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 LabMD, INC.'S MOTION FOR STAY PENDING REVIEW

Reed D. Rubinstein, Partner
D.C. Bar No. 440153
Dinsmore & Shohl, L.L.P. 1919
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Telephone: 202.372.9120
Fax: 202.372.9141
reed.rubinstein@dinsmore.com

Michael D. Pepson
Cause of Action
Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842
michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and proceedings before federal agencies.

COUNSEL FOR PETITIONER LabMD, INC.

Dated: December 23, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

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:

Brill, Commissioner Julie

Brown, Jarad

Cause of Action Institute

Chappell, Hon. D. Michael

Cox, Megan

Daly, John

Daugherty, Michael J.

Dinsmore & Shohl, LLP

Epstein, Daniel

Federal Trade Commission

Harris, Lorinda

Holder, United States Attorney General Eric

Kollar-Kotelly, Hon. Colleen

Krebs, John

Lassack, Margaret

Mehm, Ryan

Morgan, Hallee

Ohlhausen, Commissioner Maureen K.

Pepson, Michael D.

Ramirez, Chairwoman and Commissioner Edith

Rubenstein, Reed D.

Sheer, Alain

Sieradzki, David

Sherman, William

VanDruff, Laura Riposo

Wright, Commissioner Joshua

Respectfully submitted,

/s/ Michael D. Pepson
Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842
Email: michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and administrative proceedings before federal agencies.

Reed D. Rubinstein, Partner
D.C. Bar No. 440153
Dinsmore & Shohl, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20006
Telephone: 202.372.9120
Fax: 202.372.9141
Email: reed.rubinstein@dinsmore.com
Senior Vice President for Litigation and Counsel to Cause of Action

Counsel for Petitioner, LabMD, Inc.

Dated: December 23, 2013

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LabMD, INC., Petitioner, v. **FEDERAL TRADE COMMISSION**, Respondent.	)	Case No. 13-15267-F **PETITION FOR REVIEW** **ORAL ARGUMENT REQUESTED** **TIME SENSITIVE**

PETITIONER'S MOTION FOR STAY PENDING REVIEW

Pursuant to FRAP 27, 8, and 18, Petitioner LabMD, Inc. (LabMD) moves to stay Respondent Federal Trade Commission's ("FTC" or "Commission") administrative enforcement action, FTC Docket 9357, or for a preliminary injunction. On August 28, 2013, the Commission issued a Complaint and Notice Order against LabMD (Ex. 1). On November 12, 2013, LabMD filed a Motion to Dismiss with Prejudice and to Stay Administrative Proceedings for lack of jurisdiction and due process violations (Ex. 2).[1] On November 14, 2013, LabMD filed a Verified Complaint in the U.S. District Court for the District of Columbia (Ex. 5). On November 18, 2013, LabMD filed a Petition for Review in this Court. On November 26, 2013, LabMD moved for a stay pending review before the Commission (Ex. 6). On December 16, 2013, the Commission erroneously denied LabMD's motion on the grounds that it did not meet any of the four

[1] FTC's Opposition to LabMD's Motion to Dismiss is attached as Ex. 3; LabMD's Reply is attached as Ex. 4. An exhibit list is attached for the Court's convenience.

stay factors and this Court lacked jurisdiction, without addressing LabMD's primary merits arguments. Order Denying Resp.'s Mot. for Stay at 1, 3-7 (Ex. 7). *Cf.* Ex. 6 at 3.

SUMMARY

LabMD is a small cancer-detection business. Ex. 5, ¶ 2. Its patient-information data-security practices are regulated by the U.S. Department of Health and Human Services (HHS). Ex. 5, ¶¶ 2, 42. FTC admits LabMD complied with these regulations at all relevant times. Initial Pretrial Conf. Trans., *In the Matter of LabMD, Inc.*, Dkt. No. 9357, at 22:10-13 (Sept. 25, 2013) (Ex. 8); Ex. 4 at 11; Ex. 6 at 7.

On August 28, 2013, FTC commenced an enforcement action, claiming that LabMD's HHS-compliant patient-information data-security practices are an "unfair" trade practice banned by Section 5 of the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45 (Section 5). Ex 1. FTC's Complaint, lacking any reference to the specific Section 5 patient-information data-security regulations or standards LabMD supposedly violated, culminated a nearly three-year government investigation that devastated the company. FTC ignored LabMD's repeated jurisdictional objections, and a federal judge's caution that there is "significant merit" to them, to bring this action.

But LabMD's fate is a foregone conclusion. According to FTC Commissioner Joshua Wright:

> The FTC has voted out a number of complaints in administrative adjudications 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 Commission staff. In other words, in 100 percent of the cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases where the ALJ ruled against the FTC, the Commission reversed.[2]

In fact, FTC has already decided LabMD's case. For example, Commissioner Brill said in a keynote speech on September 17, 2013, that LabMD "failed to properly secure consumer information."[3] Only one month later, she again described LabMD as a company "whose practices violated the law."[4] No neutral judge with any concern for avoiding the appearance of prejudgment would speak this way about a pending case.

A stay to allow for judicial review of FTC's conduct in this case is proper. First, LabMD is likely to prevail on the merits of its *ultra vires*, constitutional, and Administrative Procedure Act (APA) claims. FTC lacks Section 5 "unfairness" jurisdiction over patient-information data-security and, as such, its assault on LabMD is *ultra vires*. Also, FTC's abusive substitution of a staff-created, consent order-based "common law" of data security for properly promulgated regulations, predetermination of LabMD's administrative case, skewed Rules of Practice that give FTC's staff undue administrative process advantages, and retaliation against LabMD for its CEO's public statements each transgress constitutional and statutory limits.

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[2] Commissioner Joshua Wright, "Recalibrating Section 5: A Response to the CPI Symposium," CPI ANTITRUST CHRONICLE (Nov. 2013) (Ex. 9).

[3] Forum Europe Fourth Annual EU Data Protection and Privacy Conference, Commissioner Julie Brill's Keynote Address, September 17, 2013, at 3 & n.15 (Ex. 10). *Cf. Cinderella v. FTC*, 425 F.2d 583, 589-92 (D.C. Cir. 1970).

[4] Commissioner Julie Brill's Opening Panel Remarks, European Institute, "Data Protection, Privacy and Security: Re-Establishing Trust Between Europe and the United States," at 3 & n.15 (Oct. 29, 2013) (Ex. 11).

Second, LabMD will suffer irreparable harm absent a stay. FTC's public disparagement and process abuses wreck LabMD's business, ruin its reputation, and wrongfully chill constitutionally-protected speech.

Third, no one is harmed by a stay. FTC admits both that LabMD complies with all applicable patient-information data-security regulations and that, at least five years after the alleged data breach that is the subject of the Complaint, *there is no victim*.

Fourth, a stay to ensure FTC complies with applicable statutory and constitutional limits is in the public interest.

FACTS

LabMD is a cancer-detection company. Doctors send LabMD blood, urine, and tissue samples. LabMD tests these and reports the results. Ex. 5, ¶¶ 2, 28, 40-43.

LabMD's patient-information data-security is exclusively regulated by HHS under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).[5]

[5] HIPAA directs HHS, not FTC, to "adopt security standards" for "health information," and HHS has done so. 42 U.S.C. § 1320d-2(d)(1); 42 U.S.C. § 1320d(4)(defining "health information" broadly); 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000) (HIPAA Privacy Rule); 68 Fed. Reg. 8,334, 8,334 (Feb. 20, 2003) (HIPAA Security Rule). FTC has repeatedly told Congress HIPAA "is not enforced by the Commission." *See* Ex. 2 at 11 n.8. FTC also agrees HHS exclusively enforces HITECH with respect to HIPPA-covered entities, like LabMD. 74 Fed. Reg. 42,962, 42,964-65 (Aug. 25, 2009) (*FTC* HITECH rule explaining HIPAA-covered entities are only subject to HHS's HITECH rule); 78 Fed. Reg. 5,566, 5,639 (Jan. 25, 2013) (HHS HITECH rule stating same); *see also* Pub. L. 111-5 § 13424(b)(1) (directing HHS and FTC to determine *which* agency should regulate *non*-HIPAA-covered entities under HITECH).

Ex. 5, ¶¶ 42-43. FTC admits that LabMD, a HIPAA-covered entity, has always complied with all HIPAA/HITECH regulations. Ex. 8 at 22:10-13; Ex. 4 at 11; Ex. 6 at 7. LabMD has never been accused of violating HHS's HIPAA/HITECH patient-information data-security standards. Ex. 5, ¶ 43.

FTC's assault against LabMD began in or about January 2010.[6] Boyle Aff., ¶ 6 (Ex. 12).[7] An Internet-security company called Tiversa, Inc. purloined a single LabMD patient-information spreadsheet file (the "PI file") without LabMD's knowledge or consent in early 2008.[8] As Commissioner Rosch later explained:

> Tiversa … has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations…. [A]n argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve [LabMD's PI file], and then repeatedly solicited LabMD, offering investigative and remediation services regarding … long before Commission staff contacted LabMD.[9]

After Tiversa bragged about what it had done in a press release and in congressional testimony and gave a copy of LabMD's file to a Dartmouth researcher who used it in an article, Ex. 5, ¶¶44-52, FTC staff reached out to Tiversa, Ex. 15. After a series of meetings and communications between Tiversa and (among others) FTC's

[6] FTC's investigation was "authorized" by a now-expired FTC resolution (Ex. 13).
[7] The exhibits cited in Mr. Boyle's affidavit are available on request.
[8] *See LabMD, Inc. v. Tiversa, Inc.*, 509 Fed. Appx. 842, 843-44 (11th Cir. 2013).
[9] Dissenting Statement of Commissioner J. Thomas Rosch, Petitions of LabMD, Inc. and Michael J. Daugherty to Limit or Quash the Civil Investigative Demands, FTC File No. 1023099, at 1-2 (June 21, 2012) (Rosch Dissent) (Ex. 14).

lead counsel in the administrative proceeding, FTC sent a civil investigative demand (CID) to a non-profit corporation operated by a Tiversa advisory board member.

FTC then launched a "non-public inquiry into LabMD, Inc.'s compliance with federal law governing information security," contacting LabMD in early 2010. Ex. 12, ¶ 6. FTC obtained other companies' files from Tiversa but singled out LabMD for uniquely burdensome treatment. LabMD voluntarily provided FTC with no less than six productions including correspondence, paper files, CD data files with over 5,000 pages of data, attended multiple in-person meetings, and had numerous telephone conversations with FTC staff. Ex. 12, ¶¶ 6-16; Ex. 5, ¶¶ 55-65.

On December 11, 2011, FTC sent LabMD and its CEO, Mr. Michael Daugherty, CIDs. They moved to quash, challenging FTC's jurisdiction (Ex. 16). Commissioner Julie Brill denied their petitions (Ex. 17). Both appealed, and FTC (predictably) upheld Commissioner Brill's factual and legal conclusions (Ex. 18).

FTC then filed a Petition to enforce the CIDs in the U.S. District Court for the Northern District of Georgia. LabMD opposed the Petition. At the hearing, when asked to cite a case that "says the FTC has the authority to investigate data security under Section 5," FTC's counsel admitted that "I cannot point you to that case. It doesn't exist…."[10] The court upheld the CIDs but said there is "significant merit" to the

[10] Trans., 16:20-25, *FTC v. LabMD*, 1:12-cv-3005-WSD (N.D. Ga. 2012) (Ex. 19).

argument that Section 5 does not provide FTC with "unfairness" jurisdiction over patient-information data-security practices.[11]

LabMD complied with the CIDs, endured two more civil investigative hearings, and produced even more documents. *See* Ex. 5, ¶¶ 10, 78. By September 2012, LabMD had spent more than $100,000.00 complying with FTC's inquiry. Ex. 12, ¶ 17.

Beginning in early 2012, Mr. Daugherty began publicly criticizing FTC. Ex. 5, ¶ 79. FTC had knowledge of this criticism no later than September 10, 2012, and appears to have subsequently monitored Mr. Daugherty's contacts and statements. Ex. 5, ¶¶ 80-85; Ex. 21. On July 19, 2013, Daugherty posted the trailer to his book, *The Devil Inside the Beltway*, on his website. He called FTC's action an "abusive government shakedown" and promised to "blow the whistle" on FTC's "abusive beltway tactics." Ex. 5, ¶ 83. On July 22, 2013, Complaint Counsel told LabMD that FTC staff had recommended to the Commission issuance of a complaint against LabMD. Ex. 5, ¶ 84. On July 30, 2013, LabMD was given a draft copy. Ex. 5, ¶ 85.

On August 28, 2013, FTC issued the Complaint. Ex. 1. It solely alleged that LabMD violated Section 5's prohibition of "unfair" acts or practices through unspecified patient-information data-security practices that, "taken together," fail to

[11] *FTC v. LabMD*, 1:12-cv-3005, at 6-7, 14 (N.D. Ga. 2012) (holding "subpoena enforcement proceeding" not proper forum for resolving jurisdictional issues) (Ex. 20).

meet unspecified standards.[12] Ex. 1, ¶¶10-11, 20-23. It relied heavily on the file purloined by Tiversa, *see* Ex. 1, ¶¶ 17-20, disregarding Commissioner Rosch's caution that FTC "should avoid even the appearance of bias or impropriety by not relying on such evidence or information in this investigation." Ex. 14 at 2. On August 29, 2013, FTC wrongfully threatened to post LabMD's confidential business information on the Internet and disseminated a disparaging blog post and press release, *see* Ex. 5, ¶¶ 87-88, 90; Ex. 22, leading to adverse third-party publicity, Ex. 23. FTC has continued to publicly criticize LabMD. Ex. 10 at 3 & n.15; Ex. 11 at 3 & n.15; Ex. 24; Ex. 25.

Mr. Daugherty published his book, which is very critical of FTC, in late September 2013. Ex. 5, ¶ 88. Shortly thereafter, Complaint Counsel began using abusive and highly irregular discovery tactics against LabMD.[13] Ex. 5, ¶¶ 91, 129-30.

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[12] FTC admits that LabMD has always complied with HIPAA/HITECH, Ex. 8 at 22:10-13; Ex. 4 at 11; Ex. 6 at 7, and that "[n]either the complaint nor the notice order prescribes specific security practices that LabMD should implement going forward," Ex. 8 at 20:15-17. FTC has never promulgated Section 5 patient-information (or any other) data-security regulations or guidance and apparently has no plans to do so. Ex. 8 at 10:11-15. LabMD is not accused of a "deceptive" trade practice. Ex. 1, ¶¶ 22-23.

[13] Complaint Counsel rejected standard FRCP discovery procedures and limits. Thus, in a three-hour period on October 24, 2013, FTC noticed twenty (20) depositions to be taken in various parts of the country, all initially scheduled at the same time on the same day. This is banned by Article III courts. *See* FRCP 30(a)(2)(A)(i). 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. Complaint Counsel even subpoenaed drafts of Mr. Daugherty's book, all comments on his drafts, all documents related to the source material for drafts

On November 12, 2013, LabMD filed a Motion to Dismiss (Ex. 2), and on December 2, 2013, LabMD filed a Reply in support of that Motion (Ex. 4). Yet exhaustion is futile and the fate of that Motion a foregone conclusion because, under its Rules of Practice, FTC alone (not the ALJ) rules on dispositive motions in the first instance.[14] Furthermore, FTC has repeatedly rejected LabMD's specific jurisdictional and due process arguments. *See* Ex. 17 at 10-13; Ex. 18; Ex. 26; Ex. 27 at 23, 68.

More importantly, this proceeding is rigged against LabMD. As Commissioner Wright notes, FTC staff seem blessed with a near-Papal level of infallibility—not once in a generation have they been wrong.[15] Commissioner Brill has also made it clear to all of the world that FTC has predetermined this case, *repeatedly* stating without qualification (or reference to standards) that LabMD "failed to properly secure consumer information." Ex. 10 at 3 & n.15; Ex. 11 at 3 & n.15. The FTC has already rejected LabMD's legal arguments, *see* Ex. 17 at 10-13; Ex. 18; Ex. 26, as Commissioners Ramirez's and Ohlhausen's statements confirm, Ex. 28 at 68; Ex. 30.

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of the book, and the like. Ex. 5, ¶¶ 91, 130. To his credit, the ALJ said "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 Resp. Mot. for a Protective Order, *In the Matter of LabMD*, Dkt. No. 9357, at 8 (Nov. 22, 2013).

[14] In 2009, FTC amended its Rules of Practice to grab powers that had been previously exercised by the independent ALJ. 74 Fed. Reg. 1,804, 1,808-10 (Jan. 13, 2009); *see, e.g.*, 16 C.F.R. § 3.22(a); *see* Ex. 8 at 7:1-18. All of the commenters on FTC's proposed Rules objected to FTC's power-grab amendments. *See* Ex. 28 (adverse comments).

[15] Ex. 9 at 4 (Commission Wright: "[I]n 100 percent of the cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases where the ALJ ruled against the FTC, the Commission reversed."); Ex. 27 at 34 (same).

ARGUMENT

I. JUDICIAL REVIEW IS PROPER NOW.

This Court has jurisdiction over this case. 15 U.S.C. § 45(c); *George Kabeller, Inc. v. Busey*, 999 F.2d 1417, 1420-21 (11th Cir. 1993); *see Ukiah Ad. Hosp. v. FTC*, 981 F.2d 543, 549-51 (D.C. Cir. 1992)(appellate jurisdiction over case at all stages). *Cf. Trudeau v. FTC*, 456 F.3d 178, 189-191 (D.C. Cir. 2006) (nonfinal action reviewable).

FTC's Complaint and Notice Order are reviewable "final agency actions." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The Court has established five factors for finality: (1) whether the action constitutes the agency's definitive position; (2) whether the action has the status of law or affects the legal rights and obligations of the parties; (3) whether the action will have an immediate impact on the daily operations of the regulated party; (4) whether pure questions of law are involved; and (5) whether review will be efficient. *TVA v. Whitman*, 336 F.3d 1236, 1248 (11th Cir. 2004).

All of the finality factors are present here. FTC has repeatedly taken definitive legal positions in this case, in other cases, and (recently) before Congress claiming Section 5 "unfairness" power to regulate patient-information and other data-security matters. FTC boasts of creating a "common law" of data-security through enforcement actions rather than regulations. Thus, the Complaint here is an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy that affects LabMD's (and all other HIPAA-regulated entities')

legal rights and obligations. *See* 5 U.S.C. § 704; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). This action has had an immediate and massive impact on LabMD's daily operations, for FTC's actions have severely burdened and irreparably harm LabMD. LabMD in this appeal raises "purely legal" issues of law and statutory interpretation and pre-enforcement review is efficient and appropriate, especially given FTC's predetermination of this matter.[16] *See CSI Aviation Servs. v. DOT*, 637 F.3d 408, 411-14 (D.C. Cir. 2011) (reviewing agency's definitive legal position).

Hornbook law is that only those administrative remedies providing a genuine opportunity for adequate relief need be exhausted, and exhaustion is not required where the administrative process is futile or inadequate. *See N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996); *Porter v. Schweiker*, 692 F.2d 740, 742-43 (11th Cir. 1982); *accord Athlone Indus. v. CPSC*, 707 F.2d 1485, 1488-90 (D.C. Cir. 1983); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 107-08 (D.C. Cir. 1986) (futility or irreparable harm excuse exhaustion). Here, FTC's historical conduct, Commissioner Wright's evidence, Ex. 9 at 4; Ex. 27 at 34, Commissioner

[16] FTC may seek cover under the mantle of *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). But 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 appeal raises purely legal claims; and LabMD is suffering grievous harm. *Cf. CSI Aviation Servs.*, 637 F.3d at 413-14. And FTC's rigged game bears only a passing resemblance to the more rigorous and objective 1970s-era procedures. Thus, *Standard Oil* provides it no cover at all, and FTC is fully exposed.

Brill's bald statements of predetermination, Ex. 10 at 3 & n.15; Ex. 11 at 3 & n.15, and the skewed FTC Rules of Practice demonstrate that FTC has denied LabMD a genuine opportunity for adequate relief and that the ongoing administrative process is a rigged exercise in futility. Therefore, exhaustion should not shield FTC from judicial review.[17]

Irrespective of the presence *vel non* of "final agency action," this Court *still has jurisdiction* to stay FTC's enforcement proceeding and decide LabMD's case.[18] *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996). It is well established that nonstatutory review is available where an agency's actions are *ultra vires* and/or unconstitutional.[19] *See, e.g., Trudeau*, 456 F.3d at 189-91 (review available of nonfinal agency action). The Court has explained the necessity of such review:

> [A]cts of all [a government department's] 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 the absolutely uncontrolled and*

[17] *Accord Etelson v. OPM*, 684 F.2d 918, 925 (D.C. Cir. 1982) (exhaustion excused 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); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996) (futility shown when agency appeared "wedded to … procedures that it had employed"); *see also Bowen v. Mich. Acad. of Fam. Phys.*, 476 U.S. 667, 670 (1986) (strong presumption of APA judicial review).

[18] *Cf. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011) (rule is that general statutory language setting a time for filing a petition does not limit jurisdiction).

[19] This Court's inherent power to issue a stay is not limited to issuance of stays only after an appeal has been taken. The All Writs Act, 28 U.S.C. § 1651, empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions" and necessary to the rule of law and extends to "potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966).

> *arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual.*

Magnetic Healing v. McAnnulty, 187 U.S. 94, 108, 110 (1902) (emphasis added). This Court has the authority to rein in FTC.

II. FTC'S RIGGED PROCEEDINGS SHOULD BE STAYED.

The standard for a stay is (1) whether the applicant has made a strong showing that he is likely to succeed on the merits;[20] (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also Winter v. NRDC*, 555 U.S. 7, 20 (2008) (preliminary injunction factors). Here, the third and fourth factors merge. *See Nken*, 556 U.S. at 435.

A. LabMD is Likely to Prevail on the Merits.

1. FTC's assault against LabMD lacks legal foundation.

FTC does not have Section 5 unfairness authority over patient-information data-security. To begin with, Congress has denied FTC carte blanche to regulate whatever it thinks "unfair." *See, e.g., Scientific Mfg. Co. v. FTC*, 124 F.2d 640, 644 (3d Cir. 1941) (Section 5 does not make FTC the "absolute arbiter of the truth of all printed matter"); *see also ABA v. FTC*, 430 F.3d 457, 468-71 (D.C. Cir. 2005). Instead, FTC must

[20] *See* 11th Cir. Rule 27-1(b). "A substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain, success." *United States v. Alabama*, 443 Fed. Appx. 411, 419 (11th Cir. 2011) (citation omitted). Where, as here, questions of first impression or complex legal issues are involved, courts "need not linger long over this factor." *United States v. Bogle*, 855 F.2d 707, 709 (11th Cir. 1988).

exercise its authority consistent with the congressionally enacted administrative structure, "particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson*, 529 U.S. 120, 125, 133 (2000). FTC has no power to act unless *FTC* can show specific congressional intent to delegate data-security authority. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Section 5 says nothing about data-security. But Congress has specifically delegated data-security regulatory authority in other statutes. *See* Ex. 2 at 11-15; Ex. 4 at 2-6. For example, HIPAA/HITECH authorize only HHS to regulate HIPAA-covered entities' data-security practices. *See* Ex. 2 at 11-12. Section 5, an older general statute that says nothing at all about patient-information data-security, must therefore yield. *See RadLAX Gateway Hotel v. Amalg. Bank*, 132 S. Ct. 2065, 2070-71 (2012).

Furthermore, even if Section 5 did give FTC some unfairness authority over patient-information, HIPAA/HITECH displace and preempt Section 5's "more general remedies." *EC Term of Years Trust v. U.S.*, 550 U.S. 429, 433 (2007). FTC's assault on LabMD shows a "clear repugnancy" between HIPAA/ HITECH and Section 5's general unfairness language.[21] Again, Section 5 must yield. *See Credit Suisse v. Billing*, 551 U.S. 264, 275-76 (2007); *see also Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

[21] This is because Congress gave HHS specific authority over patient-information data-security. HHS exercises that authority, *see, e.g.*, 78 Fed. Reg. 5,566 (2013), but there is an obvious conflict between HIPAA/HITECH and Section 5, for FTC admits LabMD complied with HIPAA/HITECH but argues it violated Section 5 at the same time.

Congress has also enacted numerous specific statutes giving FTC narrow authority to regulate data-security practices in *other* economic sectors.[22] If Section 5 generally authorized FTC to regulate data security, Congress would not have done this. *Rumsfeld v. FAIR*, 547 U.S. 47, 57-58 (2006); *Babbitt v. Sweet Home*, 515 U.S. 687, 701 (1995); *see* Ex. 2 at 15. FTC's Section 5 power-grab thus offends the rule against attributing redundancy to Congress, *Gutierrez v. Ada*, 528 U.S. 250, 258 (2000), and violates the interpretive canon that no statute should be interpreted to render its parts "inoperative or superfluous."[23] *See Corley v. United States*, 556 U.S. 303, 314 (2009).

FTC, until it recently reversed course without explanation, repeatedly told Congress it lacked Section 5 unfairness authority to regulate data security.[24] *See* Ex. 2 at 16-17 & nn. 12-14. Even now, it demands Congress pass laws authorizing it to regulate

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[22] *E.g.*, Fair Credit Reporting Act (FCRA), Pub. L. 108-159, 117 Stat. 1953, as amended by Pub. L. 108-159, 111 Stat. 1952 (2003) (financial institution data security); Gramm-Leach-Bliley Act (GLBA), Pub. L. 106-102, 113 Stat. 1338 (1999) (mandating data-security requirements for and authorizing FTC regulation of financial institutions); Children's Online Privacy Protection Act (COPPA), Pub. L. 105-277, 112 Stat. 2681-728 (1998) (authorizing FTC regulation of online privacy and security for children). These statutes explicitly authorize the Commission to set substantive data-security standards, *see* 15 U.S.C. §§ 1681m(e)(1), 6804(a)(1)(C), 6502(b), and to enforce those standards under the FTCA, *see* 15 U.S.C. §§ 1681s(a), 6805(a)(7), 6505(d).

[23] If FTC has general Section 5 authority to regulate data security, then many other statutes are also rendered superfluous. *See* Cable Television Consumer Protection and Competition Act, Pub. L. 102-385, 106 Stat. 1460 (1992); Video Privacy Protection Act, Pub. L. 100-618, 102 Stat. 8195 (1988); Driver's Privacy Protection Act of 1994, Pub. L. 103-322, 106 Stat. 2099 (1994); Computer Fraud Abuse Act of 1986, Pub. L. 99-474, 100 Stat. 1213 (1986). This list is illustrative, not exhaustive.

[24] *See* Michael D. Scott, *The FTC, the Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?* 60 ADMIN. L. REV. 127, 130-31 (2008) (discussing prior FTC statements to Congress).

data-security. Ex. 2 at 17. However, Congress will not do so.[25] In fact, Congress in the Federal Trade Commission Act Amendments of 1994, codified at 15 U.S.C. § 45(n), *narrowed* FTC's Section 5 "unfairness" authority to rein in FTC abuse. *See* Ex. 2 at 18.

Simple "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude" as general regulatory authority over data security for the entire economy requires rejection of FTC's *ultra vires* power grab. *Brown & Williamson*, 529 U.S. at 133. The idea that Section 5's "unfairness" prong gives FTC patient-information data-security authority requires not only an extremely strained understanding of the vague term "unfairness" but also willful blindness to Congress's subsequent narrowly tailored data-security-specific legislation. Such an idea lacks weight. *See id.* at 160-61; *see also* Ex. 2 at 11-20.

In *Brown & Williamson*, the Supreme Court rejected FDA's overreaching. 529 U.S. at 125-26. There, as here, the agency pestered Congress for more power, but Congress rejected its proposals and responded with targeted legislation. *Cf. id.* at 153-58. But Congress does not hide massive regulatory schemes in statutory mouseholes. *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001). Congress would not grant FTC unfettered power to create and enforce a data-security "common law" in so cryptic a fashion. *Brown & Williamson*, 529 U.S. at 160.

[25] *See, e.g.*, S. 1151, 112th Cong. (2011); S.1408, 112th Cong. (2011); S.1434, 112th Cong. (2011); S. 1535, 112th Cong. (2011); *see* Ex. 2 at 17-18 & n.15; Ex. 4 at 9.

Brown & Williamson controls, and FTC's claimed Section 5 unfairness authority to regulate LabMD's patient-information data-security practices should be rejected. What FTC has done to LabMD is *ultra vires*. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013); *see also Leedom v. Kyne*, 358 U.S. 184, 188 (1958). The government's abuse exceeds its delegated powers and is contrary to specific FTCA prohibitions on the use of consent orders and speeches to create a binding "common law" of data security. *See* 15 U.S.C. §§ 45(m)(1)(B)(bar on enforcing consent orders),(n); Ex. 9 at 8.

2. FTC's *ex post* data-security regime violates due process.

Due process requires FTC to give fair *ex ante* notice of what it thinks Section 5 forbids or requires. *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). This limits FTC's ability to regulate through after-the-fact enforcement actions. *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995); *see Satellite Broad. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). Where, as here, a party first receives notice of a purportedly proscribed activity through an enforcement action, due process is violated.[26] *See, e.g., U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1355-57 (D.C. Cir. 1998); *see* Ex. 2 at 22-28.

FTC admits it lacks data-security regulations or standards. Ex. 8 at 10:11-15, 21:11-22:13; Ex. 4 at 11. It admits LabMD has complied with all HHS data-security

[26] The test for constitutionally adequate notice is whether by reviewing the regulations and other agency-issued public statements, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards parties must meet. *See Trinity Broad.*, 211 F.3d at 628-32. *FTC* "has the responsibility to state with ascertainable certainty" what standards third parties must follow. *Gates & Fox v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). It has failed to do so.

regulations. Ex. 8 at 22:10-13. It admits Section 5 bars FTC from enforcing its consent orders against third parties.[27] 15 U.S.C. § 45(m)(1)(B); *see* Ex. 2 at 26. Yet it claims Section 5's statutory unfairness language provides fair notice. Ex. 3 at 16-17. But Section 5's general "unfairness" prohibition, 15 U.S.C. § 45(a), (n), does not even refer to "data security," let alone prescribe or proscribe data-security practices. Therefore, it is too vague to provide constitutionally adequate *ex ante* notice of patient-information data-security practices. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391-95 (1926); *Trinity Broad. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000); Ex. 4 at 12.

LabMD is entitled to a fair and level review of its case by FTC. However, the public statements of Commissioner Brill, Ex. 10 at 3; Ex. 11 at 3; Ex. 17; Ex. 27 at 23, and the empirical data presented by Commissioner Wright, Ex. 9 at 4, demonstrate this case has been predetermined. This, too, violates LabMD's due process rights. *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 589-92 (D.C. Cir. 1970).

Finally, in 1977, the D.C. Circuit observed that FTC's Rules of Practice "make the FTC adjudicatory process as fair to each side in every respect as in a federal court." *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 104 (D.C. Cir. 1977). In that case, the court criticized FTC's attempt to "undercut" the ALJ, which "would subvert completely the

[27] *See* Ex. 29 at 78-79. FTC "apparently expects entities to piece together…complaints and consent orders in thirty-six cases, without any authoritative commentary, to arrive at … [FTC's] interpretation of adequate data-security practices…." Stegmaier & Bartnick, *Physics, Russian Roulette, and Data Security: The FTC's Hidden Data-Security Requirements*, 20 GEO. MASON L. REV. 673, 700 (2013). But "baffling and inconsistent" rules do not give fair notice. *Satellite Broad.*, 824 F.2d at 2-4.

essential separation of the adjudicatory and investigatory functions." *Id.* at 103-04. However, when FTC radically restructured its Rules of Practice in 2008 to grab ALJ powers, it did just that. *See* 73 Fed. Reg. 58,832 (Oct. 7, 2008). All commenters, including the ABA Section of Antitrust Law, opposed FTC's power-grab amendments, and most argued that they violated due process. *See* Ex. 28 (adverse comments). The commenters' themes—FTC's power-grab undermined the integrity and accuracy of the administrative process, compromised the ALJ's independence, and deprived FTC adjudications of even the appearance of fairness—resonate here.

B. Absent a Stay, LabMD Will Suffer Irreparable Harm.

FTC threatens LabMD's very existence, harms LabMD's business reputation and image, and continues to cause LabMD to lose commercial goodwill. Ex. 5, ¶¶ 88, 138-41. These irreparable harms suffice to support a stay,[28] as does the adverse publicity caused by FTC's communications. Exs. 21-25; Ex. 10 at 3; Ex. 11 at 3. *See Housworth v. Glisson*, 485 F. Supp. 29, 35-36 (N.D. Ga. 1978) (adverse publicity from *pending* administrative license revocation proceeding is irreparable harm even though order not effective). The loss of constitutional freedoms for even minimal periods of time is also irreparable harm. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009). FTC's actions have done just that to LabMD. Therefore, a stay is proper.

[28] *Accord Ferrero v. Assoc. Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) ("loss of customers and goodwill is an 'irreparable' injury"); *Hospital Therapy Serv. v. Shalala*, 1997 U.S. Dist. LEXIS 21350, *30 (N.D. Ga. 1997); *Sci. App. Inc. v. Energy Cons. Corp.*, 436 F. Supp. 354, 361 (N.D. Ga. 1977) (harm to reputation).

C. No One Will Be Harmed By A Stay.

LabMD has never been accused of violating HIPAA/ HITECH by FTC, HHS, or anyone else. Ex. 5, ¶ 2; Ex. 8 at 22:10-13. Its patient-information data-security practices currently meet or exceed HIPAA/HITECH regulations, and the alleged data-security breach that is the subject of FTC's Complaint apparently occurred sometime in or before 2008. FTC's Complaint does not allege specific financial or other harm due to LabMD's "unfair" acts or practices, Ex. 1, ¶¶ 13-21, or even name a victim or complaining witness, Ex. 8 at 33:3-5. Consequently, no one will be harmed by a stay.

D. A Stay is in the Public Interest.

A stay to ensure FTC's respect for FTCA, APA, and constitutional boundaries on its power is in the public interest. *See Odebrecht Constr. v. Sec'y, Fla. DOT*, 715 F.3d 1268, 1290 (11th Cir. 2013) (frustration of federal statutes not in public interest); *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272-73 (11th Cir. 2006) (protection of First Amendment always in public interest); *Gordon v. Holder*, 721 F.3d 638, 652 (D.C. Cir. 2013) (public interest expressed in statutes); *In re Med. Reimb. Litig.*, 309 F. Supp. 2d 89, 99 (D.D.C. 2004) (agency compliance with law is a compelling public interest). Indeed, FTC's insatiable lust for power and desire to punish LabMD for speaking out resurfaced recently in a FTC filing (Ex. 31). *Cf. supra* note 13; Ex.7 at 2.

CONCLUSION

For the foregoing reasons, this matter should be stayed pending review.

Respectfully submitted,

/s/ Reed D. Rubinstein
Reed D. Rubinstein, Partner
D.C. Bar No. 440153
Dinsmore & Shohl, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Telephone: 202.372.9120
Fax: 202.372.9141
Email: reed.rubinstein@dinsmore.com
Senior Vice President for Litigation and
Counsel to Cause of Action

/s/ Michael D. Pepson
Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842
Email: michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and
administrative proceedings before federal
agencies.

Counsel for Petitioner, LabMD, Inc.

Dated: December 23, 2013

LIST OF EXHIBITS SUPPORTING PETITIONER'S MOTION FOR STAY PENDING REVIEW

Exhibit 1:

Complaint and Notice Order, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Aug. 28, 2013).

Exhibit 2:

Respondent LabMD, Inc.'s Motion to Dismiss Complaint With Prejudice and to Stay Administrative Proceedings, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Nov. 12, 2013).

Exhibit 3:

Complaint Counsel's Response in Opposition to Respondent's Motion to Dismiss Complaint With Prejudice and to Stay Administrative Proceedings, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Nov. 22, 2013).

Exhibit 4:

Respondent LabMD, Inc.'s Reply to Complaint Counsel's Response in Opposition to Respondent's Motion to Dismiss Complaint With Prejudice and to Stay Administrative Proceedings, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Dec. 2, 2013).

Exhibit 5:

Verified Complaint, *LabMD, Inc., v. Federal Trade Commission et al.*, Dkt. No. 1, Case No. 13-cv-01787 (D.D.C. Nov. 14, 2013).

Exhibit 6:

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, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Nov. 26, 2013).

Exhibit 7:

Order Denying Respondent LabMD's Motions for Stay, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Dec. 13, 2013) (particularly relevant text highlighted).

Exhibit 8:

Transcript, Initial Pretrial Conference, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Sept. 25, 2013) (particularly relevant text highlighted).

Exhibit 9:

Commissioner Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI ANTITRUST CHRONICLE (Nov. 2013).

Exhibit 10:

Commissioner Julie Brill, Forum Europe Fourth Annual EU Data Protection and Privacy Conference, Commissioner Julie Brill's Keynote Address (Sept. 17, 2013).

Exhibit 11:

Commissioner Julie Brill, Commissioner Julie Brill's Opening Panel Remarks, European Institute, *Data Protection, Privacy and Security: Re-Establishing Trust Between Europe and the United States* (Oct. 29, 2013).

Exhibit 12:

Affidavit of John W. Boyle, *Federal Trade Commission v. LabMD, Inc. et al.*, No. 12-cv-3005 (N.D. Ga. Sept. 14, 2012) (exhibits available upon request).

Exhibit 13:

Federal Trade Commission, FTC File No. P954807, Resolution Directing Use of Compulsory Process in Nonpublic Investigation of Acts and Practices Related to Consumer Privacy and/or Data Security (2008).

Exhibit 14:

Dissenting Statement of Commissioner J. Thomas Rosch, Petition of LabMD, Inc. and Michael J. Daugherty to Limit or Quash the Civil Investigative Demands, FTC File No. 1023099 *In the matter of LabMD, Inc., and Michael J. Daugherty* (June 21, 2012).

Exhibit 15:

Letter from Carl H. Settlemyer, Federal Trade Commission, to Robert Boback, Chief Executive Officer, Tiversa, Inc. (June 25, 2008).

Emails between Carl H. Settlemyer, Federal Trade Commission, and Robert Boback, Chief Executive Officer, Tiversa, Inc., cc Stacey Ferguson, Alain Sheer, Richard A. Quaresima (Jan. 26, 2009 – Mar. 4, 2009).

Exhibit 16:

LabMD's Petition to Limit Or Quash the Civil Investigative Demand, *In the matter of LabMD, Inc.* No. 558053 (Jan. 1, 2012) (exhibits available upon request).

Exhibit 17:

Order Denying LabMD's Petition to Limit Or Quash the Civil Investigative Demand, *In the matter of LabMD, Inc., and Michael J. Daugherty* No. 558053 (April 20, 2012) (particularly relevant text highlighted).

Exhibit 18:

Order Affirming Order Denying LabMD's Petition to Limit Or Quash the Civil Investigative Demand, and Denying Request for a Hearing, *In the matter of LabMD, Inc., and Michael J. Daugherty* (June 21, 2012).

Exhibit 19:

Transcript, Hearing on the Petition of the Federal Trade Commission for an Order to Enforce Civil Investigative Demands, *Federal Trade Commission v. LabMD, Inc., et al.*, 12-cv-3005 (N.D. Ga., Sept. 19, 2012) (particularly relevant text highlighted).

Exhibit 20:

Order Granting the Petition of the Federal Trade Commission for an Order to Enforce Civil Investigative Demands, *Federal Trade Commission v. LabMD, Inc., et al.*, 12-cv-3005 (N.D. Ga., Nov. 26, 2012) (particularly relevant text highlighted).

Exhibit 21:

LexisNexis download by Matthew Smith, Federal Trade Commission, Sept. 10, 2012, of Amy Wenk, *Atlanta Medical Lab Facing Off Against FTC*, ATLANTA BUSINESS CHRONICLE, Sept. 7, 2012.

Exhibit 22:

Press Release, Federal Trade Commission, "FTC Files Complaint Against LabMD for Failing to Protect Consumers' Privacy" (Aug. 29, 2013).

Lesley Fair, Federal Trade Commission, *FTC Files Data Secuirty Complaint Against LabMD*, Federal Trade Commission BCP Business Center (Aug. 29, 2013).

Bulletin, News from the Federal Trade Commission (Sept. 17, 2013) (relevant text highlighted).

Exhibit 23:

Alison Grande, *FTC Says Authority Extends to LabMD's Health Data*, LAW360 (Nov. 27, 2013).

Jon Brodkind, *Medical Lab Appegedly Exposed Customer Info On P2P, Clains It Was The Victim*, ARS TECHNICA (Aug. 29, 2013).

Exhibit 23 (cont.):

Elise Viebeck, *FTC: Medical Lab Exposed 10K Patients To Identity Fraud*, THE HILL (August 29, 2013).

Paul C. Van Slyke and Tammy Woffenden, *FTC Files Suit Against Medical Laboratory: A Roadmap to Avoid Failing to Protect Consumer Privacy*, BLOOMBERG LAW.

Anne Flaherty, *FTC: Medical Lab's Lax Security Led to Data Leak*, THE BIG STORY (Aug. 29, 2013).

Jeff Goldman, *FTC Claims LabMD Failed to Protect Consumers' Personal Data*, ESECURITY PLANET (Aug. 30, 2013).

Jeffrey Roman, *FTC Complaint Leads Breach Roundup*, Data Breach Today (Sept. 5, 2013).

Anne Flaherty, *FTC: Medical Lab's Lax Security Led to Data Leak*, FOX FIRST AT TEN (August 29, 2013).

Anne Flaherty, *FTC: Medical Lab's Lax Security Led to Data Leak*, BUSINESSWEEK (August 29, 2013).

Patrick Ouellette, *FTC Files LabMD Patient Privacy Complaint; LabMD Responds*, HEALTHIT SECURITY (Aug. 30, 2013) (excerpt).

FTC Reveals Provisionally Redacted Complaint Against LabMD, PHIprivacy.net (Sept. 12, 2013).

Allison Grande, *FTC Blasts LabMD's Bid to Stall Data Security Suit*, LAW360 (preview of article).

Eduard Kovacs, *FTC Accuses Medical Testing LabMD of Exposing Details of 10,000 People*, SOFTPEDIA (Aug. 30, 2013) (excerpt).

Deborah Peel, *FTC Files Complaint Against LabMD for Failing to Protects Consumers' Privacy*, Patient Privacy Rights (Aug. 29, 2013) (preview of article).

FTC Files Complaint Against LabMD for Failing to Protect Consumers' Privacy, North Carolina Consumers Council (Aug. 30, 2013).

Anne Flaherty, *The FTC claims an Atlanta medical lab didn't do enough to protect its records, resulting in the leak of SSNs of 9,000 consumers*, PHI DISPOSAL NEWS (Sept. 5, 2013).

Anne Flaherty, *FTC: Medical Lab's Lax Security Led to Data Leak*, BREITBART (Aug. 29, 2013).

Exhibit 23 (cont.):

Anne Flaherty, *FTC: Medical Lab's Lax Security Led to Data Leak*, DENVER POST (Dec. 18, 2013).

Exhibit 24:

Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, *The FTC's Privacy Agenda for the 2014 Horizon*, Forum for EU-US Legal-Economic Affairs (Sept. 14, 2013) (excerpt).

Exhibit 25:

Jessica Rich, Director, Bureau of Competition, Federal Trade Commission, *Privacy Today and the FTC's 2014 Privacy Agenda*, International Association of Privacy Professionals (Dec. 6, 2013) (excerpt with highlighted text).

Katy Bachman, *FTC's Jessica Rich Lays Out Ambitious Ad Enforcement Agenda*, ADWEEK (Sept. 30, 2013).

Exhibit 26:

Plaintiff's Response In Opposition To The Motion To Dismiss By Defendant Wyndham Hotels & Resorts, LLC, *Federal Trade Commission v. Wyndham Worldwide Corp. et al.*, Dkt. No. 110, Case No. 13-cv-01887 (D. N.J. June 17, 2013) (excerpt).

Exhibit 27:

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 (Dec. 3, 2013) (excerpt with particularly relevant text highlighted).

Exhibit 28:

Comments of the ABA Section of Antitrust Law in Response to the Federal Trade Commission's Request for Public Comment Regarding Parts 3 and 4 Rules of Practice Rulemaking—P072194, at 3 (Nov. 6, 2008).

Comments of Whole Foods Market, Inc., Parts 3 and 4 Rules of Practice Rulemaking—P072104.

Comments of Robert Pitofsky & Michael N. Sohn, P072104—Parts 3 and 4 Rules of Practice Rulemaking (Nov. 6, 2008).

Linda Blumkin, Comment #538311-00002, FTC-2008-0095-0004 (Jan. 15, 2009).

U.S. Chamber of Commerce, Comment, Re: Parts 3 and 4 Rules of Practice Rulemaking—P072104, at 1-2 (Nov. 6, 2008).

Exhibit 28 (cont.):

Hallberg, Richard, Comment #538311-00002, FTC-2008-0095-0005 (Nov. 6, 2008).

Exhibit 29:

Hearing, Motion To Dismiss, *Federal Trade Commission v. Wyndham Worldwide Corp. et al.*, 13-cv-01887 (D. N.J. June 17, 2013) (excerpt with particularly relevant text highlighted).

Exhibit 30:

Edith Ramirez, *The Privacy Challenges Of Big Data: A View From The Lifeguard's Chair, Keynote Address by FTC Chairwoman Edith Ramirez,* Technology Policy Institute Aspen Forum (August 19, 2013).

Edith Ramirez, *Opening Remarks of FTC Chairwoman Edith Ramirez: The Internet of Things: Privacy and Security in a Connected World* (Nov. 19, 2013).

Maureen K. Ohlhausen, *The FTC's Privacy Agenda for the 2014 Horizon*, Forum for EU-U.S. Legal-Economic Affairs (Sept. 14, 2013).

Maureen K. Ohlhausen, *Remarks of FTC Commissioner Maureen K. Ohlhausen*, Google Data Security Event (Apr. 17, 2013).

Exhibit 31:

FTC's Opposition To Motions To Quash And For Protective Order Regarding Subpoenas Served On Scott Moulton And Forensic Strategy Services, LLC, *In the matter of LabMD, Inc.*, Dkt. No. 9357 (Dec. 19, 2013) (relevant text highlighted).

Exhibit A: Affidavit of Scott A. Moulton, *LabMD v. Tiversa, Inc. et al.*, Dkt. No. 11-cv-04044 (N.D. Ga. Jan. 12, 2012) & Resume of Scott A. Moulton.

Exhibit B: Letter, Scott Moulton to Matthew Smith (Nov. 19, 2013).

Exhibit C: Engagement Letter between LabMD, Inc., and Forensic Strategy Services, LLC (July 20, 2011).

CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of December, 2013, the foregoing Motion For Stay Pending Review was filed in the Eleventh Circuit Court of Appeals using the CM/ECF system. The original and three copies are also being filed by U.S. Mail.

I further certify that electronic copies of the foregoing Motion For Stay Pending Review were served via the CM/ECF system to:

Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Edith Ramirez
Commissioner and Chairwoman
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

David L. Sieradzki
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580
Phone: 202.326.2092
Fax: 202.326,2477
dsieradzki@ftc.gov

John F. Daly
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580
Phone: 202.326.2244
Fax: 202.326.2477
jdaly@ftc.gov

I also certify that paper copies of the foregoing Motion For Stay Pending Review were delivered to Counsel for Respondent Federal Trade Commission via courier on December 23, 2013.

Date: December 23, 2013

Respectfully submitted,

/s/ Michael D. Pepson
Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave, N.W.
Suite 650
Washington, D.C. 20006
Telephone: 202.499.4232
Fax: 202.330.5842
michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and administrative proceedings before federal agencies.