conduct an investigation or commence an enforcement action does not allow a plaintiff to evade administrative review or avoid administrative procedures").

At the conclusion of the evidentiary hearing, the ALJ will determine whether, as a matter of law and fact, plaintiff engaged in "unfair . . . acts or practices," under 15 U.S.C. § 45(a)(1) of the Federal Trade Commission Act ("Section 5"). As the district court noted, "[a]fter the ALJ issues an initial decision, either party may appeal to the Commission for *de novo* review of the ALJ's factual findings and legal conclusions. 5 U.S.C. § 557(b)." The court explained that "[i]f the Commission concludes that the Plaintiff engaged in 'unfair . . . acts or practices,' and enters a cease and desist order, the Plaintiff has a statutory right to 'obtain a review of such order in the court of appeals.' 15 U.S.C. § 45(c)." Order at 4. Plaintiff may not circumvent the process established by Congress by seeking to entangle this Court in premature consideration of questions that are properly addressed on the basis of an administrative record after issuance of a final decision if, in fact, the outcome of the administrative proceedings is adverse to plaintiff.

[1] Decisions of the Fifth Circuit before October 1, 1981, are binding precedent of this Court. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209-1210 (11th Cir.1981) (en banc).

As the district court found, plaintiff also failed to demonstrate the irreparable injury necessary to support issuance of the requested relief. It is established that "the expense and burdens associated with complying with an agency's information requests and submitting to an administrative proceeding do not qualify as legally recognized harms, and do not provide a basis upon which to grant LabMD relief." Order at 14-15 (citing *Imperial Carpet Mills, Inc. v. Consumer Prod. Safety Comm'n*, 634 F.2d 871, 874 (5th Cir. Jan. 1981) (holding that "the burden of defending against the Complaint; the expense of complying with the Commission's anticipated final order; the resulting bad publicity; and the potential for a dangerous loss of credit" do not justify intervention into administrative agency action)).

LabMD seeks a stay because it wishes to forestall an evidentiary hearing regarding allegations that it unjustifiably harmed consumers. Curtailing that inquiry prematurely, as LabMD proposes, would undermine the process established to consider such claims and disserve the public interest. The request for an injunction pending appeal should be denied.

STATEMENT

1. Administrative Proceedings

In January, 2010, the FTC commenced an investigation into plaintiff's data security practices regarding patient information, which eventuated in the filing of an administrative complaint in 2013 that alleges that LabMD may have engaged in "unfair . . . acts or practices," under 15 U.S.C. § 45(a)(1) of the Federal Trade

Commission Act by failing to provide reasonably adequate security for patient information retained on its internal network. *See* Order at 2.

Plaintiff moved the Commission to dismiss the administrative complaint on the theory that the agency lacked statutory authority to address the data security practices of companies to which the Health Insurance Portability and Accountability Act ("HIPAA") applies and that application of the statute to LabMD would violate the Due Process Clause. *Id.* at 3. In January, 2014, the Commission denied the motion. Discovery has concluded and a hearing before an ALJ is scheduled to begin on May 20. *See* Plaintiff's Motion for Stay at 4.

2. Plaintiff's Prior Judicial Actions

In November, 2013, LabMD filed a complaint against the FTC in the District Court for the District of Columbia, seeking to enjoin the administrative proceeding on the grounds that the FTC lacked statutory authority to regulate LabMD's data security practices, that application of the statute to LabMD violated the Due Process Clause, and that the FTC was acting to retaliate against LabMD's president's public criticism of the agency on the internet and in a book published in 2013. *LabMD v. FTC,* No. 1:13-cv-1787 (D.D.C. Nov. 14, 2013) [2]

[2] LabMD's president authored a book entitled *The Devil Inside the Beltway: The Shocking Expose of the US Government's Surveillance and Overreach into Cybersecurity, Medicine and Small Business*, which was not published until years after the FTC initiated its investigation into LabMD. *See* Compl. ¶ 38; Order at 7. As plaintiff's allegations

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While its complaint was pending in the district court, LabMD filed an action in this Court to enjoin the administrative proceedings on the same grounds that it advanced in its district court suit. This Court dismissed *sua sponte,* holding that its jurisdiction did not extend beyond review of a final cease and desist order. The Court stated that it did "not express or imply any opinion about whether a district court has jurisdiction to hear [the plaintiff's] claims or about the merits of those claims." *LabMD Inc. v. FTC,* No. 13-15267-F (11th Cir. Feb. 18, 2014).

Plaintiff chose not to pursue its district court action and voluntarily dismissed its suit in the District of Columbia District Court.

3. The Present Action

A month later, however, plaintiff filed this suit in the Northern District of Georgia, and on March 20, 2014, it moved for a preliminary injunction to restrain the administrative proceedings on the same grounds that it urged in its two previous actions.

On May 15, the court dismissed, holding that it lacked jurisdiction to enjoin the ongoing enforcement proceeding and that plaintiff's claims would be reviewable in this Court at the conclusion of the administrative action. The court rejected plaintiff's attempt to style its suit as a challenge to final agency action under the Administrative Procedures Act. The court explained that the "Commission's denial of LabMD's

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make clear, the FTC did not investigate LabMD in response to its criticisms; LabMD's criticisms responded to the FTC's investigation.

Motion to Dismiss the Administrative Complaint on the grounds that the FTC does not have the statutory authority to regulate data security practices under Section 5 is the type of Order that 'ha[s] long been considered nonfinal.'" Order at 12 (quoting *DRG Funding Corp. v. Secretary of HUD*, 76 F.3d 1212, 1215 (D.C. Cir. 1996)). The court observed that "[t]he Commission's Order is the equivalent of a district court's decision to deny a motion to dismiss, 'which—unlike a final order ending the case—assures its continuation.'" *Id.* The court noted that plaintiff's assertion that the FTC proceeding was outside the agency's authority made no "difference to the finality analysis because the purpose of finality is to prevent piecemeal 'consideration of rulings that may fade into insignificance by the time the initial decisionmaker disassociates itself from the matter.'" *Id.* (quoting *Aluminum Co. of America v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986)).

ARGUMENT

I. The District Court Correctly Held That It Lacked Jurisdiction To Enjoin The Ongoing Administrative Proceedings.

The former Fifth Circuit explained nearly half a century ago that Congress has provided for direct and exclusive review of FTC proceedings in the courts of appeals. "All constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered" at that time, "and this statutory right to review has long been viewed as constituting a speedy and adequate remedy at law." *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967). The Court accordingly affirmed

dismissal of a suit that sought to enjoin an FTC enforcement proceeding under the Clayton Act on the grounds that the Commission was acting outside its authority and in violation of the APA.[3] *See also American Gen. Ins. Co. v. FTC*, 496 F.2d 197, 199 (5th Cir. 1974) (affirming dismissal of action seeking to enjoin FTC proceeding on the ground that the agency was acting outside its authority); *Coca-Cola Co. v. FTC*, 475 F.2d 299 (5th Cir. 1973) (affirming dismissal of suit seeking to enjoin Commission proceedings).

The correctness of these holdings was confirmed by *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994), in which the Supreme Court held that a district court lacked authority to enjoin enforcement proceedings of the Mine Safety and Health Administration. The Court explained that the comprehensive review structure established by the statute, which called for direct review of final action in the court of appeals, "demonstrate[s] that Congress intended to preclude challenges" prior to the completion of agency proceedings. *Id.* at 208. The review scheme created by the Federal Trade Commission Act is comparable in all respects to the scheme at issue in *Thunder Basin.* Like the action in *Thunder Basin,* plaintiff's suit is an "attempt to make an 'end run' around the statutory scheme," and "would allow the plaintiff to short-circuit the administrative review process and the development of a detailed factual

[3] The direct review provision of the Clayton Act, 15 U.S.C. § 21(c), parallels the direct review provision of the Federal Trade Commission Act that governs the present administrative proceedings, 15 U.S.C. § 45(c).

record by the agency." *Great Plains Coop v. CFTC,* 205 F.3d. 353, 355 (8th Cir. 1994) (holding that district court lacked jurisdiction to interfere with ongoing administrative proceedings). As the court in *Great Plains Coop* explained, questions regarding the agency's jurisdiction, like all other issues, are subject to judicial review "only after a final order has been issued . . . and then only by direct review in the appropriate court of appeals." *Id.* at 356.

The Supreme Court in *Thunder Basin* also made clear that constitutional, as well as statutory claims, should be considered on review of final agency action, declaring that "petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals" on review of a final determination. *Id.* at 215. This Court had reached the same conclusion even prior to *Thunder Basin,* holding that the exclusive scheme for review of Federal Aviation Administration orders precluded a *Bivens* action for First Amendment and due process violations. The Court declared that "[w]here Congress has provided in the courts of appeals an exclusive forum for the correction of procedural and substantive administrative errors, a plaintiff may not bypass that forum by suing for damages in district court." *Green v. Brantley*, 981 F.2d 514, 521 (11th Cir. 1993). This Court subsequently applied the holdings of *Thunder Basin* and *Green* in *Doe v. FAA*, 432 F.3d 1259 (11th Cir. 2005), rejecting the plaintiffs' contention that "their allegation of a constitutional violation removes their complaint from the purview of the statutory review scheme[.]" *Id.* at 1263.

Plaintiff makes no attempt to square its arguments with this uniform precedent. Indeed, even prior to *Thunder Basin,* its reliance on the Administrative Procedures Act would have been precluded by *FTC v. Standard Oil*, 449 U.S. 232 (1980), in which the Supreme Court reversed a court of appeals ruling that would have allowed a district court to determine whether the Commission had brought an enforcement proceeding "solely because of outside pressure or with complete absence of a reason to believe determination[.]" *Id.* at 238 (internal quotation marks and citation omitted).[4] The Court noted that "[t]o be sure, the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act," but noted that "the extent to which the respondent may challenge the complaint and its charges proves that the averment of reason to believe" was not "definitive" so as to render it final agency subject to review under the Administrative Procedures Act. *Id.* at 241.

Assertions, such as those offered by plaintiff, that permitting an administrative review process to go forward would be "futile" (Plaintiff's Mot. at 6), do not provide a basis for jurisdiction. Plaintiff's contentions parallel those made in *American Airlines Inc. v. Herman*, 176 F.3d 283 (5th Cir. 1999), where the plaintiff urged that "it would be

[4] The Supreme Court explained that "[t]he gist of Socal's recitation of events preceding the issuance of the complaint is that political pressure for a public explanation of the gasoline shortages of 1973 forced the Commission to issue a complaint against the major oil companies despite insufficient investigation." 449 U.S. at 235.

futile for it to pursue the administrative process because the [agency] already has 'finally and definitively rejected each of American's challenges to its statutory and regulatory authority.'" *Id.* at 292. The court explained, however, that "[t]he requirement that the reviewable order be 'definitive' in its impact on the rights of the parties is something more than a requirement that the order be unambiguous in legal effect. It is a requirement that the order have some substantial effect *which cannot be altered by subsequent administrative action*." *Id.* (quoting *Atlanta Gas Light Co. v. Federal Power Comm'n,* 476 F.2d 142, 147 (5th Cir. 1973) (emphasis in original)). The court further noted that "a 'final decision' is a statutorily specified jurisdictional prerequisite. The requirement is, therefore, . . . something more than simply a codification of the judicially developed doctrine of exhaustion, *and may not be dispensed with merely by a judicial conclusion of futility*." *Id.* (quoting *Weinberger v. Salfi,* 422 U.S. 749, 766 (1975) (emphasis added in *American Airlines*)).

The court in *American Airlines* also rejected the contention, similar to that advanced by plaintiff here, that it recognize district court jurisdiction under *Leedom v. Kyne,* 358 U.S. 184 (1958), which "sanction[s] the use of injunctive powers only in a very narrow situation in which there is a 'plain' violation of an unambiguous and mandatory provision of the statute." 176 F.3d at 293. As the district court noted, "[u]nder the *Leedom* exception, federal courts typically lack jurisdiction to enjoin an ongoing administrative proceeding, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598 (1950), unless the agency commits an 'egregious error' that plainly violates an

unambiguous and mandatory provision of a federal statute, and the aggrieved party has no adequate or meaningful opportunity to vindicate its rights." Order at 18. Citing *American Airlines,* the district court noted that *Leedom* "does not apply to a 'dispute over whether an agency charged with a statute's implementation has interpreted it correctly.'" Order at 18 (quoting 176 F.3d at 293). The district court correctly stated: "That is the crux of the Plaintiff's Complaint in this matter, but it is insufficient to invoke the exception under *Leedom.* LabMD can obtain meaningful and adequate review of its jurisdictional challenge in the Court of Appeals, if that is necessary." *Id.*

In sum, plaintiff's statutory and constitutional claims can be considered on review of a final cease and desist order, should one be issued by the Commission. Plaintiff's present challenge is foreclosed by Supreme Court and Circuit precedent.

II. Plaintiff Has Demonstrated No Cognizable Injury That Would Support An Injunction, Which Would Undermine the Effective Operation of the Statutory Review Scheme.

Because plaintiff has demonstrated no possibility of success on appeal, it is unnecessary to weigh the balance of harms. Moreover, as the Fifth Circuit observed in *Imperial Carpet Mills, Inc. v. Consumer Prod. Safety Comm'n*, 634 F.2d 871, 874 (5th Cir. Jan. 1981), where the district court lacks authority to enjoin an agency enforcement proceeding, it is unnecessary "to consider the harm to plaintiffs in the absence of immediate judicial relief." In any event, as the district court concluded, plaintiff has identified no injury that would justify the extraordinary remedy of an injunction

pending appeal. Order at 14-15 (recognizing that plaintiff's asserted harms—shutting down operations, laying off employees, and being unable to procure insurance—"do not provide a basis upon which to grant LabMD relief"). The Supreme Court in *FTC v. Standard Oil* explained that "the expense and annoyance of litigation is part of the social burden of living under government" and "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." 449 U.S. at 244 (internal quotation marks and citations omitted). And as this Court's predecessor determined, "the harm asserted would seem to be nothing more than would accrue to any defendant to administrative action: the burden of defending against the complaint; the expense of complying with the Commission's anticipated final order; the resulting bad publicity; and the potential for a dangerous loss of credit."

An injunction would, moreover, seriously disserve the public interest by disrupting an evidentiary proceeding on the eve of its commencement and interfering with the process of fact-gathering and review plainly set forth in the governing statute.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's motion for an injunction pending appeal.

Respectfully submitted,

s/ Abby C. Wright

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MAY 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright
ABBY C. WRIGHT