IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LabMD, INC., Plaintiff, v. FEDERAL TRADE COMMISSION, Defendant.	)	Civil Action No.: _____ *Related Case*: FTC v. LabMD et al., 1:12-cv-3005-WSD

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff, LabMD, Inc. ("LabMD"), submits this memorandum in support of its motion for a preliminary injunction against the Defendant, Federal Trade Commission (the "FTC"). LabMD asks this Court to enjoin the FTC from (1) taking further enforcement action against LabMD regarding alleged "protected health information" ("PHI") data-security deficiencies; and (2) retaliating against LabMD for exercising its constitutional right to free speech.

INTRODUCTION

LabMD is a small medical diagnostics business based in Atlanta that provides testing services to detect cancer in patients. LabMD has maintained, and continues to maintain, PHI in accordance with the Health Insurance Portability and Accountability

Act of 1996 ("HIPAA"), the Health Information Technology for Economic and Clinical Health Act ("HITECH"), and regulations promulgated by United States Department of Health and Human Services ("HHS") implementing these laws. There is no allegation that LabMD has failed to comply with any of these.

The FTC began an "informal" investigation of LabMD's PHI data-security in January 2010. In 2012, the FTC served a series of Civil Investigative Demands ("CIDs") (the administrative agency equivalent of a subpoena) on LabMD seeking records and testimony. In August 2012, the FTC filed an action in this District to enforce the CIDs. LabMD opposed the action based on the FTC's lack of jurisdiction. In response, the FTC argued that the jurisdictional issue was not pertinent at that time, but would become relevant if and when the FTC brought an enforcement action:

> The question of whether the FTC has regulatory coverage or the jurisdiction to actually engage in this or actually to conduct a law enforcement action comes later if [the FTC] were to in fact then bring a complaint or . . . an enforcement action against LabMD . . . .

Verified Complaint ("Compl."), LabMD v. FTC, Dkt. No. 1 (Mar. 19, 2014), at ¶ 34 & Ex. 10 at 7:19-23. Based on this assurance, this Court enforced the CIDs.

The FTC then "formally" investigated LabMD's PHI data-security practices throughout 2012 and 2013. The FTC did not and does not have any PHI or other data-security regulations or standards. No law specifically authorizes the FTC to "enforce"

PHI data security. Yet it investigated LabMD anyway, without ever disclosing what it thought the company had done wrong or how, precisely, its PHI data-security fell short.

In July 2013, Michael Daugherty, LabMD's chief executive officer ("CEO"), whose efforts to obtain clarity about the company's alleged PHI deficiencies were repeatedly rebuffed, publicly criticized the FTC and its staff for trying to destroy the company. He criticized the government on his website, subsequently authored and published a book harshly criticizing the FTC's actions and tactics, and gave speeches pointing out the absurdity of the company's plight.

Almost immediately after the book trailer was posted on the Internet, the FTC retaliated by commencing an administrative enforcement action (where FTC staff prosecute the charges and the Commission first approves the complaint and then judges the law and facts) asserting that LabMD had engaged in unspecified "unfair" practices in violation of Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a), (n). The FTC did this without accusing LabMD of violating any HHS PHI data-security regulations and without HHS's participation. Compl. ¶¶ 17, 43, 52.

LabMD moved to dismiss the enforcement action on the same jurisdictional grounds raised in objecting to the CIDs and on due process grounds. The FTC issued a final ruling January 16, 2014, denying LabMD's motion to dismiss and asserting that Section 5 grants it jurisdiction to regulate PHI data security and to use a "common law"

of third-party consent orders and Internet posts to "over-file" HHS and add nonspecific, unpublished requirements on top of existing regulations. The FTC then claimed deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Compl. ¶¶ 70-71 & Ex. 3 at 6. Accordingly, the FTC deems its opinion to be reviewable final agency action.

LabMD filed this lawsuit seeking preliminary and permanent injunctive relief and a declaratory judgment because (1) the FTC lacks jurisdiction to bring the enforcement action; (2) the FTC's enforcement action violates due process for failure to give fair notice; (3) the FTC's actions are ultra vires; and (4) the FTC unconstitutionally retaliated against LabMD for speaking out.

LabMD now moves for a preliminary injunction, as it meets the four-factor test for relief.

First, LabMD's verified complaint demonstrates a substantial likelihood of success on the merits. The history of legislation concerning PHI data-security shows that Congress never intended for the FTC to regulate this area under Section 5. For example, Congress recently has enacted legislation that grants the FTC specific and limited powers of PHI regulation and enforcement under the American Recovery and Reinvestment Act of 2009 ("ARRA"), see Compl. Ex. 2 at 12 n.20, and specific data-security authority in other areas under other legislation. Likewise, Congress has

enacted numerous other targeted, narrowly tailored data-security statutes, such as HIPAA and HITECH, which are enforced by other agencies. These specific grants of jurisdiction control and trump the FTC's recently claimed general Section 5 "unfairness" data-security jurisdiction.

Moreover, even if the FTC has authority to regulate PHI under Section 5, LabMD is likely to prevail on the merits because the ex post manner in which the FTC has conducted its enforcement activities violates due process. The FTC has failed to provide LabMD with constitutionally adequate fair notice and due process, by among other things, refusing and failing to promulgate any data-security regulations or guidance that would have allowed LabMD to ascertain ex ante with reasonable certainty what data-security practices the FTC believes Section 5 to forbid or to require.

Second, LabMD is suffering and will continue to suffer irreparable harm. The FTC's enforcement action has eviscerated LabMD's business, ruined its reputation, and wrongfully chilled constitutionally-protected speech. Due to the FTC's actions, including its campaign of public disparagement, LabMD is no longer receiving new samples, one of its insurers declined to renew LabMD's coverage for its directors and officers, another insurer declined to issue LabMD medical malpractice insurance, and LabMD's general liability insurer recently notified LabMD that the insurer would not renew LabMD's policy effective May 6, 2014. Daugherty Decl. ¶¶ 9,16 & Exs. 2-3.

Without general liability insurance, LabMD cannot operate or even lease commercial space. Furthermore, given the FTC's sovereign immunity defenses, LabMD's ability to recover money damages from the FTC or its agents as a practical matter is nonexistent.

The third and fourth factors, which merge when the government is a party, also favor LabMD. The balance of hardships favors LabMD because the FTC admits that it has not accused LabMD of violating any HHS regulations governing LabMD's PHI data-security practices and the FTC lacks even one complaining witness who will say he or she has been harmed. Similarly, the public interest lies in keeping the FTC within its statutory and constitutional boundaries, and in protecting LabMD's free speech rights.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Here is a brief overview of the FTC's "investigation" into LabMD's PHI data-security practices.

At all times relevant, LabMD is and has been a "health care provider," and its PHI data-security regulated by HHS under HIPAA, as codified at 45 U.S.C. § 1320d et seq., and HITECH, as codified at 42 U.S.C. 300jj et seq., §§17901 et seq.[1] Compl. ¶ 16; Daugherty Decl. ¶ 3.

[1] See 42 U.S.C. §1320d(3)-(4) (defining terms); 45 C.F.R. § 160.103 (same); 42 U.S.C. § 1320d-2(d)(1) (establishing "Security standards for health information" and providing HHS with enforcement authority); 65 Fed. Reg. 82,462 (Dec. 28, 2000)

On or before January 19, 2010, the FTC commenced its investigation of LabMD for alleged patient-information data-security inadequacies. Aff. of John Boyle ("Boyle Aff.") ¶ 6. On December 21, 2011, the FTC served CIDs on LabMD and its CEO, Mr. Michael Daugherty. Compl. ¶ 27. After LabMD challenged the FTC's jurisdiction, the FTC petitioned this Court to enforce the CIDs. Id. ¶¶ 28, 33. This Court upheld the FTC's authority to issue the CIDs, noting its "sharply limited" role at that stage of the proceedings. Id. ¶ 34, Ex. 8: Opinion and Order, FTC v. LabMD, 1:12-cv-3005-WSD, Dkt. 23, at 6-8, 17 (N.D. Ga. Nov. 26, 2012). The Court, however, observed that there was "significant merit" to LabMD's argument that Section 5 does not give the FTC "unfairness" jurisdiction over PHI data-security. Compl. Ex. 8 at 14.

On July 19, 2013, Mr. Daugherty posted the trailer to his book, The Devil Inside the Beltway, on his website. He described the FTC's action as an "abusive government shakedown" and promised to "blow the whistle" on its "abusive beltway tactics." Compl. ¶ 38; Daugherty Decl. ¶ 11. Almost immediately, on July 22, 2013, FTC staff advised LabMD that they had recommended a complaint, i.e., an enforcement action, issue against LabMD.[2] Compl. ¶ 39. On August 28, 2013, the FTC issued a complaint

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(HHS's HIPAA Privacy Rule); 68 Fed. Reg. 8,334 (Feb. 20, 2003) (HHS's HIPAA Security Rule); 78 Fed. Reg. 5,566 (Jan. 25, 2013) (HHS's HITECH Rule).

[2] For additional background, see LabMD's opposition to the FTC's petition to enforce the CIDs, FTC v. LabMD, et al., Case No. 1:12-cv-3005-WSD, Dkt. No. 13, and LabMD's petition to quash the CIDs in, In the matter of LabMD, Inc., No. 558053

and notice order against LabMD. Id. ¶ 41 & Ex. 4. The FTC solely alleged that LabMD violated Section 5's prohibition of "unfair" acts or practices through unspecified PHI data-security practices that "taken together" failed to meet unspecified standards.[3] See Compl. Ex. 4, ¶¶ 10-11, 22-23.

On September 25, 2013, the FTC admitted at a pretrial conference that LabMD is not accused of violating applicable PHI data-security regulations. Compl. Ex. 9 at 22:10-13. The FTC also admitted that "[n]either the complaint nor the notice order prescribes specific security practices that LabMD should implement going forward." Id. at 20:15-17. It admitted lacking a complaining witness. Id. at 33:3-5. Finally, it admitted never promulgating Section 5 PHI or any other Section 5 data-security regulations or guidance or having plans to do so. Id. at 10:11-15.

On November 12, 2013, LabMD filed a motion to dismiss the enforcement action with the FTC, arguing lack of jurisdiction and due process violations.[4] Compl.

(Jan. 1, 2012), available at http://www.ftc.gov/sites/default/files/documents/petitions-quash/labmd-inc./120110labmdpetition.pdf (last visited Mar. 4, 2014).

[3] The FTC's complaint in the enforcement action solely concerns PHI data-security. The FTC, however, has never alleged LabMD violated any HHS PHI data-security regulations. See Compl. Ex. 2 at 12 & nn. 19-20; Ex. 4; Ex. 9 at 22:10-13. In September 2013, HHS reportedly said that it had decided "not to join [the] FTC in their investigation of these [alleged] p2p sharings [by LabMD] . . . ." Pepson Decl., Ex. 1. Moreover, the FTC has not accused LabMD of a "deceptive" trade practice.

[4] On November 14, 2013, LabMD filed a verified complaint in the U.S. District Court for the District of Columbia challenging FTC's jurisdiction and alleging

¶¶ 55, 59 & Exs. 11-12. On January 16, 2014, the FTC issued a final ruling, denying LabMD's motion to dismiss. Compl. ¶ 4, Ex. 2. The FTC then claimed Chevron deference. Compl. ¶¶ 70-71 & Ex. 3 at 6 (FTC v. Wyndham World. Corp., No. 2:13-cv-01887-ES-SCM, Dkt. 151 (D. N.J. Jan. 17, 2014)). The FTC's administrative enforcement action against LabMD is ongoing.

ARGUMENT AND CITATION OF AUTHORITIES

LabMD is not asking this Court to find facts or to parse the merits of different data-security methods. Instead, it is asking this Court solely to determine whether an Executive Branch agency has exceeded its authority and to decide pure questions of constitutional law and statutory interpretation, tasks reserved for Article III courts. See Chevron, 467 U.S. at 843 n. 9.

"[A] preliminary injunction is warranted if the movant demonstrates '(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm

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constitutional violations. LabMD v. FTC, et al., Case No. 1:13-cv-01787-CKK, Dkt. 1 (D.D.C. Nov. 14, 2013). On November 18, 2013, LabMD filed a petition for review in the U.S. Court of Appeals for the Eleventh Circuit. LabMD, Inc. v. FTC, Case No. 13-14267-F (11th Cir. Nov. 18, 2013). On February 18, 2014, the Eleventh Circuit dismissed LabMD's petition because LabMD's "APA, *ultra vires*, and constitutional claims . . . first must be asserted and considered in a district court." Order, LabMD v. FTC, Case No. 13-15267-F, at 2 (11th Cir. Feb. 18, 2014). On February 19, 2014, LabMD voluntarily dismissed the District of Columbia case without prejudice.

suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction is issued, and (4) an injunction would not disserve the public interest.'" Odebrecht Const., Inc. v. Sec'y, Florida Dep't of Transp., 715 F.3d 1268, 1273-74 (11th Cir. 2013) (quoting Grizzle v. Kemp, 634 F.3d 1314, 1320 (11th Cir. 2011)); Royal v. Reese, Case No. 1:14-cv-0025-WSD, 2014 U.S. Dist. LEXIS 1201, *5 (N.D. Ga. Jan. 7, 2014).[5] "'Of these four requisites, the first factor, establishing a substantial likelihood of success on the merits, is most important . . . .'" Mukendi v. Wells Fargo N.A., No. 1:13-CV-1436-RWS, 2013 U.S. Dist. LEXIS 66598, *3-4 (N.D. Ga. May 9, 2013) (citation omitted). Where, as here, the government is a party, the third and fourth factors merge. Nken v. Holder, 556 U.S. 418, 435 (2009). All factors favor an injunction here.

I. LabMD's verified complaint demonstrates a substantial likelihood of success on the merits.

A. This matter is final and ripe for review.

The FTC admitted finality when it submitted its January 16, 2014, order to multiple courts and demanded Chevron deference. Compl. ¶¶ 70-71 & Ex. 3 at 6. The FTC's order both states the agency's definitive legal position on its own jurisdiction and

[5] See also Baker v. Select Portfolio Servicing, Inc., No. 1:12-CV-03493-JEC, 2013 U.S. Dist. LEXIS 127891, *5-6 (N.D. Ga. Sept. 9, 2013) (citing McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir.1998)).

on LabMD's due process challenge, and, the FTC says, has the force of law.[6] See CSI Aviation Servs. v. DOT, 637 F.3d 408, 411-14 (D.C. Cir. 2011) (APA judicial review proper when agency has taken a definitive legal position). Yet, even without this admission, the FTC's January 16, 2014, order is Administrative Procedure Act (the "APA") final agency action. Sackett v. E.P.A., 132 S. Ct. 1367, 1373 (2012) (". . . the APA provides for judicial review of all *final* agency actions . . . ."); id. at 1374 ("The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question.") (Ginsburg, J. concurring)).[7]

This matter is also ripe. LabMD has exhausted all administrative remedies with respect to its jurisdictional and due process arguments.[8] See, e.g., CSI Aviation Servs., 637 F.3d at 411-14; Sackett, 132 S. Ct. at 1371-72; see also Athlone Ind. v. CPSC, 707

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[6] Only agency interpretations with "the force of law" are eligible for Chevron deference. U.S. v. Mead Corp., 533 U.S. 218, 226-27 (2001). The FTC cannot change its tune and take an inconsistent litigation position here. See N.H. v. Maine, 532 U.S. 742, 749-51 (2001) (discussing circumstances where judicial estoppel is proper).

[7] See also Compl. Ex. 1: Order, LabMD v. FTC, Case No. 13-15267-F, at 2 (11th Cir. Feb. 18, 2014) (holding that LabMD's "APA, *ultra vires*, and constitutional claims . . . first must be asserted and considered in a district court"); TVA v. Whitman, 336 F.3d 1236, 1248 (11th Cir. 2004) (listing finality factors).

[8] Exhaustion is not required where, as here, the administrative process is futile or inadequate. See Compl. ¶ 94; N.B. by D.G. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996).

F.2d 1485, 1487-88 (D.C. Cir. 1983). And the FTCA contemplates district court review of ongoing FTC enforcement actions. 15 U.S.C. § 45(c)-(d) (district court has jurisdiction until order reviewable under 15 U.S.C. § 45(c) has been issued); Compl. Ex. 1: Order, LabMD v. FTC, Case No. 13-15267-F, at 1 (11th Cir. Feb. 18, 2014) (holding that no such order has been issued); see Boise Cascade v. FTC, 498 F. Supp. 772, 777 (D. Del. 1980) (district courts have jurisdiction prior to issuance of cease order); see also Sackett, 132 S. Ct. at 1372-74 (analysis for concurrent jurisdiction).[9]

Furthermore, LabMD's nonstatutory ultra vires and constitutional claims are ripe and justiciable now, regardless of the presence or absence of final agency action.[10]

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[9] Courts may cite agency expertise as grounds for withholding review until an administrative proceeding has run its course. But cf. CSI Aviation Servs., 637 F.3d at 413. However, this should not happen here. See id. at 411-14. Not only does the FTC lack the statutory authority to regulate PHI and/or data-security under Section 5, and violated LabMD's constitutional rights, it also lacks the expertise to do so. For example, Executive Order 13636, "Improving Critical Infrastructure Cybersecurity," 78 Fed. Reg. 11,739 (Feb. 19, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-02-19/pdf/2013-03915.pdf (accessed Mar. 18, 2014), directed the Department of Commerce to set the relevant data-security standards, not the FTC. If the FTC had general jurisdiction under Section 5 to regulate data security by "making it up as it goes," then the President could simply have called on the Commission instead of creating a new regulatory infrastructure and standard-setting process.

[10] Even if "final agency action" was lacking (which it is not), this Court still may stop the FTC's jurisdictional over-reach now. See Am. Gen. Ins. Co. v. FTC, 496 F.2d 197, 200 (5th Cir. 1974) (jurisdiction to correct "gross and egregious" jurisdictional errors); XYZ Law Firm v. FTC, 525 F. Supp. 1235, 1237 (N.D. Ga. 1981) (same); see

The APA, as codified at 5 U.S.C. § 704, has no jurisdictional effect and does not bar these claims. See, e.g., Trudeau v. FTC, 456 F.3d 178, 184-87 & nn. 6-8 (D.C. Cir. 2006); see also Arbaugh v. Y & H Corp., 546 U.S. 500, 511, 516-17 (2006) (clarifying bright-line distinction between jurisdictional and nonjurisdictional rules); Muniz-Muniz v. U.S. Border Patrol, 2013 U.S. App. LEXIS 25400, *11 (6th Cir. 2013) (noting that "all of our sister circuits" have concluded 5 U.S.C. § 704 has no effect on federal-question jurisdiction). Also, 5 U.S.C. § 702 waives the FTC's sovereign immunity for all "agency actions," see Trudeau, 456 F.3d at 187, including administrative complaints, see FTC v. Standard Oil Co., 449 U.S. 232, 238 n.7 (1980).

B. The FTC's ultra vires data-security power-grab should be rejected.

Chevron does not immunize the FTC from judicial review in this case.

First, LabMD's constitutional arguments should be reviewed de novo even if Chevron otherwise applies. See Nat'l Mining Ass'n v. Sec'y of Labor, 153 F.3d 1264, 1267 (11th Cir. 1998) (no deference owed for pure issues of statutory construction and issues beyond an agency's expertise).

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also Leedom v. Kyne, 358 U.S. 184, 188 (1958). See generally Trudeau, 456 F.3d at 189-91; Sharkey v. Quarantillo, 541 F.3d 75, 88 n.10 (2d Cir. 2008).

The same holds true for LabMD's constitutional due process claims. See Coca-Cola Co. v. FTC, 475 F.2d 299, 303 (5th Cir. 1973) (jurisdiction over nonfrivolous constitutional claims); XYZ Law Firm, 525 F. Supp. at 1237 (same); see also Nat. Parks Cons. Assoc. v. Norton, 324 F.3d 1229, 1240-41 (11th Cir. 2003) (jurisdiction over constitutional claims even in the absence of "final agency action").

Second, the FTC's ruling that Section 5 grants it the authority to regulate PHI and/or create its own PHI data-security common law is not entitled to Chevron deference, for the FTC's standardless ex post enforcement creates serious constitutional fair-notice due process problems. See Ala. Power Co. v. DOE, 307 F.3d 1300, 1316 (11th Cir. 2002) (constitutional avoidance canon trumps Chevron).[11]

Third, even if Chevron applies, LabMD has still demonstrated a substantial likelihood of success on the merits under Chevron's two-step analysis. See City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (explaining analysis). Under Chevron step one, review is de novo, and courts apply ordinary tools of statutory construction. Id.[12] Courts consider a statute's text, structure, purpose, and legislative history. Miami-Dade County v. EPA, 529 F.3d 1049, 1063 (11th Cir. 2008); Loving v. IRS, 2014 U.S. App. LEXIS 2512, *6-7 (D.C. Cir. 2014); Hearth, Patio & Barbecue Ass'n v. DOE, 706 F.3d 499, 503 (D.C. Cir. 2013). This Court owes no deference "when the

[11] Accord Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 573-75 (1988) (same).

[12] The FTC must exercise its statutory 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). The FTC has no power to act unless the FTC can show specific congressional intent to delegate PHI regulatory authority. See La. Pub. Serv. Com. v. FCC, 476 U.S. 355, 374 (1986) ("agency literally has no power to act . . . unless and until Congress confers power upon it").

issue is a 'pure question of statutory construction.'"[13] Nat'l Mining Ass'n, 153 F.3d at 1267 (citation omitted). If Congress's intent is clear, "that is the end of the matter . . . ." City of Arlington, 133 S. Ct. at 1868.

If the Court concludes that Section 5 is ambiguous, then, under Chevron step two, the question is whether the agency's construction is "permissible." Id. But see Railway Labor Executives' Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (rejecting argument "that Chevron step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power"). The agency's construction must be "reasonable" to warrant deference.[14] Am. Library Ass'n v. FCC, 406 F.3d 689, 698-99 (D.C. Cir. 2005).

This Court should analyze the FTC's Section 5 "unfairness" authority claim using these interpretive canons: A statute should not be interpreted to render other

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[13] The existence of an ambiguity with respect to the scope of FTC's Section 5 authority does not warrant deference per se. Instead, it must appear that Congress explicitly or implicitly delegated the FTC the authority to cure that ambiguity. Hearth, 706 F.3d at 504. Deference is wholly inappropriate where it provides a backdoor for an agency to circumvent limits on its authority. Id. at 506 n.8.

[14] "Even where an agency's 'construction satisfies Chevron,'" it must be rejected if it is "'otherwise arbitrary and capricious.'" Int'l Union v. MSHA, 626 F.3d 84, 90 (D.C. Cir. 2010) (citation omitted); 5 U.S.C. §706(2)(A). The FTC's actions can only be upheld "on the basis articulated by the agency itself," Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983), and agency action "may not stand if the agency has misconceived the law." SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

statutes superfluous or to create inconsistencies; when an agency tells Congress that it lacks statutory authority and then Congress enacts numerous targeted laws in response, the agency cannot change its tune; older general statutes yield to more recent specific statutes; statutes should be interpreted consistent with the administrative structure Congress has enacted; and Congress does not hide elephants in mouse holes.

Section 5 says nothing about data security, undercutting the FTC's power claims. See La. Pub. Serv. Com. v. FCC, 476 U.S. 355, 374 (1986). But the fact that Congress has legislated in the area of data security against the backdrop of the FTC's historic disavowal of Section 5 "unfairness" jurisdiction over it is also critical.[15] Congress primarily has delegated PHI data-security issues to HHS and delegated to the FTC narrow authority to regulate data security in other areas for specific purposes.[16]

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[15] Until recently, the FTC repeatedly told Congress that its Section 5 "unfairness" authority does not authorize it to regulate data security. 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). Even now, while claiming plenary authority under Section 5 to regulate PHI or any other data-security through an administrative "common law," the FTC still asks Congress for statutory authority. See, e.g., S. 1151, 112th Cong. (2011); S.1408, 112th Cong. (2011); S.1434, 112th Cong. (2011); S. 1535, 112th Cong. (2011). Congress repeatedly refuses these requests. Cf. FDA v. Brown & Williamson, 529 U.S. 120, 153-60 (2000) (Congress's rejection of an agency's proposals for broad power—after agency disavows jurisdiction—in favor of targeted legislation shows lack of jurisdiction).

[16] See, 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

For example, HIPAA/HITECH authorize only HHS to regulate HIPAA-covered entities' data-security, while ARRA grants the FTC only limited authority to regulate non-HIPAA entities.[17] If Section 5 generally authorized the FTC to regulate data security, then Congress would not have done this. Rumsfeld v. FAIR, 547 U.S. 47, 57-58 (2006) (Congress does not enact meaningless laws).

Section 5 is an older general statute that says nothing at all about PHI data-security. The FTC may not abuse this general authority by unilaterally "expanding" its jurisdiction into areas the Congress has delegated to other federal agencies. Cf. RadLAX Gateway Hotel v. Amalg. Bank, 132 S. Ct. 2065, 2070-71 (2012).[18] The

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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 FTC 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).

[17] The FTC claims HIPAA does not evince congressional intent to displace its claimed "unfairness" PHI data-security authority. Compl. Ex. 2 at 12. But HIPAA was enacted in 1996, and even the FTC admits that it did not claim "unfairness" data-security authority until years later. Id. at 8. The recent vintage of the FTC's claimed Section 5 "unfairness" data-security authority is precisely why the HIPAA Privacy Rule's Implied Repeal Analysis omits mention of Section 5 but specifically discusses the FTC's data-security authority under a different, targeted statute. 65 Fed. Reg. 82,462, 82,481-82,485 (Dec. 28, 2000). HIPAA was necessary, in part, because the FTC has never had Section 5 "unfairness" authority over PHI. Cf. id. at 82,464 (HHS's HIPAA rule "establishes, for the first time, a set of . . . fair information practices").

[18] Although Section 5 grants the FTC fairly broad enforcement powers, Congress has denied the FTC carte blanche to regulate whatever it thinks "unfair." See, e.g.,

FTC's here offends the rule against attributing redundancy to Congress, see Gutierrez v. Ada, 528 U.S. 250, 258 (2000), and violates the canon that no statute should be interpreted to render its parts "inoperative or superfluous."[19] See Corley v. U.S., 556 U.S. 303, 314 (2009).

Even if Section 5 did give the FTC some "unfairness" data-security authority, HIPAA and HITECH displace and preempt these "more general remedies." EC Term of Years Trust v. U.S., 550 U.S. 429, 433 (2007). The FTC's assault on LabMD notwithstanding LabMD's HIPAA/HITECH compliance shows a "clear repugnancy" between these targeted statutes and Section 5.[20] Again, Section 5 must yield. See Credit Suisse v. Billing, 551 U.S. 264, 275-76 (2007) (applying four-factor analysis); see also Carcieri v. Salazar, 555 U.S. 379, 395 (2009) (implied repeal if statutes irreconcilably conflict).

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) (rejecting analogous FTC ultra vires power-grab).

[19] If the 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.

[20] This is because Congress gave HHS specific authority over PHI. See supra note 1. There is a clear conflict between HIPAA/HITECH and Section 5, for neither HHS nor anyone else has accused LabMD of HIPAA/HITECH data-security violations.

The FTC's authority must be exercised within the congressionally-enacted structure, "particularly where Congress has spoken subsequently and more specifically to the topic at hand." Brown & Williamson, 529 U.S. at 125, 133. Congress would not grant the FTC unfettered power to create and enforce PHI "common law" in the cryptic fashion of Section 5, id. at 160, for it does not hide massive regulatory schemes in statutory mouse holes. Whitman v. Am. Trucking Ass'ns., 531 U.S. 457, 468 (2001); see Loving, 2014 U.S. App. LEXIS 2512 at *16-24. Furthermore, the FTC's claimed power to create administrative "common law" using consent orders and Internet posts violates specific statutory prohibitions. See 15 U.S.C. §§ 45(m)(1)(B),(n); see also 5 U.S.C. § 552(a)(1) (Federal Register publication requirements); see also Leedom v. Kyne, 358 U.S. 184, 188 (1958). Therefore, an injunction is proper. See City of Arlington, 133 S. Ct. at 1869 (agency acting beyond jurisdiction is ultra vires).

C. The FTC's ex post facto data-security regime violates due process.

LabMD did not receive constitutionally adequate notice of the alleged violations because the FTC has never promulgated data-security rules or regulations. See Compl. ¶¶ 47-48, 74-80 & Ex. 9 at 10:8-14; Ex. 14 at 69:22-70:5. Due process requires the FTC to give fair ex ante notice of what Section 5 forbids or requires and not regulate through ex post facto enforcement actions. FCC v. Fox TV Stations, Inc., 132 S. Ct.

2307, 2317 (2012); Georgia Pac. Corp. v. OSHRC, 25 F.3d 999, 1005 (11th Cir. 1994); Satellite Broad. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987); see, e.g., U.S. v. Chrysler Corp., 158 F.3d 1350, 1355-57 (D.C. Cir. 1998) (due process violated where a party first receives notice of a purportedly proscribed activity through an enforcement action); see also Trinity Broad. v. FCC, 211 F.3d 618, 632 (D.C. Cir. 2000) (ascertainable certainty test); Gates & Fox v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986).[21]

It is well settled that fair-notice due process requirements apply when agencies seek burdensome relief, as the FTC did here. Compl. ¶¶ 124-125 & Ex. 4. See, e.g., Chrysler Corp., 158 F.3d at 1355-57 (product recall); PMD Produce Brokerage v. USDA, 234 F.3d 48, 51-52 (D.C. Cir. 2000) (license revocation). The FTC claims that Section 5's statutory "unfairness" language alone constitutes fair notice. Compl. Ex. 2 at 16. But the statute does not mention "data security," let alone prescribe or proscribe PHI data-security practices. See Stegmaier & Bartnick, Physics, Russian Roulette, and Data Security: The FTC's Hidden Data-Security Requirements, 20 GEO. MASON L. REV. 673, 706 (2013)("[S]tatutory language does not provide notice of required data-

[21] The FTC order cites the following case to claim fair notice, see Compl. Ex. 2 at 16: Trans Union Corp. v. FTC, 245 F.3d 809, 817-18 (D.C. Cir. 2001) (rejecting a fair notice claim "because of the extremely clear process for clarifying the meaning of the regulation"). Here, however, Section 5 does not mention data security; LabMD could not have obtained guidance or an advisory opinion, Compl. ¶ 80, Ex. 14 at 52:10-11; and the FTC admittedly refuses even to endorse any standards at all, id. at 53:9-10.

security safeguards."). Section 5 thus does not provide constitutionally adequate ex ante notice of prohibited PHI data-security practices. See Connally v. Gen. Constr. Co., 269 U.S. 385, 391-95 (1926).

Also, the FTC's complaint against LabMD does not cite any specific medical-industry standards that LabMD allegedly failed to follow, and the FTC's January 16, 2014, order is likewise untethered to any objective standards, including industry standards, customs, or regulations in effect and applicable to businesses of LabMD's size and nature at the time of the alleged violations. See Compl. Ex. 4 at 17-19. Thus, even if Section 5 could provide constitutionally adequate notice, the FTC's amorphous "reasonableness" standard violates due process. See S&H Riggers & Erectors v. OSHRC, 659 F.2d 1273, 1273, 1280-83 (5th Cir. 1981) (reasonableness standard divorced from objective industry standards violates due process); see also Fla. Mach. & Foundry, Inc. v. OSHRC, 693 F.2d 119, 120-21 (11th Cir. 1982) (industry standards control).

The FTC's paid "expert" report, first produced to LabMD the evening of March 18, 2014, highlights the constitutional infirmity,[22] Pepson Decl. ¶ 19, Ex. 18, as does the FTC's refusal to simply tell LabMD during discovery what specific PHI data-security rules, regulations, and other binding standards the company allegedly violated.

[22] Although the FTC's complaint suggests LabMD's PHI deficiencies are ongoing, its "expert's" opinion stops in January, 2010. Pepson Decl., Ex. 18 at 46.

See Compl. ¶¶ 54-60; Pepson Decl. ¶¶ 12-19, Exs. 11-18. This report does not tie a given LabMD PHI data-security practice to the violation of a given and applicable medical-industry regulation or standard. See Pepson Decl., Ex. 18 at 16-46. But cf. Truett Aff. ¶¶ 2, 9; Maire Aff. ¶¶ 1-9. Due process simply does not allow the FTC to create enforceable PHI rules through a litigation expert's opinion and then to spring them for the first time on LabMD more than four years after the fact in an enforcement action. S&H Riggers, 659 F.2d at 1285; see Satellite Broad. Co., 824 F.2d at 3.

II. LabMD is suffering irreparable harm and is unlikely to recover money damages.

The FTC's actions, including its disparagement campaign, threatens LabMD's existence, harms LabMD's business reputation and image, and continues to cause LabMD to lose commercial goodwill. Daugherty Decl., ¶¶ 5-9, 16, 19; Pepson Decl., Exs. 2-10. LabMD has been denied directors and officers (D&O) insurance, even though LabMD has had only one nominal claim since 2009, and lost its medical malpractice insurance. Daugherty Decl. ¶ 9. In addition, LabMD's general liability insurer recently notified the company that the insurer would not renew LabMD's policy effective May 6, 2014, thereby preventing it from even leasing commercial space. Id. These harms, and the adverse publicity caused by the FTC, support injunctive relief.[23]

[23] See 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.

Id. ¶¶ 6-9; Pepson Decl., Exs. 2-10; Housworth v. Glisson, 485 F. Supp. 29, 35-36 (N.D. Ga. 1978) (adverse publicity from pending administrative proceeding is irreparable harm).

Interference with constitutional rights is also irreparable harm. Mills v. District of Columbia, 571 F.3d 1304, 1312 (D.C. Cir. 2009). "It is well-established . . . that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" White v. Baker, 696 F. Supp. 2d 1289, 1312-13 (N.D. Ga. 2010) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976)). The timing of the FTC's enforcement action not only reflects retaliation against LabMD, but also has had "a chilling effect on free expression." White, 696 F. Supp. 2d at 1312-13.

Moreover, the economic costs of responding to the FTC's actions have irreparably harmed LabMD and continue to do so. By September 2012, LabMD had already incurred over $100,000 in litigation costs alone. Boyle Aff., ¶ 17. LabMD's management has been forced to spend thousands of hours of time responding to the FTC's claims and repairing the damage done by its disparagement. Daugherty Decl., ¶¶ 5-9. Due to sovereign immunity, it is unlikely that LabMD can recover money damages for the FTC's misconduct. See America's Health Ins. Plans v. Hudgens, 915 F. Supp. 2d 1340, 1364-65 (N.D. Ga. 2012).

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).

III. The balance of the equities and the public interest favor granting the injunction.

Where the government is a party, the third and fourth factors for granting injunctive relief merge. Nken, 556 U.S. at 435.

First, the balance of equities favors LabMD. A government agency has no legitimate interest in ultra vires and unconstitutional conduct. See KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1272 (11th Cir. 2006) (The government "has no legitimate interest in enforcing an unconstitutional ordinance. For similar reasons, the injunction plainly is not adverse to the public interest."). The FTC's complaint does not allege specific financial or other harm due to LabMD's "unfair" acts or practices, Compl. Ex. 4, ¶¶ 13-21, or even name a victim or complaining witness. Compl. Ex. 9 at 33:3-5. LabMD has never been and is not accused of violating HIPAA/HITECH. Compl. ¶ 17 & Ex. 9 at 22:10-13; Daugherty Decl. ¶ 4; see Pepson Decl. Ex. 1.

Second, ensuring the FTC respects statutory and constitutional limits is in the public interest. Odebrecht Constr., 715 F.3d at 1290. "The public interest favors compliance with federal statutes . . . ." Chastain v. NW Ga. Hous. Auth., 2011 U.S. Dist. LEXIS 135712, *37 (N.D. Ga. 2011) (citation omitted). Further, "because a constitutional right is at issue, the entry of an injunction would not be adverse to the public interest but would in fact advance it." White, 696 F. Supp. 2d at 1313.

CONCLUSION

LabMD has demonstrated a likelihood of success on the merits, irreparable harm, a favorable balance of the equities and the public interest in FTC's respect for its statutory and constitutional boundaries. For the foregoing reasons, this Court should grant LabMD's motion.

Respectfully submitted this 20th day of March, 2014.

/s/ Ronald L. Raider

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CERTIFICATION AS TO FONT

In accordance with Local Rule 7.1(D), the undersigned certifies that this brief was prepared with Times New Roman 14, a font and point selection approved by the Court in Local Rule 5.1.

/s/ Ronald L. Raider

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CERTIFICATE OF SERVICE

This is to certify that, on March 20th, 2014, I electronically filed the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system, and served the following by statutory overnight delivery and certified U.S. Mail as follows:

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This 20th day of March, 2014.

/s/ Ronald L. Raider

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