ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-15267-F

LabMD, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of *In the Matter of LabMD, Inc.*, F.T.C. Docket No. 9357

PETITIONER'S RESPONSE TO JURISDICTIONAL QUESTIONS

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Dated: December 30, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LabMD, INC.,	)	
Petitioner,	)	
v.	)	No. 13-15267-F
FEDERAL TRADE COMMISSION,	)	
Respondent.	)	

PETITIONER'S AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Circuit Rule 26.1-1, I, the undersigned counsel of record for LabMD, Inc. (LabMD), certify that LabMD is not publicly held, has no parent corporation, subsidiary, conglomerate, or affiliate, and no publicly-held corporation owns 10% of more of its stock. I further certify that to the best of my knowledge the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal:

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Brown, Jarad

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Dated: December 30, 2013

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LabMD, INC., Petitioner,	)	
v.	)	Case No. 13-15267-F
FEDERAL TRADE COMMISSION, Respondent.	)	

PETITIONER'S RESPONSE TO JURISDICTIONAL QUESTIONS

QUESTIONS PRESENTED

(1) Does the complaint and proposed order by the Federal Trade Commission ("FTC" or "Commission") attached to the instant petition for review constitute an order reviewable by this Court under 15 U.S.C. § 45(c)?

(2) Was the petition for review timely filed within 60 days of the order?

SUMMARY

(1) Yes. However, this Court now has jurisdiction over Petitioner LabMD's ("LabMD") Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, non-statutory *ultra vires*, and constitutional claims even if FTC has not served LabMD with a reviewable 15 U.S.C. § 45(c) order.

(2) Yes. However, this Court has jurisdiction regardless. Judicial review of non-statutory *ultra vires* and constitutional claims is not cabined by 15

U.S.C. § 45(c)'s time limits. Also, controlling authorities hold that general times for filing a petition for review, such as 15 U.S.C. § 45(c)'s sixty-day time, are non-jurisdictional and do not bar courthouse doors.

BACKGROUND

FTC has assaulted LabMD for alleged patient-information data-security failings, charging it with "unfair" trade practices notwithstanding FTC's admissions that LabMD complied with all Department of Health and Human Services ("HHS") patient-information data-security regulations and that FTC could not identify an actual consumer victimized by LabMD's alleged unfairness.[1]

[1] FTC's complaint against LabMD alleges "potential exposure" of "confidential" consumer data including "names, dates of birth, Social Security numbers, codes for lab tests conducted, health insurance company names, addresses, and policy numbers…." *See* FTC Opposition to Motions to Quash at 2 (Dec. 18, 2013) (Stay Motion, Ex. 31).

All of this information was voluntarily given to LabMD by its doctor-customers and their patients. The Department of Justice says that when a person voluntarily conveys information to a third party she forfeits her right to privacy therein. *See* Def's' Mem. of Law in Support of Mot. to Dismiss Compl., *ACLU et al. v. Clapper et al.* Case No. 13 Civ. 3994 (WHP), Dkt. 33, at 32 -34 (citations omitted). The Supreme Court agrees. *Smith v. Maryland*, 442 U.S. 735, 742, 744 (1979); Mem. Opinion and Order, *ACLU, et al. v. Clapper, et al.,* Case No. 13 Civ. 3994 (WHP), at 42-44 (Dec. 27, 2013) (citations omitted) ("Mem. Ord.").

FTC is therefore bound to the conclusion that the business records purloined by Tiversa, Inc. and FTC, and used to justify FTC's action in this case, belong to LabMD and no one else. Mem. Ord. at 42 ("[T]he business records created by Verizon are not 'Plaintiff's call records.' Those records are created and maintained by the telecommunications provider….that distinction is critical because when a person voluntarily conveys information to a third party, he forfeits his right to privacy in the information."). This means FTC has devoted

See Petitioner's Motion for Stay Pending Review, Dkt. 9 (Dec. 23, 2013) ("Stay Motion") at 2, 17-18, 20 & Ex. 8 at 22:10-13, 33:3-5. FTC justifies this by claiming an ethereal, unbounded power to create a "common law" of patient-information data-security through random Internet postings and consent orders. *See* Stay Motion at 18 & n.27 & Ex. 3 at 16-22; Ex. 8 at 9:13-10:16; Ex. 2 at 22-27; Ex. 4 at 11-18.

Proving that administrative process is the punishment when federal bureaucrats wrongfully grab for power, FTC's abusive, multi-year campaign of investigation and litigation against LabMD, its employees, and its customers has destroyed the company's reputation and its business. *See* Stay Motion at 7-8 &

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three years of legal process and countless hundreds of thousands of taxpayer dollars to ruin a small cancer-detection laboratory for its alleged failure to "properly" handle its own property based on "standards" specified for the first time in an administrative complaint filed years after the fact.

FTC does not allege that LabMD engaged in a "deceptive" trade practice. FTC's Section 5 "unfairness" authority does not explicitly authorize FTC to regulate patient-information data-security (or any other data-security, for that matter). Rather, Congress directed HHS to regulate patient-information data-security, and LabMD has complied with HHS's rules throughout. Nevertheless, FTC has over-filed to impose a fabricated "common law" patient-information data-security scheme on LabMD and, by extension, on all other HHS-regulated HIPAA-covered entities. *See* Stay Motion, Ex. 3 at 4-5. This abuse of power should not stand.

n.13, 19. Therefore, on December 23, 2013, LabMD filed a Motion for Stay Pending Review, Dkt. No. 9, which is incorporated by reference.[2]

ARGUMENT

I. THE COURT NOW HAS JURISDICTION TO REVIEW FTC'S COMPLAINT AND NOTICE ORDER UNDER 15 U.S.C. § 45(c) AND LabMD's APA, ULTRA VIRES, AND FAIR NOTICE CLAIMS.

LabMD seeks "review of the Federal Trade Commission's on-going proceeding known as FTC Docket No. 9357," because it challenges FTC's statutory authority to regulate patient-information data-security practices and refusal to provide LabMD and other medical providers with constitutionally adequate notice of the patient-information data-security practices it believes Section 5 to forbid or require through APA rules.

LabMD's principal place of business is in the State of Georgia. Stay Motion, Ex. 1, ¶ 1; Ex. 5, ¶ 28. Therefore, this Court has jurisdiction over LabMD's APA, non-statutory *ultra vires*, and constitutional due process fair notice claims. *See* 15 U.S.C. § 45(c) (any person "required" by an FTC order to cease and desist may obtain review in the court of appeals within any circuit where she resides); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1420 (11th Cir. 1993) (where a statute commits review of agency action to the courts of appeal, courts of appeal are exclusively vested with jurisdiction to hear and decide

[2] This Court's jurisdictional questions are also addressed on pages 10-13 of the Stay Motion.

any challenge "that might affect the Circuit Court's future jurisdiction" (citing *Telecommunications Research & Action Center v. FCC ("TRAC")*, 750 F.2d 70, 75 (D.C.Cir. 1984)); *accord Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 549-51 (D.C. Cir. 1992) (jurisdictional challenge, APA, non-statutory *ultra vires*, and constitutional claims that could otherwise be brought in a federal district court must instead be heard by the court of appeals).

A. The Complaint And Notice Order Are Reviewable By This Court Under 15 U.S.C. § 45(c).

FTC's complaint and notice order are reviewable by this Court under 15 U.S.C. § 45(c), because they are "final agency actions" under 5 U.S.C. § 704 and thus reviewable under the APA.[3]

The empirical evidence is that FTC has prevailed in every case that it has voted out for administrative adjudication and that has been tried by an administrative law judge ("ALJ") *in the past nearly twenty years*. "[I]n 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed."[4] This is unsurprising given the combination of FTC's

[3] *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980), ruled an administrative complaint is an APA "agency action." FTC's complaint and notice order to LabMD are "final" agency action for the reasons discussed *infra.*

[4] Wright, "Recalibrating Section 5: A Response to the CPI Symposium," at 4, CPI Antitrust Symposium (November 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/recalibrating-

administrative process advantages and the vague nature of its Section 5 authority.[5]

See Stay Motion at 9 & nn. 14-15, 17-19 & Ex. 27 at 34; Ex. 28. And, the toxic

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section-5-response-cpi-symposium/1311section5.pdf (accessed December 29, 2013) (emphasis added) (attached as Ex. 9 to Stay Motion). FTC Commissioner Wright says:

> The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges ("ALJs") in the past nearly twenty years. In each of those cases, after the administrative decision was appealed to the Commission, the Commission ruled in favor of FTC staff. In other words, in 100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed. By way of contrast, when the antitrust decisions of federal district court judges are appealed to the federal courts of appeal, plaintiffs do not come anywhere close to a 100 percent success rate. Indeed, the win rate is much closer to 50 percent.

Id. Commissioner Wright also says:

> There are a number of hypotheses one might suggest to explain this disparity, but the leading two possibilities are (1) Commission expertise over private plaintiffs in picking winning cases and/or (2) institutional and procedural advantages for the Commission in administrative adjudication that are fundamentally different than what private plaintiffs face in federal court.

Id. However, given that Commissioner Wright's data shows FTC is reversed by courts of appeal at four times the rate of federal district judges, he concludes that the "relatively harsh treatment Commission decisions have endured in federal courts of appeal over the same time period relative to the treatment federal district courts have received gives at least some pause to the expertise hypothesis." *Id.*, *citing* Joshua D. Wright & Angela Diveley, "Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission," J. OF ANTITRUST ENFORCEMENT 16 (Dec. 2012).

[5] On December 16, 2013, Commissioner Wright said:

> Gap between Section 5 in theory and practice stems in part from the vague and ambiguous nature of the FTC's authority under the statute[.] Section 5 today is as broad or as narrow as a majority of

brew of unbalanced process and vague, undefined authority gives FTC unduly broad power. As Commissioner Wright recently told Congress, "firms typically prefer to settle Section 5 claims rather than go through the lengthy and costly administrative litigation in which they are both shooting at a moving target and may have the chips stacked against them."[6]

The complaint and notice order thus effectively "mark the consummation of the agency's decision-making process" and constitute an "agency decision by which rights or obligations have been determined or from which legal consequences will flow." *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1181 (11th Cir. 2011) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)); *see* Stay Motion at 2-3, 9, 11-12 & Ex. 9 at 4; Ex. 10 at 3 & n.15; Ex. 11 at 3 & n.15; Ex. 17 at 10-13; Ex. 18; Ex. 28; Ex. 26; Ex. 27 at 23, 34, 68; Ex. 30.

> Commissioners believes it is[.]Businesses cannot distinguish lawful conduct from unlawful conduct without guidance[.]…Uncertainty surrounding scope of Section 5 is exacerbated by the administrative process advantages available to the FTC[.]

Joshua Wright, "The Need For Limits On Agency Discretion & The Case For Section 5 Guidelines," at 4, 7, 10 (Dec. 16, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/need-limits-agency-discretion-case-section-5-guidelines/131216section5_wright.pdf (accessed Dec. 30, 2013).

[6] Preliminary Transcript, "The FTC at 100: Where Do We Go From Here?," House of Representatives, Subcommittee on Commerce, Manufacturing, and Trade, Committee on Energy and Commerce, at 34 (Dec. 3, 2013), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Preliminary-Transcript-CMT-FTC-at-100-2013-12-3.pdf (accessed Dec. 16, 2013) (excerpt attached as Ex. 27 to Stay Motion).

Therefore, they are reviewable by this Court under 15 U.S.C. § 45(c) and the APA. *See, e.g.*, *Athlone Ind. v. CPSC*, 707 F.2d 1485, 1487-88 (D.C. Cir. 1983) (reviewing administrative complaint under APA as "final agency action"); *see Bennett*, 520 U.S. at 177-78; *CSI Aviation Servs. v. DOT*, 637 F.3d 408, 411-14 (D.C. Cir. 2011) (distinguishing *FTC v. Standard Oil Co.*).

B. The Court Has Jurisdiction Even If The Complaint And Notice Order Are Not Reviewable Under 15 U.S.C. § 45(c).

This Court has jurisdiction over the LabMD's APA, non-statutory *ultra vires* and constitutional claims, and over the Commission's December 16, 2013, Order Denying Respondent LabMD's Motions for Stay (Stay Denial Order), now, even if the complaint and notice order are not reviewable under 15 U.S.C. § 45(c).[7] *Kabeller*, 999 F.2d at 1420; *Trudeau v. FTC*, 456 F.3d 178, 189-191 (D.C. Cir. 2006) (holding jurisdiction over *ultra vires* and constitutional claims exists without "final agency action"); *North Carolina v. Federal Power Com.,* 393 F. Supp. 1116, 1124 (MDNC 1975). As *Trudeau* held:

[7] Although "final agency action" is a prerequisite to a successful cause of action under the APA, the presence or absence of a "final agency action" has no bearing on resolution of the merits of LabMD's non-statutory *ultra vires* and constitutional claims and literally no effect on this Court's jurisdiction to adjudicate those claims. *See, e.g., Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1240-41 (11th Cir. 2003) (reaching merits of appellants' constitutional claim, notwithstanding lack of "final agency action"); *Sierra Club & Valley Watch, Inc. v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011) (explaining why "final agency action" is not jurisdictional requirement).

> [I]f a plaintiff is unable to bring his case predicated on either a specific or general statutory review provision, he may still be able to institute a non-statutory review action. Because [j]udicial review is favored when an agency is charged with acting beyond its authority, [e]ven where Congress is understood generally to have precluded review, the Supreme Court has found an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction. *Pursuant to this case law, judicial review is available when an agency acts ultra vires, even if a statutory cause of action is lacking.*

Id. at 189-90 (internal quotation marks omitted and emphasis added (citing *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996); *Dart v. U.S.*, 848 F.2d 217, 221 (D.C. Cir. 1988); *Griffith v. FLRA*, 842 F.2d 487, 492 (D.C. Cir. 1988); *Aid Ass'n for Lutherans v. USPA*, 321 F.3d 1166, 1173 (D.C. Cir. 2003)); *accord Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108, 110 (1902); *Leedom v. Kyne*, 358 U.S. 184, 188 (1958); *see also* Stay Motion at 12-13. *Cf. Florida Bd. of Bus. Reg. Dep't of Bus. Reg. v. NLRB*, 686 F.2d 1362, 1368-70 (11th Cir. 1982) (subject-matter jurisdiction found based on less egregious facts).[8]

[8] Notably, FTC's Stay Denial Order does not distinguish (or mention) *Trudeau*, though it is a controlling authority cited repeatedly by LabMD. Instead, FTC cites inapposite dicta from *Nat'l Parks Conservation Ass'n*, 324 F.3d at 1240, for the proposition that "the 'final agency action' requirement implicates federal subject matter jurisdiction." Order at 5. But the *very next page* of that decision makes clear that the presence *vel non* of "final agency action" has no effect on subject-matter jurisdiction to adjudicate constitutional and non-statutory claims. *See Nat'l Parks Conservation Ass'n*, 324 F.3d at 1240-41; *accord Trudeau*, 456 F.3d at 189-91. Thus, regardless of whether this Court accepts LabMD's arguments that FTC's complaint, notice order, and Stay Denial Order are "final agency actions" under 5 U.S.C. § 704 or whether an applicable exception to the "final agency action" requirement applies (at most a jurisdictional requirement for APA review under 5 U.S.C. §§ 701-06), this Court retains

5 U.S.C. § 702 waives FTC's sovereign immunity regardless of the presence *vel non* of a "final agency action." *See Trudeau*, 456 F.3d at 187 (holding § 702's waiver of sovereign immunity permits not only APA causes of action, but non-statutory *ultra vires* and [constitutional] actions as well and "that the waiver applies regardless of whether the FTC's … [action] constitutes 'final agency action'"). The APA is not a jurisdictional statute.[9] *See Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Cohen v. United States*, 650 F.3d 717, 721 (D.C. Cir. 2011). Instead, "what its judicial review provisions, 5 U.S.C. §§ 701-06, do provide is a limited cause of action for parties adversely affected by agency action." *Trudeau*, 456 F.3d at 185. Thus, regardless of whether LabMD has an APA cause of action now (though they are ripe for review now, as explained below), this Court has jurisdiction.[10] *Id.* at 187.

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jurisdiction to review LabMD's non-statutory *ultra vires* and constitutional claims regardless.

[9] Thus, 5 U.S.C. § 704's general "final agency action" requirement for a successful APA cause of action has no jurisdictional effect, *see Sierra Club & Valley Watch*, 648 F.3d at 854, particularly in light of recent Supreme Court precedent clarifying that, absent a clear statement from Congress that a statutory provision is jurisdictional, it is not. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514-16 (2006).

[10] Here, there are at least two relevant jurisdiction-conferring statutes: 15 U.S.C. § 45(c) and 28 U.S.C. § 1331 (Section 1331). Section 1331 generally vests district courts with jurisdiction to adjudicate APA, non-statutory *ultra vires* and constitutional challenges to agency action. But under this Court's precedent, because 15 U.S.C. § 45(c) vests exclusive jurisdiction to review FTC's cease and desist orders in courts of appeal, this Court has jurisdiction to adjudicate all

FTC says no federal court has jurisdiction over this matter and that its three-year assault on LabMD cannot be stopped because "neither the District Court nor the Court of Appeals has jurisdiction to entertain LabMD's … challenge to this adjudicatory proceeding." Stay Denial Order at 4. FTC, however, does not have the power to do whatever it wants to LabMD.

To begin with, there is a "strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *see also Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 n.4 (1986) (holding that a "right of action" is "expressly created" by § 704 of the APA "absent some clear and convincing evidence of legislative intention to preclude review"). Precluding judicial review requires clear and convincing evidence that Congress intended to dislodge this presumption. *Kucana v. Holder*, 130 S. Ct. 827, 839 (2010). Moreover, it is the agency's "heavy burden" to prove judicial review is unavailable, *Bowen*, 476 U.S. at 671-72, *not* LabMD's.

Neither Section 5's plain language nor its legislative history show Congress intended to prevent judicial review of *ultra vires* and unconstitutional FTC administrative enforcement action. *See Barlow v. Collins*, 397 U.S. 159, 165

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related claims that could otherwise be properly brought in a district court under Section 1331. *Trudeau*, 456 F.3d at 187. Thus, this Court has jurisdiction over LabMD's APA, nonstatutory *ultra vires*, and constitutional fair notice claims.

(1970) (APA "allows judicial review of agency action except where '(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.'"). In fact, it is well settled that FTC administrative actions are subject to judicial review before a final cease and desist order. *See, e.g., Borden, Inc. v. FTC,* 495 F.2d 785, 786-87, 789 (7th Cir. 1974) (review available where agency clearly violates right *or* issue involved is a strictly legal and does not require fact-finding; affirming dismissal for failure to exhaust, not lack of jurisdiction). FTC's over-reaching claim that no court ever has the authority to protect LabMD until after the rigged administrative process is complete should fail.

FTC has repeatedly rejected LabMD's jurisdictional and constitutional arguments, in this matter and elsewhere.[11] *See* Stay Motion Ex. 1 (unanimous

[11] FTC may cite *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261 (9th Cir. 1990), and argue that because it expressly declined to reach the merits of LabMD's jurisdictional and due process arguments in denying LabMD's Motion for a Stay Pending Judicial Review, Stay Motion, Ex. 6, it has yet to express a definitive legal position here and thus there is no "final agency action." However, *Ukiah Valley* is no longer good law and factually distinguishable.

First, *Ukiah Valley* was decided pre-*Arbaugh v. Y & H Corp*., 546 U.S. 500, 514-16 (2006). In *Arbaugh* the Supreme Court clarified the difference between jurisdiction and proof of the elements needed to sustain a claim for relief, and *Ukiah Valley* fails an *Arbaugh* analysis.

Second, the *Ukiah Valley* plaintiff raised only APA claims, and the case was decided after the ALJ granted plaintiff's motion to dismiss for lack of jurisdiction during the pendency of case. Here, LabMD has raised APA, non-statutory *ultra vires*, and constitutional fair notice claims. And, under FTC's current Rules of Practice, the ALJ lacks authority to decide any dispositive motions. 16 C.F.R. § 3.22(a). In fact, the Commission has already rejected

decision); Ex. 3 at 12 & n.9; Ex. 5, ¶¶ 72-74, 98-100,110-12, 132-36; Ex. 17 at 10-13; Ex. 18; Ex. 26; Ex. 27 at 23, 68. These arguments raise "purely legal" issues of law and statutory interpretation and no additional "fact-finding" is required. *See* Stay Motion at 13-18; Ex. 2 at 9-28; Ex. 4 at 1-18. Consequently, judicial review now is appropriate. No more agency game-playing should be tolerated.

Finally, FTC's Stay Denial Order, too, is reviewable now. *North Carolina,* 393 F. Supp. at 1124 (an order denying a motion for stay rejecting a statutory contention was "a final order denying relief" authorizing appeal to the court of appeals).

C. Exhaustion Should Not Shield FTC From Review.

FTC may hold up the exhaustion doctrine to shield itself from judicial review. But this Court holds that as a general matter exhaustion of administrative remedies requirement is not jurisdictional. *TVA v. United States EPA,* 278 F.3d 1184, 1202 (11th Cir. 2002); *N.B. by D.G. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). This is consistent with Supreme Court cases holding

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LabMD's specific arguments in this case, Stay Motion, Ex. 17 at 10-13; Ex. 18, and another case, *see* Ex. 26, and brought at least eighteen other such cases resulting in consent orders, Ex. 3 at 12 & n.9. Plainly, FTC's mind is made up.

Third, *Ukiah Valley* was decided in 1990, more than twenty years ago. As Commissioner Wright's evidence of predetermination demonstrates, FTC is a very different place today than it was then. Stay Motion, Ex. 9 at 4. In any event, FTC plans to rule on the merits of LabMD's jurisdictional and due process arguments in about two weeks, on or about January 16, 2013. *See* Stay Motion, Ex. 7 at 2.

exhaustion is prudential, not jurisdictional, absent express statutory language to the contrary. *See, e.g., Nev. v. Hicks*, 121 S. Ct. 2304, 2315 (2001); *Sims v. Apfel*, 530 U.S. 103, 106 n.1 (2000) (court-imposed exhaustion requirement not jurisdictional). 15 U.S.C. § 45(c) does not mandate exhaustion. Thus, the mere fact that LabMD has not exhausted FTC's inadequate and rigged administrative remedies does not foreclose judicial review.

Courts should of course take care not to inject themselves into fact-bound agency proceedings that have yet to produce any definitive legal conclusions. *See CSI Aviation Servs.*, 637 F.3d at 414. And, courts generally will not entertain a claim unless the unexhausted remedies are inadequate or futile. *See Alchua County*, 84 F.3d at 1379. But this is not a case of fact-bound agency proceedings without legal conclusions. And, the evidence of inadequacy and futility is overwhelming.

To begin with, FTC has repeatedly taken "a definitive legal position" that it has jurisdiction to regulate LabMD's patient-information data-security and the constitutional authority to do so through consent orders and adjudications without pre-existing standards or APA rules. *See* Stay Motion at 18 & n.27 & Ex. 3 at 12 & n.9; Ex. 17 at 10-13; Ex. 18; Ex. 26; Ex. 27 at 23, 68. These are legal matters that require no fact-finding at all. *See* Stay Motion at 13-19 & Ex. 2; Ex. 4.

Furthermore, FTC has "imposed a substantial burden on" LabMD.[12] *See* Stay Motion at 7-8, 19. Consequently, "the disputed statutory authority underlying the order is fully fit for judicial review without further factual development."[13] *CSI Aviation Servs.* 637 F.3d at 414; Stay Motion at 7-8 & n.13, 19 (detailing substantial burdens FTC has imposed on LabMD).

[12] The Supreme Court has recognized the burdensome nature of administrative litigation before the FTC. *See Standard Oil Co.*, 449 U.S. at 247 n. 14 ("The adjudicatory proceedings which follow the issuance of a complaint may last for months or years. They result in substantial expense to the respondent and may divert management personnel from their administrative and productive duties to the corporation. Without a well-grounded reason to believe that unlawful conduct has occurred, the Commission does not serve the public interest by subjecting business enterprises to these burdens"). Mere litigation expense alone is not irreparable harm, but what FTC has done to LabMD, causing loss of good will, ruining LabMD's reputation, and chilling constitutionally protected speech certainly is.

[13] FTC may try to hide under *Standard Oil Co.'s* veil. This case, however, was a fact-specific evidentiary-sufficiency-type challenge to a Commission complaint. *See* 449 U.S. at 235-36. In *Standard Oil*, FTC had not stated a definitive legal position, the petitioner did not raise purely legal claims, and FTC's actions imposed no draconian hardships. Here, however, FTC has repeatedly stated definitive legal and factual conclusions (specifically, that it has Section 5 unfairness jurisdiction over patient-information data-security and that LabMD failed to properly secure patient-information), LabMD's petition for review raises purely legal claims, and LabMD is suffering grievous harm. *See CSI Aviation Servs.*, 637 F.3d at 413-14. Furthermore, FTC's current adjudicative practices bear only a passing resemblance to the more rigorous, objective ,and fair 1970s-era practices and procedures. *See, e.g.,* 16 C.F.R. § 3.22(a); *see* Stay Motion, Ex. 8 at 7:7-18; Ex. 9 at 4; Ex. 28. Indeed, Commissioner Wright's empirical evidence demonstrates that *for nearly two decades* issuance of a complaint has been tantamount to a conclusive determination of Section 5 liability. *See* Stay Motion, Ex. 9 at 4. Thus, *Standard Oil* covers FTC not at all.

Also, only those administrative remedies providing a genuine opportunity for adequate relief need be exhausted. *See Alachua County*, 84 F.3d at 1379; *accord Athlone Indus.*, 707 F.2d at 1488-90. The empirical data demonstrates FTC's administrative process is an exercise in futility and so FTC denies LabMD (and all others similarly situated) a genuine opportunity for adequate relief. *See supra* at fn. 2. Therefore, exhaustion should not bar judicial review here.[14]

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[14]A D.C. Circuit case cited by FTC in its stay denial Order demonstrates why this Court has jurisdiction over this case now:

> [T]he doctrine of exhaustion is a flexible one. … [T]he exhaustion requirement is generally not jurisdictional in nature, but rather must be applied in accord with its purposes. … [I]n the numerous … cases applying the exhaustion doctrine to challenges to agency authority, the courts have identified two exceptions to the general rule of exhaustion. The first exception, derived from the Supreme Court's decision in *Leedom v. Kyne*, permits immediate judicial review of a challenge to agency authority where the agency's assertion of jurisdiction would violate a clear right of a petitioner by disregarding a specific and unambiguous statutory, regulatory, or constitutional directive. The second exception permits immediate judicial review where postponement of review would cause the plaintiff irreparable injury.

Ticor Title Ins. Co. v. FTC, 814 F.2d 731, 738-40 (D.C. Cir. 1987)(citations and internal quotation marks omitted). Both exceptions—disregard of a specific and unambiguous statutory, regulatory, or constitutional directive and irreparable injury—are present here. *See* Stay Motion at 18-19 & Ex. 2; Ex.4. 15 U.S.C. § 45(n) unambiguously mandates that FTC "shall have no [unfairness] authority" under these circumstances and that "public policy considerations may not serve as a primary basis" for an "unfairness" action, which is the case here. Also, even though 15 U.S.C. § 45(m)(1)(B) statutorily bars FTC from enforcing consent orders against third parties, *Good v. Altria Group, Inc.*, 501 F.3d 29, 53 (1st Cir. 2007) (Section 5 "specifically provides" that FTC "cannot enforce … [consent orders] against non-parties"), it has done so here.

II. THE PETITION FOR REVIEW WAS TIMELY.

LabMD's Petition for Review of FTC's complaint and notice order was timely filed.

First, the complaint and notice order are "final" for judicial review purposes because it is a statistical certainty LabMD will lose to FTC. *See supra* note 4; Stay Motion, Ex. 10 at 3 & n.15, Ex. 11 at 3 & n.15. But 15 U.S.C. § 45(c) sets the time for petition filing within sixty days of the date that a respondent is required by an order to cease and desist from a given practice, and FTC has specified no such date. Therefore, LabMD's Petition is timely filed.[15]

Second, nothing in Section 5 suggests that the mere fact that LabMD's Petition was filed more than sixty days after FTC voted out the complaint and notice order divests this Court of jurisdiction in any respect.[16] *Cf. Monia v. FAA*,

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[15] Equitable tolling principles also hold that the Petition is timely filed. *See Justice v. United States*, 6 F.3d 1474, 1479-1480 (11th Cir. 1993). For example, LabMD's Petition was undoubtedly filed within sixty days of Commissioner Brill's October, 2013, speech demonstrating that FTC has prejudged this matter, Stay Motion, Ex. 11 at 3 & n.15, and Commissioner Wright's November, 2013, empirical evidence of predetermination *See* Stay Motion at 2-3. Both of these data points confirm the futility of exhaustion and LabMD could not have known about or discovered either until October, 2013 at the earliest. Also, LabMD initially filed a Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the District of Columbia, Stay Motion, Ex. 5, which independently warrants equitable tolling. *See Justice*, 6 F.3d at 1479-80.

[16] The rule is that general language setting a time for filing a petition does not limit jurisdiction or bar the courthouse doors. *See Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011); *see also Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 518-19 (D.C. Cir. 2011) (filing deadlines, statutory or not, are generally non-

641 F.3d 515 (D.C. Cir. 2011) (holding that statute providing a petition "must be filed not later than 60 days after the order is issued" was non-jurisdictional due to lack of clear statement from Congress ranking this requirement as jurisdictional).

Third, LabMD need not even have filed a petition for review to trigger the Court's jurisdiction over FTC's ultra vires and unconstitutional actions. *Ukiah Adventist,* 981 F.2d at 549; *TRAC*, 750 F.2d at 70; *Kabeller*, 999 F.2d at 1419-21 (adopting *TRAC*). In *Ukiah Adventist*, plaintiff challenged FTC's jurisdiction in a federal district court. The action was transferred to the U.S. Court of Appeal for

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jurisdictional). As the Supreme Court explained in *Henderson*, a rule is not jurisdictional unless it governs a court's subject-matter or personal jurisdiction. 131 S. Ct. at 1202-03 (citations omitted).

42 U.S.C. § 45(c) provides:

> Any person…required by an order of the Commission to cease and desist from…any… act or practice may obtain a review of such order in the court of appeals of the United States …by filing in the court, within sixty days from the date of the service of such order, a written petition.…Upon such filing of the petition the court shall have jurisdiction….

Section 5 does not explicitly condition jurisdiction on a sixty-day filing nor does it specify any consequence for noncompliance with this deadline. Rather, it conditions jurisdiction only on the filing of a petition. Therefore, the sixty-day time is non-jurisdictional. *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010) (where a statute does not specify a consequence for non-compliance with its timing provisions federal courts will not in the ordinary course impose their own coercive sanction); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-44 (2010)(discussing clear-statement requirement for jurisdictional limitations). On the facts of this case, it would be absurd to hold Section 5 therefore deprives this Court of the authority to protect LabMD from FTC's *ultra vires* and unconstitutional actions, even if the Petition for Review of the complaint and notice order was untimely.

the Ninth Circuit. Plaintiff appealed but the D.C. Circuit court affirmed, holding that a jurisdictional challenge to an ongoing FTC proceeding was within the "class of claims" exclusively vested in the courts of appeals.[17] *Ukiah Adventist,* 981 F.2d at 550. As the court explained:

> Since the Ninth Circuit court of appeals has exclusive prospective jurisdiction over the FTC proceeding, it is the only court of appeals, under *TRAC*, that may review Ukiah's challenge to the FTC's jurisdiction in an ongoing agency proceeding.

Id. (citations omitted). Therefore, this Court has jurisdiction over LabMD's APA, *ultra vires*, and constitutional fair notice claims.

[17] The same proposition holds true with respect to *most* constitutional challenges to agency action, such as LabMD's fair-notice due process claim. *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 965 (D.C. Cir. 1996). However, the District Court has jurisdiction over LabMD's claim that FTC's Rules of Practice structurally and facially offend due process. *See Free Enterprise Fund v.PCAOB*, 537 F.3d 667, 671 (D.C. Cir. 2008), overruled on other grounds.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over this case now and should grant LabMD's Motion for Stay Pending Review and set a briefing schedule.

Respectfully submitted,

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Dated: December 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 2013, the foregoing Response to Jurisdictional Questions was filed in the Eleventh Circuit Court of Appeals using the CM/ECF system. I further certify that electronic copies of the foregoing Response to Jurisdictional Questions were served via the CM/ECF system to:

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