UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

ORIGINAL

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

RESPONDENT LabMD, INC.'S REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR STAY OF FINAL ORDER PENDING REVIEW BY A UNITED STATES COURT OF APPEALS

Patrick J. Massari
Erica L. Marshall
CAUSE OF ACTION INSTITUTE
1875 Eye Street, NW
Suite 800
Washington, DC 20006
Tel. (202) 499-4232
Fax (202) 338-5842
patrick.massari@causeofaction.org

September 15, 2016

Counsel for Respondent LabMD, Inc.

RECORD REFERENCES AND GLOSSARY

ALJ — FTC Chief Administrative Law Judge D. Michael Chappell

Brief for Appellee Federal Trade Commission, *LabMD, Inc. v. FTC*, No. 14-12144 (July 24, 2014) (excerpt attached as Reply Exhibit 1)

CC — Complaint Counsel

CCAB — Complaint Counsel's Appeal Brief (Exhibit 3 to LabMD Stay Application)[1]

CC Motion to Enforce Briefing Limits — Compliant Counsel's Motion to Enforce Limits on Appeal Briefing Pursuant to Rule 3.52 (Dec. 7, 2015) (excerpt attached as Reply Exhibit 2)

CC Opposition to LabMD Cross-Motion to Strike — Complaint Counsel's Opposition to Respondent's Cross-Motion to Strike Notice of Appeal (Dec. 17, 2015) (excerpt attached as Reply Exhibit 3)

CC Privilege Log — Excerpt from Complaint Counsel's Opposition to Respondent's Motion Compel A Proper Privilege Log and Complaint Counsel's Revised Log of Privileged Documents Responsive to Respondent's First Requests for Production (attached as Reply Exhibit 4)

"Commission Opinion" or "Op." — Opinion of the Commission, *In the Matter of LabMD, Inc.*, No. 9357 (July 28, 2016) (Exhibit 6 to LabMD Stay Application).

Commission Order Extending Deadlines — Order Extending Deadlines for Filing Petition for Reconsideration and Answer Thereto, *In the Matter of LabMD, Inc.*, No. 9357 (Aug. 12, 2016) (Exhibit 7 to LabMD Stay Application)

December 18 Order — Commission Order (Dec. 18, 2015) (attached as Reply Exhibit 5)

"Compl." or Complaint — Complaint, *In the Matter of LabMD, Inc.*, No. 9357 (Aug. 28, 2013) (Exhibit 8 to LabMD Stay Application)

Daugherty Decl. — Declaration of LabMD, Inc. President and Chief Executive Officer Michael J. Daugherty in Support of Respondent LabMD, Inc.'s Application for Stay of Order Pending Review in U.S. Court of Appeals (Exhibit 18 to LabMD Stay Application)

---

[1] Materials attached to LabMD's Stay Application as Exhibits, as required by Commission Rule 3.56(c), 16 C.F.R. § 3.56(c), are not reattached to this Reply.

FTC — Federal Trade Commission

"ID" or "Initial Decision" — Initial Decision , *In the Matter of LabMD, Inc.*, No. 9357 (Nov. 13, 2015) (Exhibit 20 to LabMD Stay Application)

HHS — U.S. Department of Health and Human Services

HIPAA — Health Insurance Portability and Accountability Act of 1996

HITECH — Health Information Technology for Economic and Clinical Health Act

IDCOL — Numbered Conclusions of Law in the ALJ's Initial Decision

IDF — Numbered Findings of Fact in the ALJ's Initial Decision

January 16 Order — Commission Order Denying Respondent LabMD's Motion to Dismiss, *In the Matter of LabMD, Inc.*, No. 9357 (Jan. 16, 2014) (Exhibit 22 to LabMD Stay Application).

KHG SA — Respondent's Motion for Reconsideration or, In the Alternative, For a Stay of Final Order Pending Review by U.S. Court of Appeals, *In the Matter of Kentucky Houshold Goods Carriers Association,* Docket No. 9309 (July 20, 2005) (excerpt attached as Reply Exhibit 6)

LabMD MSD Reply — Respondent LabMD Inc.'s Reply in Support of Motion for Summary Decision, *In the Matter of LabMD, Inc.*, No. 9357 (May 12, 2014) (Exhibit 23 to LabMD Stay Application)

LabMD MSD Reply, Ex. 1 — Excerpt from Transcript of Proceedings Before the Honorable William S. Duffey, Jr.. United States District Judge, *LabMD, Inc. v. FTC*, No. 1:14-cv-810-WSD, (N.D. Ga. May 7, 2014)

LabMD Notice of Conditional Cross-Appeal — Respondent LabMD, Inc.'s Notice of Conditional Cross-Appeal (Dec. 1, 2015) (attached as Reply Exhibit 7)

May 19 Order — Commission Order Denying Respondent LabMD's Motion for Summary Decision, *In the Matter of LabMD, Inc.*, No. 9357 (May 19, 2014) (Exhibit 25 to LabMD Stay Application)

PHI — Protected Health Information, as defined by HIPAA and HHS regulations.

Order — Final Order, *In the Matter of LabMD, Inc.*, No. 9357 (July 28, 2016) (Exhibit 29 to LabMD Stay Application)

RX532 — Deposition Transcript of Testimony of Daniel Kaufman (May 12, 2014) (Exhibit 33 to LabMD Stay Application)

RX644 — STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113TH CONG., TIVERSA, INC.: WHITE KNIGHT OR HIGH-TECH PROTECTION RACKET (2015) (prepared for Chairman Darrell E. Issa) (Exhibit 35 to LabMD Stay Application)

Rosch Dissent — 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 (June 21, 2012) (attached as

"SA" or "Stay Application" — Respondent LabMD Inc.'s Application for Stay of Final Order Pending Review by a United States Court of Appeals, *In the Matter of LabMD, Inc.*, No. 9357 (Aug. 30, 2016).

"SO" or "Opposition" — Complaint Counsel's Opposition to Respondent's Application for Stay of Final Order, *In the Matter of LabMD, Inc.*, No. 9357 (Sept. 9, 2016)

Tr. — Excerpts from Transcript of evidentiary hearing before the ALJ (Exhibit 37 to LabMD Stay Application and attached Reply Exhibit 9)

Supp. Daugherty Decl. — Supplemental Declaration of LabMD, Inc. President and Chief Executive Officer Michael J. Daugherty in Support of Respondent LabMD, Inc.'s Reply to Complaint Counsel's Opposition to Respondent's Application for Stay of Order Pending Review in U.S. Court of Appeals (attached as Reply Exhibit 10)

Exhibit A — Expert Opinion Declaration of Cliff Baker

I. INTRODUCTION

At a May 2014 hearing on a LabMD motion for preliminary injunction, the Honorable William S. Duffey, Jr.,[1] commented on the FTC investigation of LabMD, stating to FTC counsel: "I could tell you as a result of that [2012] hearing [on the CID] that there was already a history of acrimony and *I think on behalf of the agency the exertion of authority in a mean-spirited way*." LabMD MSD Reply, Ex. 1 at 47:17-21 (emphasis added)); *see also id.* 94:14-15 (stating to FTC counsel: "I think that you will admit that there are no security standards from the FTC.").

After learning that FTC was monitoring the website of LabMD CEO Michael Daugherty,[2] Judge Duffey said: "This is taking an interesting and troubling turn which…[the Court] never expected" due to "an admission by an FTC lawyer that they monitor blogs routinely of companies for whatever purposes…." *Id.* 27:5-9. Judge Duffey described aspects of the FTC investigation of LabMD "as almost being unconscionable." *Id*. 77:9-10. Judge Duffey reached this conclusion before it came to light that FTC's case against LabMD was predicated on false evidence and testimony relating to the 1718 File. *See* ID 6-11, 88; IDF 100-168. "The ALJ [subsequently] found…that after the meeting between Tiversa and FTC staff in the fall of 2009, Mr. Boback directed Mr. Wallace to generate false information purporting to show that the 1718 file had spread

[1] U.S. District Judge for the Northern District of Georgia.

[2] Alarm bells began going off in the corridors of FTC's Division of Privacy and Identity Protection when Mr. Daugherty's website previewed his soon-to-be-published book, The Devil Inside the Beltway, in July 2013. "Three days after Mr. Daugherty posted the [book] trailer online,…FTC gave notice of its intent to file a complaint against LabMD." *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1277 (11th Cir. 2015). The book was critical of FTC's gestapo tactics in pursuing LabMD generally, and particularly singled out misconduct on the part of CC Alain Sheer and Ruth Yodaikan. Mr. Sheer's draconian obsession with destroying LabMD culminated in his importuning Tiversa to provide fraudulent evidence of "spread" regarding the 1718 File. It is a cautionary tale of agency retaliation and misconduct when confronted by a citizen who refused to capitulate to agency overregulation and malfeasance.

to multiple locations on the Internet…." Op. 32 n.84; *see* Op. 31 (Boback's claims of "spread" are "false").

In an exercise of judicial restraint, Judge Duffey (and later the Eleventh Circuit) declined to address the legality of FTC's actions to allow it to further consider those actions before it would need to defend its conduct in federal Court. *See generally LabMD, Inc. v. FTC*, 776 F.3d 1275 (11th Cir. 2015).

Judge Duffey further found that "there is significant merit to…[LabMD's] argument that Section 5 does not justify an investigation into data security practices and consumer privacy issues[.]" *FTC v. LabMD*, No. 1:12-cv-3005-WSD, Dkt. No. 23, at 14 (N.D. Ga. 2012). *Cf. FTC v. AT&T Mobility*, No. 15-16585, 2016 U.S. App. LEXIS 15913, *24-25 (9th Cir. Aug. 29, 2016) (rejecting FTC's claimed Section 5 jurisdiction over entities regulated by FCC).

In November 2015, the Initial Decision authored by FTC Chief Administrative Law Judge D. Michael Chappell dismissed the FTC complaint against LabMD in its entirety for lack of evidence of harm, ID 88, rejecting in great detail Tiversa's false evidence and perjured testimony, *see* ID 7-11; IDF 100-168.

Three years earlier, FTC Commissioner J. Thomas Rosch warned the Commission to avoid reliance on the 1718 File (the sole basis for the Commission Opinion's conclusion that LabMD's alleged data-security practices harmed or likely harmed consumers, *see* Op. 17-25) as "evidence" in this case: "[T]he Commission should avoid ***even the appearance of bias or impropriety by not relying on such evidence or information [i.e., the 1718 File] in this investigation***." Rosch Dissent at 2 (emphasis added).

Nonetheless, rather than prosecuting Tiversa for unfair-and-deceptive trade practices, 15 U.S.C. § 45(a); *see* RX644, the Commission ignored these red flags, choosing instead to reverse

the Initial Decision dismissing the complaint. It did this even though the Commission Opinion acknowledges that after a meeting between Tiversa representatives and lead CC Alain Sheer and other FTC staff, Tiversa created false evidence for use by Mr. Sheer, Op. 31-32 & n.84;[3] there is no evidence that any identifiable consumer has been harmed by Tiversa's 2008 theft of the 1718 File or LabMD's alleged data-security practices, long-since discontinued, *see* Op. 17,36; ID 52,88; IDCOL 18; and LabMD is out of business, "with a computer that is shut down and not connected to the Internet," Op. 36.

As CC's Opposition confirms, the Commission Opinion and Final Order are *ultra vires*, unconstitutional, unsupported by evidence, and contrary to law, serving only three (prohibited) purposes: first, to retaliate against LabMD for its CEO's decision to exercise his First Amendment right to publicly criticize FTC; second, to give FTC that which, by its own admission,[4] Congress refused to give it—new nationwide data-security "unfairness unreasonableness" civil-penalty powers under 15 U.S.C. § 45(m)(1)(B) to wield against *all* U.S. businesses; and third, to give FTC a new "tool" to attempt to demand *Chevron* deference in pursuit of its unilateral extra-statutory "expansion" of its "unfairness" powers.[5]

Unless the Commission fully grants LabMD's stay application or otherwise dismisses this case, a Court of Appeals will be forced to address the Commission's decision to give itself new national data-security civil penalty powers (which Congress intentionally and specifically denied),

---

[3] Tiversa's false evidence formed the basis for FTC's in-house prosecution of LabMD, *see* SA 4-7 & nn.6-7; IDF 100-168, as Mr. Sheer made clear in his opening statement, Tr. 16-17,31.

[4] *See* Prepared Statement of the FTC, Privacy in the Digital Age: Preventing Data Breaches and Combating Cybercrime, Before the Senate Committee on the Judiciary, at 11 (Feb. 4, 2014); January 16 Order at 8 n.10.

[5] FTC has tried this before without success. *See LabMD, Inc.*, 776 F.3d at 1278-79 (rebuffing FTC deference demands).

while also punishing LabMD for speaking out and criticizing FTC, all on an emergency briefing schedule. Because LabMD has satisfied all four stay factors, there is no reason why an Article III Court should be forced to address the issues of national importance presented by this case on such an expedited basis.

II. UNADDRESSED AND UNDISPUTED MATTERS

Generally, an opposition must address arguments and factual assertions to avoid conceding points. *See CREW v. Cheney*, 593 F. Supp. 2d 194, 229 (D.D.C. 2009)("failure to respond to an argument…acts as a concession"); *see, e.g., DeVito v. Smithkline Beecham Corp.*, No.02-CV-0745, 2004 U.S. Dist. LEXIS 27374, *13 (N.D.N.Y Nov. 29, 2004).

Here, CC offers no response to most of LabMD's arguments and facts. Instead, in an apparent attempt to avoid application of this principle to its Opposition, CC states in a footnote: "In addressing only the relevant facts and issues, Complaint Counsel does not concede any of the irrelevant factual assertions made by Respondent." Op. 2 n.1. CC should not be allowed to avoid substantively responding to LabMD's arguments and factual assertions through this disclaimer.

In any event, LabMD's Stay Application and supporting materials—and CC's failure to rebut or challenge LabMD's factual assertions and address LabMD's arguments—speak for themselves. And a federal Court will ultimately decide for itself what facts and issues are relevant.

III. CC'S OPPOSITION CONFIRMS ALL STAY FACTORS FAVOR LabMD

A. LabMD Likely to Succeed on Merits

1. Stay Warranted Due to Complex Record and Important Issues

There is no dispute that "[t]he Commission may…grant a stay if the case presents the application of difficult legal questions to a complex factual record…." SO 7 n.8. "Complaint Counsel agrees…this case involves an extensive and complex record and presents important

issues." SO 7-8 n.8. The Commission has also recognized this. *See* SA 9-11. As demonstrated by LabMD's stay application, SA 1-24, the issues here are far more complex than those in *ECM Biofilms* (unaddressed by CC), where this Commission granted a full stay. *See In the Matter of ECM Biofilms, Inc.*, No. 9358, at 1-2 (Dec. 8, 2015).

This case involves the application of difficult legal questions, as well as legal questions on which a wide range of reasonable jurists (and legal scholars) have disagreed with the positions set forth in the Commission Opinion. *See, e.g., FTC v. LabMD*, No. 1:12-cv-3005-WSD, Dkt. No. 23, at 14 (N.D. Ga. 2012)("Court finds there is significant merit to…[LabMD's] argument that Section 5 does not justify an investigation into data security practices and consumer privacy issues[.]"); ID 88 (LabMD's "alleged unreasonable data security cannot properly be declared…unfair….[T]he Complaint must be DISMISSED."); Gus Horowitz, *Data Security and the FTC's UnCommon Law*, 101 IOWA L. REV. 955, 958-59 (2016). *Cf. FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 634 (D. N.J. 2014)("[S]tatutory authority and fair-notice challenges [to FTC "unfairness" data-security regulation] confront this Court with novel, complex statutory interpretation issues that give rise to a substantial ground for difference of opinion.").

For this reason alone, the first stay factor is met. *See* SA 9-12.

2. **Stay Also Warranted Because LabMD Likely to Succeed on Appeal**

i. CC Misunderstands Stay Standard

CC suggests LabMD must make a "strong showing on the merits," arguing LabMD has not done so because it is only "recycling" arguments the Commission already rejected and expressing "mere disagreement" with the Commission. SO 5. Not so.

In the administrative context, "likelihood of success" is not measured by whether *the Commission* believes the respondent likely to succeed on appeal. The stay standard does not

require that the Commission admit decisional error. *In the Matter of Novartis*, 128 F.T.C. 233, 1999 FTC LEXIS 211, *2-5 (1999); *see also Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977).

CC's reliance on *Daniel Chapter One*, SO 5, 13, should be rejected on the facts and law. First, *Daniel Chapter One* states: "[T]he Commission need not harbor doubt about its decision in order to grant the stay. Respondents…may satisfy the 'merits' factor if their argument on at least one claim is 'substantial'—so long as the other three factors weigh in their favor." 2010 FTC LEXIS 23, *6 (2010)(citations and quotation marks omitted). Second, *Daniel Chapter One* is factually inapposite, as it involved routine deception claims and, unlike here, the Commission "affirm[ed] the Initial Decision…both as a matter of fact and…law." *Daniel Chapter One*, 2009 FTC LEXIS 259, *1 (Dec. 24, 2009).

Regardless, for the reasons set forth in its Stay Application, LabMD has independently satisfied the first stay factor even under CC's manufactured standard.

ii. CC's Failure to Respond to LabMD Arguments

As discussed above, CC did not substantively respond to many of LabMD's merits arguments, thereby conceding those points, notwithstanding its footnote disclaimer. *See* SO 2 n.1.

Among other things, CC did not substantively address the following LabMD arguments:

- FTC lacks "unfairness" data-security jurisdiction, and its actions against LabMD are ultra vires. *Cf.* SA 12-13.
- FTC violations of LabMD's due process rights for failure to give fair notice. *Cf.* SA 12-14, 18.
- FTC abused its discretion by prosecuting LabMD in-house in an attempt to, *inter alia*, advance FTC's national policy goals. *Cf.* SA 14.

- Commission Opinion misinterpreted plain language of Section 5(n) and violated Section 5(n)'s prohibition against primary reliance on putative "public policy" evidence to prove harm. *Cf.* SA 14-15.
- FTC failure to establish constitutionally required objective-medical-industry-practice standard of care and deviations therefrom at specific points in time. *Cf.* SA 16-18.
- Commission Opinion wrongfully rejected Initial Decision's conclusion that CC failed to meet its burden of proof even under CC's claimed "significant risk" standard. *Cf.* SA 16.
- The Commission Opinion wrongfully relied on ex parte, uncross-examined statements for the truth of the matters asserted. *Cf.* SA 16.
- The Commission Opinion's misapplication of HIPAA standards unsupported by any expert testimony (which it was CC's burden to adduce), contrary to the Complaint, the Commission's prior Orders, and CC's representations. *Cf.* SA 17-19.
- Commission Opinion's wrongful rejection of the Initial Decision's determination that CC's harm experts' reports and testimony were not entitled to weight, speculative, and based on fabricated evidence and perjured testimony. *Cf.* SA 19-20.
- FTC's relationship with Tiversa and use of 1718 File in the LabMD prosecution violates the Fourth Amendment. *Cf.* SA 20.
- The Commission Opinion's cost-benefit analysis is fatally flawed. *Cf.* SA 20-21.
- The Order is invalid because it relates to alleged acts or practices occurring many years ago, long-since discontinued, which will never reoccur. *Cf.* SA 23-24.
- FTC's retaliatory issuance of the LabMD complaint violates 15 U.S.C. § 45(b) and LabMD's First Amendment rights. *Cf.* SA 24.

- FTC's in-house administrative process is unconstitutional. *Cf.* SA 24-25.

CC's silence speaks for itself. Because CC "did not bother to respond" to LabMD's arguments, it conceded the points. *See, e.g., DeVito*, 2004 U.S. Dist. LEXIS 27374, at *13.

iii. CC's Limited Substantive Responses to LabMD's Arguments Fail on Facts and Law

CC's reliance on *POM Wonderful* to claim that a federal Court should defer to the Commission's rejection of the Initial Decision fails. *See* SO 5. *POM Wonderful* is a deceptive-practices case where the Commission *affirmed* the ALJ's findings on liability. 777 F.3d 478, 489 (D.C. Cir. 2015). Here, the Commission reversed the Initial Decision dismissing the complaint, and thus the reviewing Court "may…examine…FTC's findings more closely[.]" *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005)(vacating Commission decision).

Next, CC's repetition of the Commission Opinion's defense of the Order, SO 6, fails for the reasons set forth in LabMD's stay application, *see* SA 21-24, 27-29. The Commission may have some "discretion" to fashion a "cease and desist" order, but it did not issue a "cease and desist" order here. Therefore, the Order exceeds the Commission's authority.

CC does not state why it did not bring an action in federal Court under Section 13(b) of the FTC Act if it wanted additional (or expedited) relief. But whatever its rationale, the Commission cannot change or ignore the text of 15 U.S.C. § 45(b), which only allows it to order LabMD to *stop* doing something—and does not allow the Commission to *require LabMD to affirmatively perform expensive, time-consuming, and burdensome* tasks.

CC's attempt to distinguish *Heater*, SO 6-7, is also in error. The principles set forth in *Heater* extend beyond monetary redress to bar FTC from including HITECH notification

provisions in "cease and desist" orders.[6] *See AMREP Corp. v. FTC*, 475 U.S. 1034, 1035 (1986) (White, J., dissenting from denial of *cert.*) (noting "decisions of the Fourth and Ninth Circuits holding that § 5 authorizes only cease-and-desist orders, and not notification orders").

Finally, CC's admission that HITECH notification requirements applied "since 2010," SO 13-14, further confirms that Part III of the Order forces LabMD to retroactively comply with notification obligations it might have had after 2010 under HITECH—a statute FTC does not enforce (and has not accused LabMD of violating), SA 22-23 & n.30—enforced by a different agency, HHS, which declined to prosecute LabMD for Tiversa's theft of the 1718 File in 2008, even though CC's own privilege log shows it reached out repeatedly over a period of 3 years to HHS regarding LabMD. *See* CC Privilege Log.

iv. CC's Efforts to Shield FTC's Actions From Judicial Scrutiny Fail

CC also invokes procedural technicalities in an effort to shield FTC's actions from judicial scrutiny, suggesting that issue-waiver principles bar LabMD from making its case on the merits. *See* SO 6-7, 13 & nn.5-7. That argument fails for at least three reasons.

First, LabMD's stay application itself is sufficient to preserve all issues raised therein and in supporting materials,[7] *see Busse Broadcasting Corp. v. FCC*, 87 F.3d 1456, 1461 (D.C. Cir. 1996), particularly because FTC has been given yet another opportunity to vacate its Opinion and Order. *See* 16 C.F.R. § 3.72(a); 15 U.S.C. § 45(b). *See generally* SA (explaining why FTC's actions are unlawful). FTC cannot later complain that it was not on notice of LabMD's arguments.

[6] Part III is fundamentally different from affirmative disclosures and corrective advertising in deception cases.

[7] Rule 3.51(b), 16 C.F.R. § 3.51(b), does not apply here because LabMD does not object to the Initial Decision dismissing the Complaint. CC apparently agrees. *See* CC Opposition to LabMD Cross-Motion to Strike at 2; CC Motion to Enforce Briefing Limits at 4 & n.3 (arguing that cross-appeals based on absence of factual and legal rulings are not allowed).

See Getty Oil Co. v. Andrus, 607 F.2d 253, 255-56 (9th Cir. 1979); *Chrysler Corp. v. FTC*, 561 F.2d 357, 364 n.7 (D.C. Cir. 1977).

Second, CC's reliance on the Commission Opinion to claim waiver fails. The Commission Opinion's reliance on *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003), *see* Op. 33, is badly misplaced. The issue-waiver principles in *Jernigan* apply only to *appellants* (here, CC because the Initial Decision dismissed the Complaint), requiring that issues be raised in the *appellant's* opening brief. *See Jernigan*, 341 F.3d at 1283 n.8. The reason for that rule is procedural fairness to the *appellee* (here, LabMD). *See id.* ("'[A]n appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed."' (citations omitted).

There is no fairness for LabMD here, for had the Commission applied the *Jernigan* principles to CC's appeal brief, it would have dismissed the case because CC declined to brief necessary elements of any Section 5 "unfairness" violation, which the Commission reached anyway, finding against LabMD (then claiming it was LabMD that did not dispute these issues).[8] *See* CCAB 1 n.1 (footnote declining to brief second prongs of Section 5(n)); Op. 25-27 (holding second two prongs of Section 5(n) met and stating that "LabMD has not disputed Complaint Counsel's showing as to the availability and cost of these alternatives").[9]

Worse yet, the Commission doubled-down on its error by barring LabMD from filing a protective conditional cross-appeal and thus denied LabMD the opportunity even to file an opening

[8] CC's Opposition recycles this claim, SO 3-4, notwithstanding CC's failure to brief these issues on appeal.

[9] LabMD has no obligation to raise any issues in an optional Rule 3.55 reconsideration petition, just as a party is not required to file a FRAP 40 petition for panel rehearing to preserve issues for Supreme Court review. *See* 61 Fed. Reg. 50,640, 50,645 (Sept. 26, 1996)(Rule 3.55 deadline shortened to 14 days to track FRAP 40).

brief as a cross-appellant (without warning LabMD of its misinterpretation of *Jernigan*).[10] *See* December 18 Order at 2 ("Respondent may not file an opening appeal brief[.]"). If the Commission interprets its Rules or Orders in this case to in any way cut off or limit LabMD's appeal rights, it will violate LabMD's due process rights—yet again—for failure to give fair notice of its extra-textual interpretations.[11] *See, e.g., Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987); *PMD Brokerage Corp. v. USDA*, 234 F.3d 48 (D.C. Cir. 2000).

Third, the Commission is aware of LabMD's constitutional and statutory objections, including but not limited to LabMD's First Amendment retaliation claim. *See LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090, *5-7 (N.D. Ga. May 12, 2014) (discussing statutory and constitutional claims raised by LabMD in three collateral federal court actions seeking to enjoin FTC prosecution). A Court of Appeals may now address the merits of those claims and grant LabMD additional discovery to further develop its First and Fourth Amendment arguments.[12] 15 U.S.C. § 45(c); *FTC v. Std. Oil Co.*, 449 U.S. 232, 244-46 (1980).

[10] *See also* LabMD Notice of Conditional Cross-Appeal, 4 (Dec. 1, 2015).

[11] The Commission Rules are, at best, not a model of clarity. *See In re Graco Inc.*, 2012 FTC LEXIS 29, *5-6 (Feb. 13, 2012)(Chappell, Chief ALJ)(noting "confusing wording in…Rules").

[12] FTC posted on the website public docket of this case a Brief for Appellee Federal Trade Commission, *LabMD, Inc. v. FTC*, No. 14-12144 (July 24, 2014), https://www.ftc.gov/system/files/documents/cases/1407labmd11cirbrief.pdf. There, it not only responded to the substance of LabMD's First Amendment retaliation claim, *see id.* 20-22, but represented to the Eleventh Circuit that "LabMD's first amendment and due process claims, like its challenges to the FTC's statutory authority, are properly considered as part of judicial review following an adverse decision by the FTC," *id.* 17. It cannot change its tune now. *N.H. v. Maine*, 532 U.S. 742, 749-51 (2001).

B. STAY NECESSARY TO PREVENT IRREPARABLE HARM TO LABMD

1. Unpayable and Unrecoverable Compliance Costs

CC does not deny that the Order will force LabMD to incur unrecoverable monetary and time costs. *Cf.* SO 10-12. Nor does CC deny that such costs are irreparable harm. Instead, CC claims that such costs are not sufficiently "substantial" and that, in its view, LabMD did not provide sufficient evidence and precise quantification of such costs. *See* SO 9-12. Those claims are contrary to fact and law.

CC argues that "the Commission has denied stays in other cases in which notification provisions would have imposed similar, de minimis costs," relying on *In re N. Tex. Specialty Physicians ("NTSP")*, 141 F.T.C. 456 (Jan. 20, 2006). SO 11-12. If anything, *NTSP* supports LabMD's argument that the unrecoverable time-and-monetary costs associated with notifying around 9,300 people and their insurance companies irreparably harms LabMD:

> While NTSP cites *California Dental*, 1996 FTC LEXIS 277, as support…, that reliance is misplaced, because in California Dental the respondent would have had to notify, and potentially renotify, up to 19,000 member dentists. By contrast, in this case, NTSP will have to notify, and potentially renotify, only approximately 400 member physicians, and a limited number of payors in a limited geographic region. *Thus, the burden and expense involved in implementing the notice provisions in the two cases are not facially comparable.*

NTSP, 141 F.T.C. at 465-66 (emphasis added). Here, unlike *NTSP*, which involved notification targeting roughly 400 dentists, LabMD will be required to send roughly 10,000 letters—about *twenty times* more notification letters than *NTSP*.

CC's reliance on dicta from *Kentucky Household Goods* to suggest LabMD has not offered sufficient evidence of irreparable harm, SO 8, fails because it is untethered from facts. Unlike here, *see* Daugherty Decl.; SA 5,25-26, Kentucky Household Goods claimed irreparable harm

without citation or supporting declaration. *See* KHG SA 7-8. *Cf. Cal. Dental Ass'n*, 1996 FTC LEXIS 227, *6-7 (supporting affidavit established irreparable harm).

CC also claims LabMD must precisely quantify its unrecoverable and unpayable compliance costs. *See* SO 9-12. Not so.

First, contra CC, *see* SO 9, it is not the *amount* of the compliance cost but the fact that such costs are unrecoverable due to sovereign immunity that renders these costs irreparably harmful. *See, e.g.*, *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 756, 770-71 (10th Cir. 2010) (approximately $1,000-per-business-per-year compliance costs cause irreparable harm because such costs are unrecoverable due to sovereign immunity).

Second, LabMD cannot precisely quantify the amount of money the Order would require it to spend because LabMD does not know what the Order requires LabMD to do, *cf.* RX532 (FTC testimony showing lack of data-security standards), because the Order is unconstitutionally vague, *see* SA 21-24, 26-29. Also, the Commission Opinion does not address at all what FTC thinks a "reasonable" "comprehensive information security program" for LabMD would require now that LabMD is out of business, except to say it would be different from what FTC apparently thinks LabMD should have had when it was operational. *See* Op. 36 ("[R]easonable and appropriate information security program for LabMD's current operations…***will undoubtedly differ from*** an appropriate comprehensive information security program if LabMD resumes more active operations." (emphasis added)). Indeed, FTC's sole expert on "reasonable" data-security limited her opinions to between 2005 and July 2010, i.e., when LabMD was operational. ID 87 n.45; RX0532 at 203:15-19 (Hill is sole source of standards).

CC's bald assertion that the Commission should not credit LabMD's insolvency, SO 8, is contrary to reality, particularly because CC does not dispute the current state of LabMD's business,

cf. SO 10-11, 14. Notwithstanding that LabMD amply met its burden of establishing irreparable harm in its Stay Application, LabMD has attached to this Reply a supplemental declaration providing additional factual evidence regarding the time-and-monetary costs associated with the Final Order. *See* Supp. Daugherty Decl. & Ex. A.

2. FTC Violations of LabMD's Constitutional Rights

CC does not address LabMD's argument that the Final Order will violate LabMD's procedural due process rights by permanently depriving it of property before a meaningful hearing. *Cf.* SA 26-27. And CC does not deny that violation of constitutional rights is irreparable harm. Instead, they essentially argue that because the Commission has already rejected LabMD's constitutional claims, LabMD's constitutional rights will not be violated. *See* SO 12-13.

Complaint Counsel's dog won't hunt. *The Commission*, which describes itself as "mainly a law enforcement agency,"[13] cannot be the arbiter of whether *the Commission* has respected LabMD's constitutional rights for the same reason a police officer cannot ultimately decide whether a challenged search violates a criminal defendant's Fourth Amendment rights. FTC is not a Court nor its equal on interpreting the federal Constitution, and lacks expertise necessary to decide constitutional questions. *See Hill v. SEC*, No. 15-12831, 2016 U.S. App. LEXIS 10946, *38-40 (11th Cir. 2016) (recognizing lack of administrative-agency expertise to adjudicate constitutional claims); *see also Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983). Irreparable harm to LabMD should be assessed *assuming the correctness of LabMD's position*, *cf. Barnes v. E-Systems*, 501 U.S. 1301, 1302 (1991)(Scalia, J., in Chambers), *a fortiori* because

[13] Hayley Tsukayama, "FTC Chairwoman Edith Ramirez Chats About Privacy," WASHINGTON POST (Jan. 6, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/01/06/ftc-chairwoman-edith-ramirez-chats-about-privacy-security-and-why-shes-at-ces/.

LabMD's constitutional claims "fall[] outside the area generally entrusted to the agency…, i.e.,…the constitutional law." *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 914-15 (3d Cir. 1981); *see NMA v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998).

Therefore, FTC must recognize that LabMD's constitutional objections are meritorious and thus constitute irreparable harm.

3. Reputational Harm

CC does not deny that reputational harm is sufficient to support a stay, instead arguing (without citation) that because LabMD is no longer in business, it cannot suffer reputational harm. *See* SO 14. However, reputational harm can be irreparable even if no business is lost. *See, e.g.*, *Kroupa v. Nielsen*, 731 F.3d 813, 820-21 (8th Cir. 2013)(banishment from 4-H clubs due to alleged cheating at State Fair is irreparable reputational harm). Accordingly, CC's argument again fails.

C. BALANCE-OF-HARMS AND PUBLIC INTEREST TIP SHARPLY IN FAVOR OF STAY

CC's Opposition confirms that the final stay factors tip sharply in favor of protecting LabMD, and the public, from the Commission Opinion and Order pending review.

CC does not dispute the absence of any evidence that any identifiable consumer has been harmed by LabMD's alleged data-security practices many years ago, long-since discontinued. *See* SO 10-11, 14-16.

Instead, CC focuses on alleged amorphous privacy harms they claim occurred as a result of Tiversa's theft of the 1718 File in early 2008, and its alleged "availability" on Limewire, which ended no later than May 2008 according to them, Compl. ¶ 20, and a conclusory assertion that LabMD "continues to preserve tissue samples, provide past test results to healthcare providers, and maintain the personal data of 750,000 people on its computer system." SO 14-17.

This argument is another dog with different fleas. CC here engages in bald speculation supported solely by the Commission Opinion's *ipse dixit.* The fact that courts routinely conclude that claims of injury based on alleged risk-of-identity-theft or "privacy" harms do not rise to the identifiable trifle of an injury-in-fact necessary to sue, *see, e.g., Khan v. Children's Nat'l Health Sys.*, No. TDC-15-2125, 2016 U.S. Dist. LEXIS 66404, *7-22 (D.Md. May 18, 2016); *Cox v. Valley Hope Ass'n*, No. 2:16-cv-04127-NKL, 2016 U.S. Dist. LEXIS 119663 (W.D. Mo. Sept. 6, 2016) (rejecting "risk of harm" and "privacy/embarrassment" theories of injury under Article III in healthcare data-breach context), underscores why CC's speculation cannot change the absence of any evidence of actual harm to anyone caused by LabMD's allegedly "unreasonable" data security. *See* ID 52, 88; IDCOL 18.

CC acknowledges that "the 9,300 consumers [listed on the 1718 File] have gone without notification…for eight years."[14] SO 16. FTC's inaction and sloth refute CC's claimed urgency. They do not deny that if FTC felt LabMD's alleged data-security practices between 2005 and 2010 posed a time-sensitive public threat, it could have sought temporary relief in federal Court pursuant to Section 13(b) of the FTC Act. *Cf.* SO 16. CC received the 1718 File from Tiversa through the Privacy Institute in 2009. IDF 136-138. CC did not recommend issuance of the administrative complaint until July 2013 (three days after LabMD publicly criticized FTC). *LabMD, Inc.*, 776 F.3d at 1277. If FTC believed notification time-sensitive and necessary to protect consumers, and the time-and-monetary costs are "de minimis," FTC would have notified the people listed on the 1718 File many years ago. It did not. Neither it nor any of its experts have "notified" or otherwise

[14] CC cannot rely on *ECM Biofilms* and *Jerk, LLC,* to support its notification demands, SO 16, because both are deception cases, which did not involve "notification" provisions resembling Part III of the Final Order. Ironically, the Commission fully granted ECM Biofilm's stay application.

contacted even a single person listed therein at any point. FTC's actions contradict CC's claimed view that notification is time-sensitive.

Likewise, CC's claim that "[t]he harm or likelihood of harm to the 9,300 consumers [listed in the 1718 File] increases every day," SO 15, should be rejected because it is belied by the facts developed through CC's own multi-year investigation. "[T]he evidence fails to show that the 1718 File was in fact downloaded by anyone other than Tiversa, who obtained the document in February 2008." ID 60. The record is devoid of any evidence that even a single identifiable "consumer" has suffered any harm due to Tiversa's theft or LabMD's alleged data-security practices, "even after the passage of many years." ID 52. In any event, the Commission may grant a stay even where, unlike here, "there is some potential for ongoing harm to consumers[.]" *N.C. Bd. of Dental Examiners*, No. 9343, 2012 FTC LEXIS 28, *16 (Feb. 12, 2012).

CC's argument that LabMD's declaration does not describe material changes to its business, SO 16, fails. The Commission Opinion justified its Order, in part, on the ground that LabMD "may resume operations at some future time[.]" Op. 36. LabMD's declaration definitively closes the door on that possibility. Daugherty Decl. ¶¶ 14-16, 19-20. CC does not dispute that LabMD "does not expect ever to resume operations and does not see how that could ever happen." *See* SO 11.

CC's claim that LabMD is still using alleged data-security practices the Commission found "unreasonable," SO 17, strains credulity. The Commission assessed LabMD's data-security practices when LabMD was an ongoing cancer-detection business with numerous employees (principally between 2005 and 2010), properly describing its alleged practices in the past tense. *See* Op. 11-25. The Commission Opinion recognizes that LabMD is now closed "with a computer that is shut down and not connected to the Internet." Op. 36. The only FTC data-security

"unreasonableness" expert did not offer any opinions beyond July 2010—over six years ago. ID 87 n.45.

CC does not dispute that LabMD's computers are turned off and not connected to the Internet, *see* SO 10-11,16, and even CC's data-security expert testified that LabMD's physical security was adequate. Tr. 293:3-7 ("Q.…[I]t's your opinion that LabMD's physical security was adequate; is that correct? [Hill] A. Yes. As far as providing locks to server rooms and access to their—physical access to their computers, yes."). If anything, LabMD's "physical security" has improved. Daugherty Decl. ¶ 11. And the FTC Complaint solely challenged "LabMD's computer security practices." Op. 25.

CC does not deny that it is in the public interest to restrain FTC from violating the Constitution and exceeding its authority, or that a federal court has already found that there is significant merit to LabMD's argument that FTC is improperly expanding its powers here. *See FTC v. LabMD*, No. 1:12-cv-3005-WSD, Dkt. No. 23, at 14 (N.D. Ga. 2012); SA 30-31. Instead, CC argues that "[t]here is no public interest in restraining agencies from fulfilling their duties while respondents challenge their authority with arguments…unlikely to succeed." SO 17. Here, FTC is not fulfilling its duties; it is violating the law. *See* SA 12-24.

Worse, the Commission Opinion and Final Order have national effects that radiate far beyond LabMD. Every U.S. business that uses computers has an interest in a full stay. Absent this, FTC will have obtained that which Congress refused to give it by FTC's own admission through its administrative prosecution of LabMD:[15] new data-security civil-penalty powers on a national scale. *See* 15 U.S.C. § 45(m)(1)(B). This is not an overstatement. Without a stay, FTC

[15] *See* Prepared Statement of FTC, Privacy in the Digital Age: Preventing Data Breaches and Combating Cybercrime, Before the Senate Committee on the Judiciary, at 11 (Feb. 4, 2014).

will be able to use the Commission Opinion and Order to threaten any U.S. business at any time (even without a breach, with or without evidence of actual harm) with massive civil penalties unless they do what FTC says. *See FTC v. Sears*, 1983 U.S. Dist. LEXIS 12619, *1-2 (D. Colo. 1983); *Audubon Life Ins.. v. FTC*, 543 F. Supp. 1362, 1363 (M.D. La. 1982); *U.S. v. Braswell, Inc*., 1981 U.S. Dist. LEXIS 15444, *5 (N.D. Ga. 1981).

Absent a full stay, FTC will have this new data-security civil-penalty power even before a single federal court addresses the legality of the Commission's Opinion and Order. This is contrary to the public interest. Instead, the strong public interest in enforcing Congress's decision to "rein in" FTC through Section 5(n) to protect the public from FTC tips sharply in favor of a stay.[16] *S. Div. First Premier Bank v. CFPB*, 819 F. Supp. 2d 906, 922 (D. S.D. 2011). The Order and Opinion must be stayed.

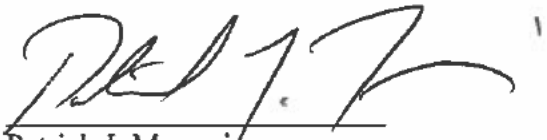
CONCLUSION

For these reasons, LabMD respectfully requests that the Commission GRANT its Application in full or otherwise dismiss this case.

[16] *See* J. Howard Beales, FTC, "The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection" (May 30, 2003)(recognizing that FTC's abuse of its "unfairness" powers was "reined in by … the 1994 amendments to the FTC Act"), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection.

Respectfully submitted,

CAUSE OF ACTION INSTITUTE



Patrick J. Massari
Erica L. Marshall
1875 Eye Street, NW
Suite 800
Washington, DC 20006
Tel. (202) 499-4232
Fax (202) 338-5842
patrick.massari@causeofaction.org

September 15, 2016

Counsel for Respondent LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2016, I caused to be filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send an electronic notification of such filing to the Office of the Secretary:

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

I also certify that I delivered via electronic mail copies of the foregoing document to:

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

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

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
Jarad Brown, Esq.
Division of Privacy and Identity Protection
Federal Trade Commission 600
Pennsylvania Ave., NW Room CC-8232
Washington, DC 20580

September 15, 2016

Patrick J. Massari

CERTIFICATE OF ELECTRONIC FILING

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

September 15, 2016

Patrick J. Massari

REPLY EXHIBIT 1

PUBLIC

No. 14-12144

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LABMD, Inc.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEE FEDERAL TRADE COMMISSION

STUART F. DELERY
Assistant Attorney General

SALLY QUILLIAN YATES
United States Attorney

MARK B. STERN
ABBY C. WRIGHT
(202) 514-0664
Attorneys, Appellate Staff
Civil Division, Room 7252
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

(1984). Plaintiff invokes that assertion to urge that the order must therefore be final action reviewable under the APA. *See* LabMD Br. 19-20.

Plaintiff gets matters backwards. The denial of a motion to dismiss is unquestionably interlocutory and non-final. The question posed by plaintiff's argument is whether the District Court for the District of New Jersey could properly accord *Chevron* deference to a non-final order. The court in that case found it unnecessary to reach the question, ruling for the Commission without reaching the issue of deference. *See Wyndham Worldwide,* 2014 WL 1349019, at *9 n.8. Whether the denial of the motion to dismiss is properly accorded deference is not, of course, an issue before this Court. And the answer to that question has no bearing on the finality of the Commission's order.

B. The district court lacked jurisdiction over LabMD's constitutional claims, as well as its statutory claims.

1. LabMD's first amendment and due process claims, like its challenges to the FTC's statutory authority, are properly considered as part of judicial review following an adverse decision by the FTC. *See Thunder Basin* at 215; *supra* 12-13.[8]

[8] LabMD's citation to pre-enforcement first amendment cases misses the mark. *See, e.g., Susan B. Anthony List v. Driehaus*, No. 13-193, 573 U.S. __, 134 S. Ct. 2334 (June 16, 2014); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 n.13, 99 S. Ct. 2301, 2311 n. 13 (1979). *Susan B. Anthony* did not involve whether a district court had jurisdiction over a challenge to non-final agency action, but rather whether the plaintiff had standing to challenge a law prior to its enforcement. In relevant part, *Babbitt* concerned the possibility of an order prohibiting certain speech. There was no

Continued on next page.

have been satisfied. LabMD, however, asks this Court to assume *ex ante* that the Commission will fail to be a fair decisionmaker and on that basis to halt ongoing administrative proceedings. LabMD Br. 34-35. LabMD has cited no authority for such an extraordinary request.

2. This Court may also affirm the district court's decision on the alternative ground that LabMD has failed to state any valid constitutional claims. *See Lucas v. W.W. Grainger, Inc.,* 257 F.3d 1249, 1256 (11th Cir. 2001) (noting that this Court may affirm a district court judgment on any basis disclosed by the record).

a. First, LabMD has failed to move its first amendment claims "across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). Agency officials are entitled to a presumption "that they have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 463-64, 116 S. Ct. 1480, 1485-1486 (1996) (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15, 47 S. Ct. 1, 6 (1926)). And LabMD has not plausibly alleged that the FTC conduct at issue "adversely affected the protected speech," or that "there is a causal connection between the [FTC's purportedly] retaliatory actions and the adverse effect on speech." *Moton v. Cowart*, 631 F.3d 1337, 1341 (11th Cir. 2011) (quotation omitted).

The Court cannot plausibly infer a causal nexus between Mr. Daugherty's first amendment activity—his public criticism of the FTC in his published book and in other public statements—and the FTC actions LabMD challenges in this lawsuit. Mr.

Daugherty's criticism began after the investigation was well underway; indeed, the entire premise of LabMD's public critique is that the agency's investigation of LabMD was itself unfair or improper. The public complaints of a target of an agency enforcement action do not render any subsequent pursuit of the action unconstitutional, as LabMD urges. And Mr. Daugherty was not singled out for enforcement: FTC has brought other enforcement actions against firms across the country alleging unfair acts or practices in connection with data security. R1-3, at 9 n.12.

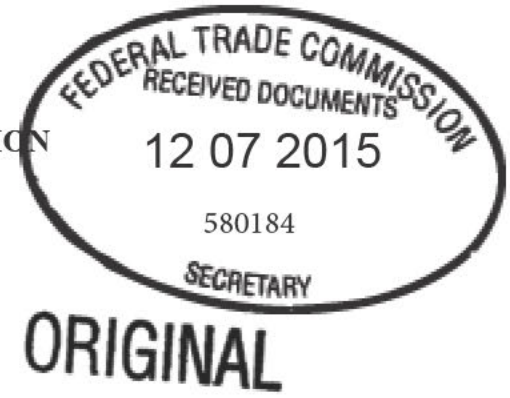
LabMD's reliance on the fact that Mr. Daugherty's publication of his book occurred at roughly the same time as the filing of the administrative complaint cannot withstand scrutiny. LabMD Br. 15. Mr. Daugherty's book was published approximately three years *after* the FTC began investigating LabMD. *See* R1, ¶ 26. Courts have correctly declined to infer retaliation unless the timing is "unusually suggestive." *Lauren ex rel. Jean v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007)); *see also Swanson v. Gen. Servs Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997) (timing must be "close" to support inference of retaliation). A causal connection cannot plausibly be inferred from timing when the allegedly protected speech occurs in the *middle* of an ongoing action. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("[Where] gradual adverse job actions began well before the plaintiff had ever engaged in any protected [first amendment] activity, an inference of retaliation does not arise.").

Moreover, nothing in the FTC administrative complaint challenges anything LabMD or Mr. Daugherty said or expressed, and a cease-and-desist order connected to data security practices would not restrict their expression in the future. And there is no basis for a contention that the enforcement action had a "chilling" effect on protected speech; such an assertion cannot be squared with the reality that LabMD and Mr. Daugherty have continued to engage in public criticism of the FTC throughout the proceeding.

b. LabMD's due process claim regarding fair notice may also be dismissed for failure to state a claim. LabMD incorrectly contends that due process requires the FTC to issue data security regulations before bringing an enforcement action against LabMD. *See* R1, ¶ 128; LabMD Br. 31. But the Supreme Court has long rejected this position, explaining instead that problems may arise that require case-by-case adjudication, and that agencies "retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective." *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03, 67 S. Ct. 1575, 1580-1581 (1947). As the Supreme Court has explained, "the proscriptions in § 5 are flexible, to be defined with particularity by the myriad of cases from the field of business, . . . [which] necessarily give[] the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85, 85 S. Ct. 1035, 1042 (1965) (quoting *FTC v. Motion Picture Adver.*

REPLY EXHIBIT 2

PUBLIC



ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of	)	**PUBLIC**
LabMD, Inc., a corporation, Respondent.	)	Docket No. 9357

MOTION TO ENFORCE LIMITS ON APPEAL BRIEFING PURSUANT TO RULE 3.52

Pursuant to Rules 3.22 and 3.52, 16 C.F.R. §§ 3.22 and 3.52, Complaint Counsel respectfully moves the Commission for an Order enforcing proper limits on appeal briefing for Respondent LabMD, Inc.'s ("LabMD" or "Respondent") anticipated "Conditional Cross-Appeal." Complaint Counsel respectfully requests that the Commission order that LabMD address any "cross-appeal" arguments in its answering brief. Rule 3.52(d), 16 C.F.R. § 3.52(d). The requested relief is necessary to ensure compliance with the governing Rules. Complaint Counsel met and conferred with counsel for Respondent on the subject of this motion, but was unable to reach agreement. Meet and Confer Statement (attached as Exhibit A).

Background

On November 24, 2015, Complaint Counsel timely filed its notice of appeal of the Initial Decision and Order entered in this action ("Initial Decision"). Contrary to the governing Rules, Respondent subsequently filed a "Notice of Conditional Cross-Appeal" ("Notice") purporting to notice its "conditional and protective cross-appeal solely to raise additional and/or alternative grounds to support the Order . . . and to preserve its rights." Notice at 1. The Notice states that

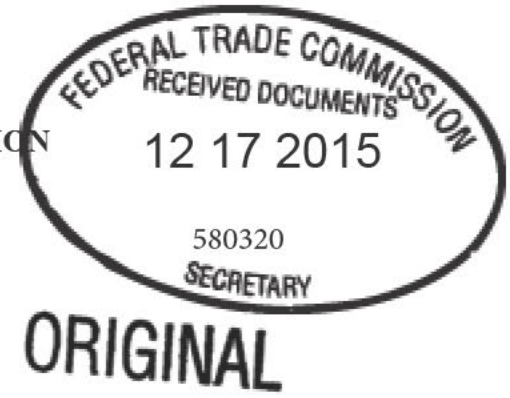
support of an order from which an appeal has been taken any matter appearing in the record, at least if the party relied on it in the district court") (dismissing cross-appeal seeking affirmance on an alternate basis and disregarding cross-appeal reply brief).

In *Rambus*, as in this case, the presiding administrative law judge dismissed the complaint and Complaint Counsel appealed. *Rambus*, 2006 FTC LEXIS 60, at *28-32. In *Rambus*, however, the respondent limited its cross-appeal to the narrow issue of whether the administrative law judge applied the correct burden of proof in the initial decision.[2] *Id.* at *33-34. The respondent did not, as LabMD proposes here, base its cross-appeal on "the absence of certain findings of fact and/or conclusions of law" in the initial decision and address twelve different issues that may have "provided additional and/or alternative grounds" for affirmance. Notice at 2. Nor is there any reason to. The Rules make clear that upon appeal the Commission will review the record *de novo* by considering "such parts of the record as are cited or as may be necessary to resolve the issues presented and … exercis[ing] all the powers which [the Commission] could have exercised if it had made the initial decision." Rule 3.54, 16 C.F.R. § 3.54; *see also Rambus*, 2006 FTC LEXIS 60, at *44.[3]

[2] *See* Br. of Appellee and Cross-Appellant, Docket No. 9302, June 2, 2004, at 134, *available at* https://www.ftc.gov/enforcement/cases-proceedings/011-0017/rambus-inc-matter.
[3] Respondent has previously briefed the principal issues of law and fact identified in Respondent's Notice of Appeal. Complaint Counsel has no objection to the Commission's consideration of those voluminous submissions as part of the Commission's *de novo* review of the entire record in this proceeding. Rule 3.54(a), 16 C.F.R. § 3.54(a).

REPLY EXHIBIT 3

PUBLIC



ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of	)	**PUBLIC**
LabMD, Inc., a corporation, Respondent.	)	Docket No. 9357

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S CROSS-MOTION TO STRIKE NOTICE OF APPEAL OR IN THE ALTERNATIVE TO REQUIRE A MORE DEFINITE STATEMENT AND/OR ALLOW RESPONDENT TO FILE AN OVERLENGTH ANSWERING BRIEF PURSUANT TO RULE 3.52(K)

Complaint Counsel's Notice of Appeal is proper, and LabMD's cross-motion should be denied in its entirety. Rule 3.52(b) requires that a notice of appeal "shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from." Rule 3.52(b), 16 C.F.R. § 3.52(b) (emphasis added). Complaint Counsel's Notice of Appeal ("Notice") meets these requirements, specifying the appeal is taken against LabMD from:

> the Initial Decision and Order entered by the Honorable D. Michael Chappell in the above-captioned matter, and any Findings of Fact and Conclusions of Law or the absence of findings of fact or conclusions of law related to the FTC Act violation alleged in the Complaint.

Notice at 1. The Notice makes clear that Complaint Counsel is appealing the entire Initial Decision and Order entered in this action. While LabMD urges a more specific articulation of Complaint Counsel's grounds for appeal, Cross-Motion at 7, Rule 3.52(b) does not. This

resolves the matter.

Because Complaint Counsel's Notice of Appeal is proper, LabMD is not entitled to any of the relief sought in its cross-motion, including its request for a more definite statement and its request for leave to file an overlength answering brief in response to Complaint Counsel's appeal brief.

To the extent that the Commission nonetheless considers LabMD's request for leave to file an overlength answering brief independently of LabMD's cross-motion to strike, it should be denied for the additional reason that LabMD has failed to meet its burden. Cross-Motion at 7. "Extensions of word count limitations are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit." Rule 3.52(k), 16 C.F.R. § 3.52(k). LabMD claims that its compliance with Rule 3.51(b) somehow justifies increasing the existing word count limit. Cross-Motion at 7. LabMD does not identify "[a]ny objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial decision," as required by cited Rule 3.51(b), that LabMD seeks to challenge. Nor does LabMD make any showing – much less a "strong showing" – of how "undue prejudice would result from complying with the existing [word count] limit," as required by Rule 3.52(k). In addition, LabMD has failed to marshal a single FTC decision in which the Commission extended the word count limitation for an answering appeal brief under similar circumstances. LabMD should not be permitted to do so here.

REPLY EXHIBIT 4

PUBLIC
PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	**PUBLIC**
LabMD, Inc., a corporation, Respondent.	)	Docket No. 9357

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO COMPEL A PROPER PRIVILEGE LOG

The Court should deny Respondent LabMD, Inc.'s ("LabMD" or "Respondent") Motion to Compel a Proper Privilege Log. Complaint Counsel has provided a proper privilege log, and its claims of privilege are supported by the law and facts.

BACKGROUND

Incident to responding to Respondent's January 30, 2014 discovery requests, Complaint Counsel served a privilege log on March 5, 2014. The internal documents on the log are attorney notes of communications with the Sacramento Police Department[1] and drafts of a spreadsheet prepared by Kevin Wilmer, an investigator in the Bureau of Consumer Protection. The final spreadsheet was provided to Respondent, who questioned Mr. Wilmer about it in deposition. *See* Wilmer Tr. at 68-69, Exhibit A. Complaint Counsel asserted Work Product protection for these internal documents.

Complaint Counsel also identified numerous privileged, confidential communications with the Department of Health and Human Services ("HHS") and asserted, as appropriate, Work

[1] Complaint Counsel produced communications with the Sacramento Police Department.

the description "email regarding LabSoft," which does not indicate that it involves attorney-client communication or an attorney's mental processes. Complaint Counsel did not challenge the immunity from production asserted as to this document because of the Commission's broad Rule 3.31(c)(5) protection for documents prepared in anticipation of litigation.

B. NOTES AND DRAFTS

Each of the notes and drafts on Complaint Counsel's privilege log was prepared in anticipation of litigation by or at the direction of Complaint Counsel. The documents relating to communications with the Sacramento Police Department relate to the incident referenced in Paragraph 21 of the Complaint. Mr. Wilmer's materials relate to his work identifying consumers likely to be harmed by Respondent's conduct, as alleged in Paragraph 22 of the Complaint. Complaint Counsel's privilege log as to internal documents is sufficient under Rule 3.38A.

III. COMPLAINT COUNSEL'S COMMUNICATION WITH HHS

Complaint Counsel's privilege log includes five categories of correspondence with HHS[6]: jurisdiction and venue for the Commission's CID enforcement proceeding, LabMD's compliance with HIPAA and other statutes, litigation strategy in the instant proceeding, analysis of the

---

[6] Respondent's requested remedy is a "proper privilege log," not access to documents on the log. These documents are not relevant to any claim or defense. Complaint Counsel has not raised relevance in this Opposition because of the limited relief Respondent seeks, and does not herein waive its relevance assertions.

If Respondent seeks production of protected communications with HHS, Complaint Counsel submits that HHS must be served with any such motion and permitted an opportunity to be heard by the Court. *See, e.g.*, *In re Grand Jury Subpoenas*, 902 F.2d 244, 248 (4th Cir. 1990) (joint privilege cannot be waived without consent of all parties).

instant proceeding, and availability and retention of experts. Each of these categories constitute work product prepared in anticipation of litigation. Where its communications with HHS were not privileged, Complaint Counsel provided documents to Respondents**.**

The FTC and HHS share a common interest in the protection of consumer information, as recognized by the Commission's Order Denying Respondent LabMD's Motion to Dismiss. *See* Comm'n Order at 11 ("[T]he patient-information protection requirements of HIPAA are largely consistent with the data security duties that the Commission has enforced pursuant to the FTC Act."). Indeed, Respondent has asserted throughout this proceeding that HHS has jurisdiction over its data security practices. *See, e.g.*, Respondent LabMD, Inc.'s Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings at 10-14.

Where parties share a common interest, privileged information may be shared without breaching the protection. All the HHS documents appearing on the log are protected work product prepared in anticipation of litigation. However, in order to preserve all the Commission's and HHS's privileges, Complaint Counsel also claimed Law Enforcement and Deliberative Process protections for certain of the documents.

A. COMMON INTEREST DOCTRINE

The common interest doctrine "permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute … their claims." *Hunton & Williams v. U.S. Dept. of Justice*, 590 F.3d 272, 277 (4th Cir. 2010). A common interest requires neither a written agreement nor participation in litigation. *Am. Mgmt Services, LLC v. Dep't of the Army*, 842 F. Supp. 2d 859, 876 (E.D. Va. 2012); *see also Nat'l Inst. Of Mil.*

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
1	FIMGLMD00007070	12/12/2013	Megan Cox		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
2	FIMGLMD00007072	10/9/2012-10/10/2012	Alain Sheer		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
3	FIMGLMD00007073	7/3/2012	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
4	FIMGLMD00007074	2/21/2013	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
5	FIMGLMD00007075	2/26/2013	Andy M. McKee, HHS	Jennifer A Trussell, HHS; Anne L. MacArthur, HHS; Amitava Masumdar, HHS; Alain Sheer; Ruth Yodaiken; Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
6	FIMGLMD00007077	7/6/2012	Alain Sheer	Cathy T. Carter, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
7	FIMGLMD00007078	11/18/2011	David Holtzman, HHS	Anne L. MacArthur, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
8	FIMGLMD00007080	7/5/2012	Kathleen M. Kersell, HHS	Patricia A. Gill, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
9	FIMGLMD00007081	12/17/2013	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
10	FIMGLMD00007086	6/21/2011	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
11	FIMGLMD00007087	1/30/2014	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC relaying analysis of a current legal proceeding and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party; and communication made to an attorney by an intra-agency client for the purpose of securing an opinion on the law, legal services, or assistance in a legal proceeding.	Common Interest; Work Product; Attorney-Client

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
12	FIMGLMD00007091	7/10/2013	Alain Sheer	Michael S. Wroblewski, HHS; Anne E. Hauswald, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
13	FIMGLMD00007092	7/5/2012	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
14	FIMGLMD00007093	2/21/2013	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
15	FIMGLMD00007095	11/21/2011	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
16	FIMGLMD00007097	2/21/2013	Alain Sheer	Andy M. McKee, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
17	FIMGLMD00007098	2/26/2013	Alain Sheer	Jennifer A. Trussell, HHS; Anne L. MacArthur, HHS; Amitava Mazumdar, HHS; Andy M. McKee, HHS; Ruth Yodaiken; Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
18	FIMGLMD00007100	7/5/2012	Alain Sheer	Kathleen M. Kersell, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
19	FIMGLMD00007101	7/11/2012	Alain Sheer	Raghu Akkapeddi, HHS; Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
20	FIMGLMD00007104	7/12/2012	Alain Sheer	Raghu Akkapeddi, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
21	FIMGLMD00007109	6/24/2011	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
22	FIMGLMD00007112	2/3/2014	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
23	FIMGLMD00007113	11/26/2013	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
24	FIMGLMD00007114	9/27/2010	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
25	FIMGLMD00007115	7/6/2012	Alain Sheer	Cathy T. Carter, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
26	FIMGLMD00007122	2/21/2013	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
27	FIMGLMD00007123	2/21/2013	Andy M. McKee, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
28	FIMGLMD00007124	2/3/2014	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
29	FIMGLMD00007125	11/26/2013	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
30	FIMGLMD00007126	6/23/2011	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
31	FIMGLMD00007127	7/11/2012	Raghu Akkapeddi, HHS	Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
32	FIMGLMD00007130	7/11/2012	Raghu Akkapeddi, HHS	Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
33	FIMGLMD00007133	7/11/2012	Raghu Akkapeddi, HHS	Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
34	FIMGLMD00007134	6/24/2011	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
35	FIMGLMD00007136	6/22/2011	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
36	FIMGLMD00007201	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
37	FIMGLMD00007203	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
38	FIMGLMD00007240	2/25/2013	Alain Sheer	Andy M. McKee, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
39	FIMGLMD00007243	11/25/2013	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Law Enforcement; Work Product
40	FIMGLMD00007245	11/26/2013	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
41	FIMGLMD00007249	2/21/2013	Anne L. MacArthur, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
42	FIMGLMD00007250	2/21/2013	Anne L. MacArthur, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
43	FIMGLMD00007251	2/25/2013	Andy M. McKee, HHS	Jennifer A. Trussell, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding the availability and retention of expert witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
44	FIMGLMD00007252	7/10/2012	Cathy T. Carter, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
45	FIMGLMD00007253	Undated	Laura Riposo VanDruff		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
46	FIMGLMD00007254	12/5/2013	Laura Riposo VanDruff		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
47	FIMGLMD00007255	5/2/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
48	FIMGLMD00007256	5/2/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
49	FIMGLMD00007257	5/8/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
50	FIMGLMD00007258	5/9/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
51	FIMGLMD00007259	5/20/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
52	FIMGLMD00007260	5/9/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
53	FIMGLMD00007261	6/5/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
54	FIMGLMD00007262	5/30/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
55	FIMGLMD00007263	7/24/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
56	FIMGLMD00007319	Undated	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation or for an adminstrative hearing and containing mental impressions, conclusions, opinions, or legal theories	Work Product
57	FIMGLMD00007320	Undated	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation or for an adminstrative hearing and containing mental impressions, conclusions, opinions, or legal theories	Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
58	FIMGLMD00007321	10/11/2012	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
59	FIMGLMD00007323	Undated	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
60	FIMGLMD00007324	1/8/2013	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
61	FIMGLMD00007325	1/16/2013	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
62	FIMGLMD00007326	Undated	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
63	FIMGLMD00007327	1/29/2012	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
64	FIMGLMD00008705	2/5/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
65	FIMGLMD00008706	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product

Line	Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privilege(s) Asserted
66	FIMGLMD00008707	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
67	FIMGLMD00008708	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
68	FIMGLMD00008709	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
69	FIMGLMD00008710	2/8/2014	Marilou King, HHS	Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product
70	FIMGLMD00008711	2/7/2014	Marilou King, HHS	Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
71	FIMGLMD00008712	2/7/2014	Marilou King, HHS	Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
72	FIMGLMD00008713	2/7/2014	Laura Riposo VanDruff	Marilou King, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Work Product

REPLY EXHIBIT 5

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

In the Matter of	)	
	)	**Docket No. 9357**
LabMD, Inc.,	)	
a corporation.	)	**PUBLIC**

ORDER

In an Initial Decision and Order issued on November 13, 2015, Chief Administrative Law Judge D. Michael Chappell dismissed the complaint against Respondent LabMD, Inc., finding that Complaint Counsel failed to prove that the alleged conduct at issue caused or was likely to cause substantial injury to consumers. We address two motions filed by the parties relating to the ensuing appeal to the Commission.

On November 24, 2015, Complaint Counsel filed a Notice of Appeal of the Initial Decision. Despite having prevailed before the ALJ, Respondent filed a "Notice of Conditional Cross-Appeal" a week later, arguing that a "conditional, protective cross-appeal in response to Complaint Counsel's notice of appeal is proper even where, as here, the administrative law judge's initial decision and proposed order dismissed the complaint in its entirety." Cross-Appeal Notice at 1. Thereafter, on December 7, 2015, Complaint Counsel filed a "Motion to Enforce Limits on Appeal Briefing" arguing that LabMD's "cross-appeal" is improper and seeking an order requiring that LabMD present all of its arguments in support of the Initial Decision in its answering brief, including any alternate grounds for affirming. On December 14, 2015, LabMD filed its opposition to Complaint Counsel's motion; alternatively, LabMD seeks leave to file an over-length answering brief. LabMD also moved to strike Complaint Counsel's Notice of Appeal claiming it is too indefinite. On December 17, 2015, Complaint Counsel filed its opposition to LabMD's motion to strike.

While our rules plainly permit the filing of cross-appeals[1] – that is, appeals challenging all or part of a given initial decision or order that are filed by parties other than the party that filed the first notice of appeal – LabMD is not challenging any part of the ALJ's Initial Decision.

[1] *See* Commission Rule of Practice 3.52, 16 C.F.R. § 3.52(b)(1); *see also* Federal Trade Commission Amendments to Parts 3 and 4 of its Rules of Practice, 74 Fed. Reg. 1804, 1819 (Jan. 13, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/federal_register_notices/rules-practice-16-cfr-parts-3-and-4/090113rulesofpractice.pdf.

LabMD states instead that the ALJ's Initial Decision and Order "were both correct and should be affirmed." Cross-Appeal Notice at 2. Moreover, we disagree with LabMD's argument that it must file a "protective cross-appeal" in order to preserve issues for appeal to a federal circuit court. 16 C.F.R. § 3.54(a). Under LabMD's reasoning, every case in which one party prevails could result in an appeal by the unsuccessful party and a second, purported "protective cross-appeal" by the victor. Such a result would be inconsistent with general appellate practice and would prove highly burdensome and wasteful for all involved. Consequently, LabMD is not entitled to file an opening appeal brief.

Of course, LabMD is certainly entitled to make, in an answering brief, conditional arguments setting forth alternate grounds for affirmance of the ALJ's decision. In view of the number of issues that may be raised in connection with Complaint Counsel's appeal, we find that LabMD's request for leave to file a longer answering brief is justified in this case. We have determined to increase the word limit for LabMD's answering brief by 7,000 words. We likewise increase Complaint Counsel's word limit for its reply brief by 7,000 words and extend by a few days the deadline by which it must be filed.

We now turn to LabMD's cross-motion to strike Complaint Counsel's Notice of Appeal. We disagree with LabMD's assertion that Complaint Counsel's notice is deficient due to a lack of specificity. Commission Rule of Practice 3.52 requires only that a notice of appeal "specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from." 16 C.F.R. § 3.52(b)(1). There is no question that Complaint Counsel's Notice of Appeal complies with Rule 3.52. There is thus no basis for striking it.[2]

Accordingly,

IT IS HEREBY ORDERED THAT while Respondent may not file an opening appeal brief, it may file an answering brief that shall not exceed 21,000 words. Any such answering brief must be filed on or before February 5, 2016; and

IT IS FURTHER ORDERED THAT Complaint Counsel may file a reply brief that shall not exceed 14,000 words. Any such reply brief must be filed on or before February 23, 2016.

By the Commission, Commissioner Brill not participating.

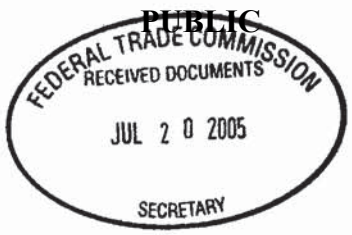
Donald S. Clark
Secretary

SEAL:
ISSUED: December 18, 2015

[2] Commissioner Brill did not take part in the consideration of, or decision regarding, any of the issues herein.

REPLY EXHIBIT 6

PUBLIC



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Liebowitz

In the Matter of	
KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.,	**Docket No. 9309**
a corporation.	

RESPONDENT'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A STAY OF FINAL ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

McMahon & Kelly LLP
Attorneys for Respondent
Kentucky Household Goods
Carriers Association, Inc.
60 East 42nd Street; Ste. 1540
New York, NY 10165-1544
212.984.4444
Fax.212.986.6905
jmcmahon@mcmahonlaw.com

July 21, 2005

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Orson Swindle
Thomas B. Leary
Pamela Jones Harbour
Jon Liebowitz

In the Matter of	
KENTUCKY HOUSEHOLD GOODS CARRIERS ASSOCIATION, INC.,	**Docket No. 9309**
a corporation.	

RESPONDENT'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A STAY OF FINAL ORDER PENDING REVIEW BY U.S. COURT OF APPEALS

Respondent Kentucky Household Goods Carriers Association, Inc. ("Kentucky Association") hereby moves the Commission for (1) Reconsideration of the Final Order entered herein based on proceedings which have taken place at the Kentucky Transportation Cabinet since Respondent made its prior Motion for a Stay in this proceeding; or, in the alternative, (2) an Order pursuant to Section 3.56(c) of the Commission's Rules of Practice, staying the Final Order entered herein on June 21, 2005,

Most importantly, Respondent believes that the Commission interpreted the applicable legal standard improperly in evaluating the record to determine the presence of "Active Supervision." *Federal Trade Commission v. Ticor Title Insurance Company, et al*, 504 U.S. 621 (1992) and *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., et al.*, 445 U.S. 97 (1980) do not contain the requirements announced by the Commission in this case.

With particular regard to this requirement of R. 3.56(c), the Commission has granted a stay where a "[Respondent's] assertions of a likelihood of success on the merits merely revisit arguments that [the Commission has] already considered and rejected." *In re Novartis Corporation*, Docket No. 9279; 128 FTC 233; 1999 FTC LEXIS 211 at 1 (August 5, 1999); *see also In re Toys "R" Us, Inc.*, Docket No. 9278; 1998 FTC LEXIS 224 at 2 (December 1, 1998).

B. The Kentucky Association Will Suffer Irreparable Harm if the Stay is not Granted

The Kentucky Association and its Members will suffer irreparable harm if the stay is not granted. However, the Kentucky moving public stands to suffer irreparable harm as well. Confusion in the computation and charging of applicable rates by Carriers will be the rule. This will be particularly so during the period that hastily assembled plans for complying with complicated statutes and regulations governing the filing and approval of household goods transportation rates are developed and implemented by Movers.

Similarly, KTC will likely be unable to accommodate the tidal wave of individual rate filings mandated by the Final Order, on short notice, in a manner consistent with the public interest.

Sections II and III of the Final Order have the effect of bringing about the cancellation of Tariff KYVDR No. 5 and any involvement of the Kentucky Association in the tariff publishing business. Since the Kentucky Association is not in a position to file individual tariffs on behalf of its Members or anyone else, the cancellation of the Agency Tariff currently on file and the Members' Powers of Attorney would represent an end of the business functions of the Kentucky Association. With no tariff on file, it would have no purpose. The Kentucky Association's non-tariff activities are insignificant in nature and would not, at the present time, warrant the continued operation of the organization.

In addition, the prejudice which would result to the Kentucky Association's 93 Members would be substantial. The preparation and development of an individual tariff is an effort and expense which few understand and fewer can perform in a professional and competent manner.

The fact that substantial, unrecoverable costs would be incurred by the Association, its Membership, KTC, and the moving public, warrants the granting of the stay. Similarly, "[the] potential to cause confusion if reversed by the court of appeals" is a matter of certainty in this case. *In re California Dental Association*, Docket No. 9259; 1996 FTC LEXIS 277 at 3 (May 22, 1996).

If the stay is not granted, and if the present Kentucky Association Agency Tariff on file with KTC is cancelled forthwith, as required by the Final Order, the predictable

sequence of events is as follows: (1) the Kentucky Association will terminate its business operations after compliance with the Final Order; (2) while many Carriers will be able to comply with the Order on an immediate basis, others will not, and there will be no enforcement mechanism or Industry group to counsel them regarding such compliance due the restrictions contained in the Final Order; (3) many of the State's Movers will either fail to file Tariffs on a timely basis, or file tariffs that fail to comply with State law; and (4) the opportunities for less than scrupulous Movers to engage in truly fraudulent activity will become more pronounced. This chain of events could never be reversed in the event of a modification or reversal of the Final Order by the Court of Appeals.

Compliance with the Final Order will represent the end of a regulatory program t6hat has functioned without challenge, complaint, or objection (except for this case) for fifty (50) years. Before the work of the Kentucky Legislature, the Kentucky Transportation Cabinet, and the Kentucky Association, in protecting the public interest are irrevocably destroyed, the judicial review contemplated by the FTC Act should be permitted.

C. No Injury to Other Parties Will Result from a Granting of the Stay

Respondent does not propose to argue the wisdom of "per se" price fixing jurisprudence. However, an important distinction needs to be drawn between a case where there is at least ***some*** evidence of economic harm suffered as the result of a price fixing conspiracy, on the one hand, and a case where the economic harm, the price fixing, and the conspiracy all exist by reason of rules of legal interpretation and not factual conclusions, on the other hand. This is that case.

REPLY
EXHIBIT 7

PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeny

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

RESPONDENT LabMD, INC.'S NOTICE OF CONDITIONAL CROSS-APPEAL

Pursuant to 16 C.F.R. § 3.52(b) and solely in response to Complaint Counsel's Notice of Appeal, Respondent hereby gives notice of its conditional and protective cross-appeal solely to raise additional and/or alternative grounds to support the Order issued by Chief Judge D. Michael Chappell dismissing the Complaint, and to preserve its rights. A conditional, protective cross-appeal in response to Complaint Counsel's notice of appeal is proper even where, as here, the administrative law judge's initial decision and proposed order dismissed the complaint in its entirety. *See, e.g., In the Matter of Rambus, Inc.*, Docket No. 9302, 2006 FTC LEXIS 60, at *28-34 (F.T.C. Aug. 2, 2006) (notwithstanding that the ALJ's initial decision and proposed order—like here—dismissed the complaint in its entirety, Respondent cross-appealed the ALJ's finding on applicable burden of proof to ensure that its rights were preserved); *cf. Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 649 (D.C. Cir. 1998) (prevailing party's conditional cross-appeal seeking affirmance on alternative grounds proper).

Based on the facts and law in this case, the Initial Decision and Order dismissing the Complaint entered by D. Michael Chappell, Chief Administrative Law Judge in the above-

captioned matter, were both correct and should be affirmed. Chief Judge Chappell's Initial Decision contains detailed findings of fact and credibility determinations based on a very careful review of the evidence, and reasoned conclusions of law that give effect to the plain meaning of FTC Act Section 5. Yet, Complaint Counsel has filed a general Notice of Appeal without specifying any factual or legal errors supposedly committed by Chief Judge Chappell, leaving Respondent, once again, to guess at what the Federal Trade Commission's case against it might be.

According to former Commissioner Joshua Wright:

> [I]n 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed. This is a strong sign of an unhealthy and biased institutional process....Even bank robbery prosecutions have less predictable outcomes than administrative adjudication at the FTC.

See Wright, "Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority" at 6 (Feb. 26, 2015) available at https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf. Given this statistical certainty, to protect its rights and to preserve all meritorious issues for appeal to an Article III court, Respondent must file this conditional and protective cross-appeal with respect to the absence of certain findings of fact and/or conclusions of law in the Chief Judge's Initial Decision, all of which would have provided additional and/or alternative grounds for the Order that he issued. Among other things, the omitted findings of fact and conclusions of law relate to the following:

a. The legal and constitutional infirmity of this case due to the Commission's and Complaint Counsel's reliance on and proffer of falsified and/or illegally-obtained evidence;

b. The legal and constitutional infirmity of this case due to the collusion and/or relationship between Complaint Counsel Alain Sheer, Ruth Yodaiken, Carl Settlemyer, and other Federal Trade Commission employees with Tiversa, Inc.;

c. The legal and constitutional infirmity of this case due to Complaint Counsel's failure to prove jurisdiction;

d. The legal and constitutional infirmity of this case due to the multiple "as-applied" violations of due process;

e. The legal and constitutional infirmity of this case due to the Commission's bias, predetermination, and legal process advantages.

f. The legal and constitutional infirmity of this case because Complaint Counsel abdicated its duty to investigate or corroborate evidence received from a third party, did not act with the due diligence required to reduce the risk of a mendacious or misguided informant, and failed to meet the standards of conduct required of government attorneys;

g. The legal infirmity of this case due to the Federal Trade Commission's violations of the Administrative Procedure Act;

h. The legal and constitutional infirmity of this case because Complaint Counsel failed to prove LabMD's data security violated relevant medical industry data security standards;

i. The legal infirmity of this case because the FTC Act, as-applied, creates a clear repugnancy with HIPAA and is preempted.

j. The legal infirmity of this case because *all* of the evidence from *all* of Complaint Counsel's expert witnesses should have been excluded under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993);

k. The legal infirmity of this case because Complaint Counsel did not carry its burden under Section 5(a) or under Section 5(n) of the FTC Act; and

l. The legal and constitutional infirmity of the proposed Notice Order in this case.

Also, in response to Complaint Counsel's appeal (whatever it may be) and to any action this Commission may take or issues it might raise or rulings it might make, whether arising from the Commission's claimed "plenary" authority over this adjudication or otherwise, Respondent hereby preserves and advances *all* of the arguments it presented before Chief Judge Chappell prior to and at the evidentiary hearing and through Respondent's post-trial briefs.

Finally, in anticipation of Article III review, Respondent hereby conditionally preserves its right to protect its interests and to object to certain evidentiary, discovery, and other rulings by Chief Judge Chappell in this action. *See Hartman v. Duffey*, 19 F.3d 1459, 1465-66 (D.C. Cir. 1994) ("In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well. Some protective cross-appeals are 'conditional' in the sense that the cross-appeal is reached ***only if and when the appellate court decides to reverse or modify the main judgment.*** The theory for allowing a conditional cross-appeal is that as soon as the appellate court ***decides to modify the trial court's judgment, that judgment may become 'adverse' to the cross-appellant's interests*** and thus qualify as fair game for an appeal ...") (emphasis added).

Respondent intends to file a brief perfecting this Notice of Appeal pursuant to 16 C.F.R. § 3.52(b) and (c).

Daniel Z. Epstein
Patrick J. Massari
Cause of Action Institute
1919 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006

Reed D. Rubinstein
William A. Sherman, II
Sunni R. Harris
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20004

Dated: December 1, 2015

Counsel for Respondent LabMD, Inc.

REPLY EXHIBIT 8

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
June 21, 2012

I dissent from the Commission's vote affirming Commissioner Brill's letter decision, dated April 20, 2012, that denied the petitions of LabMD, Inc. and Michael J. Daugherty to limit or quash the civil investigative demands.

I generally agree with Commissioner Brill's decision to enforce the document requests and interrogatories, and to allow investigational hearings to proceed. As she has concluded, further discovery may establish that there is indeed reason to believe there is Section 5 liability regarding petitioners' security failings *independent* of the "1,718 File" (the 1,718 page spreadsheet containing sensitive personally identifiable information regarding approximately 9,000 patients) that was originally discovered through the efforts of Dartmouth Professor M. Eric Johnson and Tiversa, Inc. In my view, however, as a matter of prosecutorial discretion under the unique circumstances posed by this investigation, the CIDs should be limited. Accordingly, without reaching the merits of petitioners' legal claims, I do not agree that staff should further inquire – either by document request, interrogatory, or investigational hearing – about the 1,718 File.

Specifically, I am concerned that Tiversa is more than an ordinary witness, informant, or "whistle-blower." It is a commercial entity that 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. Indeed, in the instant matter, an argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve the 1,718 File, and then repeatedly solicited LabMD, offering

investigative and remediation services regarding the breach, long before Commission staff contacted LabMD. In my view, while there appears to be nothing *per se* unlawful about this evidence, the Commission should avoid even the appearance of bias or impropriety by not relying on such evidence or information in this investigation.

REPLY EXHIBIT 9

In the Matter of:

LabMD, Inc.

May 21, 2014
Trial - Public & In Camera Record
Volume 2

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

FEDERAL TRADE COMMISSION

I N D E X

IN RE LABMD, INC.

TRIAL VOLUME 2

PUBLIC AND IN CAMERA RECORD

MAY 21, 2014

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
LabMD, Inc., a corporation,) Docket No. 9357
)
Respondent.)
---)

May 21, 2014
9:37 a.m.
TRIAL VOLUME 2
PUBLIC AND IN CAMERA RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, Court Reporter

APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:
LAURA RIPOSO VANDRUFF, ESQ.
ALAIN SHEER, ESQ.
MARGARET LASSACK, ESQ.
RYAN MEHM, ESQ.
Federal Trade Commission
Bureau of Consumer Protection
Division of Privacy and Identity Protection
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2999
lvandruff@ftc.gov

ON BEHALF OF THE RESPONDENT:
WILLIAM A. SHERMAN, II, ESQ.
REED D. RUBINSTEIN, ESQ.
Dinsmore & Shohl LLP
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, D.C. 20004
(202) 372-9100
william.sherman@dinsmore.com

APPEARANCES: (continued)

ON BEHALF OF THE RESPONDENT:
KENT G. HUNTINGTON, ESQ.
HALLEE MORGAN, ESQ.
MICHAEL PEPSON, ESQ.
Cause of Action
1919 Pennsylvania Avenue, N.W.
Suite 650
Washington, D.C. 20006
(202) 499-2426
kent.huntington@causeofaction.org

290

Q. Okay. You would also agree then that this would affect in fact security, the data security of the company, if this policy were followed, it would in fact have an impact on data security for the company; correct?

A. What I can say about this particular policy, that as it is written, it is not sufficient to satisfy a security goal because there's no discussion or presentation of how this policy would actually satisfy a specific security goal and what goal is to be satisfied.

So there is no link to the overall security goal, so an employee doesn't understand the consequences that violating this policy would have on security.

So as I've previously stated, when defining policies for a comprehensive security plan, you have to link your security goals to the policy, so -- and the policy then to the mechanisms that would enforce that.

And so in the -- with this presentation of it in an employee handbook, this would not be sufficient to communicate a security policy for employees. This would sufficiently communicate a business policy. But an individual doesn't -- wouldn't necessarily understand the security implications of violating this policy, so I

291

can't say that this policy would protect data, because you need that overall connection between the goals that are to achieve and an explanation to the employees about that.

Q. If the policy were followed to the letter with regard to Internet and e-mail usage, would that have a positive impact on the data security of the company?

A. Yes. If this policy was followed and there were no violations, it would have a positive impact.

Q. Do you consider the fact that -- and we can skip down to the paragraph two paragraphs below that, where it reads, "You will be reprimanded for failure to comply with this policy."

Is that sufficient to communicate a consequence of violating the policy?

A. It communicates a consequence but not a security consequence or the consequences to the overall security of the organization --

Q. And the last sentence of that same paragraph says, "A combination of phone calls or e-mails may result in immediate termination."

Did I read that correctly?

A. Yes.

Q. Is that sufficient to communicate a consequence of violating the policy?

292

A. As I have previously stated, it communicates a consequence, but not the consequences and the implications of how a violation would affect the overall security of the organization's computing infrastructure and the data that's maintained within that infrastructure.

Q. Let's turn to page 9 of this same document.

There's a heading on that page called Security.

Would you enlarge that.

Do you see that, Professor Hill?

A. Yes, I do.

Q. Under Security, it reads, "When LabMD facilities are equipped with electronic security systems, access to the buildings before and after normal working hours may be achieved on a limited basis only. Should you be required to work during hours other than normal working hours, you must call someone who will allow you access or make arrangements in advance of hours needing access."

Would you consider this as beneficial in terms of securing a company's data, in terms of securing a company's information, to have this type of security policy in place?

A. Yes. This follows the principle of physical security that I provided as a part of a comprehensive

293

information security program, so this addresses the need for physical security.

Q. And in fact, it's your opinion that LabMD's physical security was adequate; is that correct?

A. Yes. As far as providing locks to server rooms and access to their -- physical access to their computers, yes. But physical security is not sufficient in protecting against electronic attacks.

Q. Right.

And I think you also said that no one portion of your seven principles alone would meet your definition of a comprehensive information security program; correct?

A. No one of the seven principles would meet the definition of any of the organizations' that I've cited notion of a comprehensive information security plan.

Q. If we look down at the bottom of that page, under LabMD Property --

A. Excuse me. Could you reduce that just slightly. It's not fitting fully on the screen.

Okay. I'm able to see it now.

Q. Again, under LabMD Property, it reads: Lockers, desks, vehicles and computers are all office equipment are LabMD's -- and all office equipment -- I'm sorry -- are LabMD's property and must be maintained according to

REPLY EXHIBIT 10

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

SUPPLEMENTAL DECLARATION OF LabMD, INC. PRESIDENT AND CHIEF EXECUTIVE OFFICER MICHAEL J. DAUGHERTY IN SUPPORT OF RESPONDENT LabMD, INC.'s REPLY TO COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR STAY OF ORDER PENDING REVIEW IN U.S. COURT OF APPEALS

I, Michael J. Daugherty, in my capacity as President and Chief Executive Officer ("CEO") of Respondent LabMD, Inc. ("LabMD"), declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the same Michael J. Daugherty who submitted a declaration in support of Respondent LabMD, Inc.'s Application for Stay of Order Pending Review in U.S. Court of Appeals. I am President and CEO of LabMD and base this declaration on facts known to me. To avoid repetition, I incorporate the statements from my first declaration into this declaration.

2. I am providing this second declaration to further address certain statements in Complaint Counsel's Opposition to Respondent LabMD's Stay Application regarding time and monetary costs associated with the Commission Final Order and Opinion, as well as statements relating to a spreadsheet referred to in this litigation as the "1718 File."

3. Subsequent to the filing of LabMD's Stay Application, I have consulted with Mr. Cliff Baker about the Commission Final Order.

4. Mr. Baker is the Founder and Managing Partner of Meditology Services. I consulted Mr. Baker because I understand that Meditology Services provides privacy and security services to healthcare clients, providing private consulting services in the areas of compliance with HIPAA and the implementation of privacy and security programs for healthcare organizations of all sizes.

5. I do not know what the Federal Trade Commission ("FTC") believes (or may later claim) Part I of its Final Order requires LabMD to do.

6. Part I of the Final Order appears to require LabMD to perform certain tasks, including, but not limited to the following.

    a. Part I of the Order states that "the content and implementation of" whatever the FTC might believe a "comprehensive information security program" to require "must be fully documented in writing."

    b. Part I.C of the Final Order indicates that LabMD must somehow conduct a "risk assessment" to attempt to determine what the FTC believes or may later claim to be a "reasonable and appropriate" "comprehensive information security program."

    c. Part I also states that "[s]uch program … shall contain," among other things: "regular testing and monitoring on the effectiveness of the safeguards' key controls, systems, and procedures"; "the development and use of reasonable steps to select and retain service providers capable of appropriate safeguarding personal information"; and "the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by Subpart C."

7. I do not know whether the FTC subjectively believes or may later claim LabMD must rebuild its computer network to comply with the Final Order. I have reviewed Complaint Counsel's Opposition to LabMD's Stay Application, other filings, and Commission Orders in this matter. Complaint Counsel's Opposition states that the Order does not require LabMD to rebuild its computer network. I understand that LabMD cannot rely on that statement for any purpose. The Commission stated on page 8 of its May19, 2014, Order Denying LabMD's Summary Decision Motion: "Just because Complaint Counsel has made particular statements or taken certain positions does not necessarily mean the Commission has adopted those positions. To the contrary, the Commission is not bound by characterizations employed by Complaint Counsel[.]"
8. To the extent Part I of the Commission Final Order does not require LabMD to rebuild an operational computer network, LabMD would still incur costs in attempting to comply with Part I of the Order.
    a. I understand that compliance with data-security standards set by HIPAA and HHS regulations may be insufficient to comply with whatever the FTC believes now or may later claim Part I of its Final Order requires of LabMD. For example, I understand that Complaint Counsel has stated that "HIPAA's requirements are irrelevant to this proceeding[.]" I further understand that the January 16, 2014, Commission Order Denying LabMD's Motion to Dismiss states: "LabMD and other companies may well be obligated to ensure their data security practices comply with both HIPAA and the FTC Act. … [A] party cannot plausibly assert that, because it complies with one of these laws, it is free to violate the other."

b. Part I appears to require LabMD to pay for a risk assessment attempting to determine and apply the FTC's views on computer data security to LabMD's current situation.

c. Mr. Baker has estimated that a risk assessment for LabMD specifically would cost LabMD about $15,000 to $20,000

d. To the extent Part I requires LabMD to develop new policies and procedures attempting to divine and establish whatever the FTC believes now or may later claim is sufficiently "comprehensive" of an "information security program" for LabMD may, Mr. Baker has estimated that the attempted development of such policies and procedures for LabMD specifically would cost LabMD approximately $8,000.

9. To the extent Part I of the Commission Final Order does not require LabMD to rebuild an operational computer network, LabMD does not have an operational computer network at all, as further discussed in my first Declaration in support of LabMD's Stay Application.

10. To the extent that Part I of the Commission Final Order purports to require LabMD to rebuild an operational computer network connected to the Internet to comply with it, I understand from Mr. Baker that LabMD would incur costs in connection with "testing and monitoring on the effectiveness of the safeguards' key controls, systems, and procedures" and related requirements. Mr. Baker has provided LabMD with the following estimates of costs LabMD would incur:

a. With respect to workstation and server encryption, network firewall, workstation firewall, malware protection, data destruction tool, secure file exchange, monitoring tool, scanning tool, encrypted USB, Mr. Baker estimates it would cost LabMD specifically between $15,000 and $20,000 to do this.

b. With respect to the implementation and configuration of tools, Mr. Baker estimates this would cost LabMD specifically between $15,000 and $20,000 to do this.

c. With respect to on-going security services (upgrade and apply patches, address application vulnerabilities, monitor logs, on-going vulnerability scanning, install security tools on new machines, review security for new technologies, malware remediation, policy updates), Mr. Baker estimates that it would cost LabMD specifically between $40,000 and $60,000 per year.

d. With respect to cyber risk insurance, Mr. Baker estimates that this would cost LabMD specifically about $10,000 to $15,000 per year based on typical customer contract requirements for coverage.

11. If LabMD is required by the Order to plug in and reactivate its two remaining workstations and its servers (which use Websense security technology) and connect those devices to the Internet, LabMD will incur about $1,000 per month to keep those devices online and cool.

12. The 1718 File is not on the LabMD Lytec server. The 1718 File has never been on the LabMD Lytec server.

13. In addition, Limewire and the 1718 File were deleted from the billing manager's workstation more than eight years ago in May 2008.

14. Attached hereto as Exhibit A is a true and correct copy of the Expert Opinion Declaration of Cliff Baker, which was filed in *LabMD, Inc. v. FTC*, C.A. No. 1:14-CV-810-WSD , in the United States District Court for the Northern District of Georgia. Paragraph 2 of Mr. Baker's Declaration describes Mr. Baker's roles in his career in the field of data security. Mr. Baker's Declaration also addresses differences between HIPAA data-security standards for Protected Health Information that apply to the medical industry and HIPAA-covered

healthcare providers and the FTC's views on the topic, as expressed in Dr. Raquell Hill's Expert Report.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 15, 2016

Michael J. Daugherty
President and Chief Executive Office
LabMD, Inc.

EXHIBIT A

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

LabMD, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Civil Action No.: 1:14-CV-810-WSD
FEDERAL TRADE COMMISSION,	)	
	)	
Defendant.	)	

EXPERT OPINION DECLARATION OF CLIFF BAKER

In accordance with 28 U.S.C. § 1746, the declarant, Cliff Baker states:

1. I am Cliff Baker. I submit this declaration for use in the lawsuit *LabMD v. Federal Trade Commission.* I offer this declaration to respond to statements in the Expert Report of Professor Hill and how her opinions on data security relate to requirements on data security for HIPAA-covered medical service providers imposed by the Department of Health and Human Services. HIPAA stands for the Health Insurance Portability and Accountability Act of 1996. I base my declaration on my personal knowledge and professional experiences.

2. I, Cliff Baker, have had the following roles in my career in the field of data security:

a. Director in the Healthcare Information Security practice at PricewaterhouseCoopers. I led the security practice nationally for the Healthcare Consulting practice. I worked at PricewatershouseCoopers for 14 years and consulted with clients nationally on implementing security programs and practices. An example of a project I led was a establishing a program that included four state healthcare associations. The program included meeting, discussing and educating over 50 organizations on adopting security measures to comply with HIPAA.

b. Chief Strategy Officer for HITRUST. I joined HITRUST in 2008 to lead the creation of the Common Security Framework, which is a healthcare industry framework based on globally recognized standards, such as ISO 27001/2 and NIST. A key objective of the framework is to provide a prescriptive and scalable reference for covered entities to determine reasonable and appropriate controls to implement for their organizations. The controls are tailored to the size and operations of the organization. I facilitated working sessions with over 200 security professionals from the healthcare

industry, security technology companies, consulting companies, and government entities in the development of the framework.

c. Founder and Managing Partner of Meditology Services. Meditology Services was founded in 2010 to provide privacy and security services to healthcare clients. I employ former Chief Information Security and Privacy Officers that were responsible for implementing security at their healthcare organizations. We provide consulting services in the areas of compliance with HIPAA and the implementation of privacy and security programs for healthcare organizations ranging from small providers to global healthcare organizations.

3. I have spent over 19 years working in the healthcare and information security fields. This experience has provided me with first-hand knowledge about the challenges and practical realities faced by healthcare organizations in securing Protected Health Information (PHI).

4. The 1996 HIPAA Statute states that in promulgating information security regulations, the Secretary must take into account "the needs and capabilities of small health care providers and rural health care providers (as such providers are defined by the Secretary)," and the preamble to the HIPAA Security

Rule (p. 8335) states accordingly that one of the foundations of the rule is that "it should be scalable, so that it can be effectively implemented by covered entities of all types and sizes."

5. The process by which HHS promulgated the initial final HIPAA Security Rule involved reviewing and responding to approximately 2,350 timely public comments, balancing the interests of health care professionals and firms with patient-related interests. Based on these public comments, HHS crafted a unique information security regulatory scheme that separated "implementation specifications" – the types of very specific security requirements emphasized by the FTC's expert – into two classes: "required" and "addressable". HHS stayed consistent with this structure in its most recent updates to the HIPAA Privacy and Security rules in 2013. This structure reflects HHS' challenge in complying with Congressional intent in establishing a security rule to address reasonable and appropriate security requirements for the range of organizations in healthcare that differ greatly in operations, size, complexity, and resources. For example, a single physician practice may differ significantly from the way in which it addresses security as compared to a multi-national health plan. The physician practice will probably not employ dedicated technology or security personnel and will rely heavily on guidance from HHS. The practice will also rely predominantly on

security that is provided by default settings and software vendor recommendations and will implement mostly manual procedures to manage and monitor access to patient information and associated Information Technology (IT) systems. On the other end of the spectrum, a national health system will likely hire a team of experienced security professionals that may even exceed the total number of employees in these small practices. These larger organizations will buy and build the most advanced and sophisticated solutions available in their efforts to protect sensitive patient data.

6. HIPAA demands that a covered entity perform a risk assessment in good faith and take actions to secure Electronic Protected Health Information (EPHI) based on the findings of that risk assessment. HIPAA's security requirements are also explicitly "scalable" based on the size of the entity. Therefore, to assess HIPAA noncompliance, it is necessary to determine if a risk assessment was performed in good faith, and resulted in a process that included implementation of requirements and appropriate responses to "addressable" issues. These responses are all subject to different standards and scalable so that they could be implemented effectively by covered entities of all types and sizes. Given the limited knowledge of information technology by many small health care providers, especially during the early years of HIPAA Security,

many of the security measures they were advised to adopt by HHS issued guidance related to physical and administrative security rather than specific technical security.

7. The preamble to the Rule makes the balancing of interests and the assessment of feasibility for small providers by HHS, employing notice and comment rulemaking, quite transparent at many points. For example, in connection with encryption of data in transit, which corresponds to Section 164.312(e)(1) of the Rule on Transmission Security, the preamble notes (FR V. 68, #34 at 8357):

> [W]e agree that encryption should not be a mandatory requirement for transmission over dial-up lines. We also agree with commenters who mentioned the financial and technical burdens associated with the employment of encryption tools. Particularly when considering situations faced by small and rural providers, it became clear that there is not yet available a simple and interoperable solution to encrypting email communications with patients. As a result, we decided to make the use of encryption in the transmission process an addressable implementation specification.

8. This concept was reinforced by CMS in a seven-part series published to provide guidance to the industry for complying with HIPAA. In Volume 2 Security Standards: Implementation for Small Provider of the HIPAA Security Series published in December 2007, CMS states:

> All covered entities must comply with the applicable standards, implementation specifications, and requirements of the Security Rule with respect to EPHI (see 45 C.F.R § 164.302.). Small providers that are covered entities have unique business and technical environments that provide both opportunities and challenges related to compliance with the Security Rule. As such, this paper provides general guidance to providers such as physicians and dentists in solo or small group practices, small clinics, independent pharmacies, and others who may be less likely to have IT staff and whose approach to compliance would generally be very different from that of a large health care system. It is important to note however, that this paper does not define a small provider, nor does it prescribe specific actions that small providers must take to become compliant with the Security Rule.

9. These comments reflect the challenges of small providers in the early years of HIPAA, but even as more recently as 2013 and 2014, HHS is still publishing security guidance for small providers, and the guidance is still elementary in nature. This is reflected by the following list of recommendations published in the most recent version of the Guide to Privacy and Security of Health Information, published by the Office of the National Coordinator for Health Information Technology in 2013:

> Remember the Basics
>
> - Is your server in a room only accessible by authorized staff? Do you keep the door locked?
> - Are your passwords easily found (e.g., taped to a monitor)? Easy to guess?

- Do you have a fire extinguisher that works?
- Where, when, and how often do you back-up? Is at least one back-up kept offsite? Can your data be recovered from the back-ups?
- How often is your EHR server checked for viruses?
- Who has keys to your building? Any former employees or contractors?
- What is your plan for what to do if your server crashes and you cannot directly recover data? Do you have documentation about what kind of server it was, what software it used, etc.?

10. These recommendations reflect HHS' understanding of the realities associated with implementing security for small providers in the healthcare industry. After almost ten years of complying with HIPAA security rules, the guidance has not changed substantively for small practices. In more recent years, HHS has focused on requiring security functionality to be built into applications for the healthcare industry, so providers will have many security controls by default and not have to rely on expertise, additional tools and resource intensive processes to protect information.

11. I have reviewed Dr. Hill's Report, and believe that the standards articulated by Dr. Hill are:

a. Confusing by introducing additional security principles (i.e., 7 security principles referenced by Dr. Hill) that are difficult to reconcile with the Administrative, Technical and Physical main structure of the HIPAA security rule.

b. Not scalable in accordance with the Security Rule, and not taking account as required by the 1996 HIPAA Statute of "the needs and capabilities of small health care providers and rural health care providers (as such providers are defined by the Secretary). For example, the recommendation for file integrity monitoring requires expertise to implement and configure these solutions and can be even more resource intensive to understand, investigate and resolve alerts produced by the solution. In my experience, I very rarely observe adoption of this technology by small providers in the industry.

c. More prescriptive than HIPAA or inconsistent with HHS guidance, including encryption at rest (an addressable requirement of 164.312(a)(1)), encryption in transit (an addressable requirement

of 164.312(e)(1)), intrusion detection (not addressed specifically by the Security Rule), virus protection (an addressable requirement of 164.308(a)(5) (ii)(B)), firewalls (not addressed specifically by the Security Rule), penetration testing (not addressed by the Security Rule), and file integrity monitoring (not addressed specifically by the Security Rule). While many of these standards are good security practices, controls such as broad scale encryption at rest are generally not adopted across the industry. The electronic health record certification requirements published for HHS for Meaningful Use Stage 2 in 2012 do not even require this level of encryption for all PHI stored by the system. In addition, tools such as intrusion detection and file integrity monitoring systems require experienced and committed technical resources to configure and manage. Dr. Hill's standards presume a level of knowledge of technical information security generally not available to small health care providers.

d. Contradictory to the guidance provided by HHS. For example, Dr. Hill almost exclusively focuses on technologies or technical processes for the risk assessment process (i.e., antivirus

applications, firewalls, various types of vulnerability scans, intrusion detection systems, penetration tests, file integrity monitoring, and other measures). This is inconsistent with HHS guidance that the risk assessment can be a qualitative and manual process as outlined in the standard referenced by Dr. Hill: Special Publication NIST 800-30 Guide for Conducting Risk Assessments.

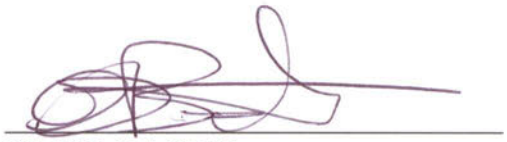
12. If health care providers are going to be held to a compliance standard that is simply an expert's opinion of best practices in information security at any point in time, when that expert standard exceeds the published compliance standard developed under HIPAA and the historical guidance provided by HHS, then the standard developed under HIPAA is made effectively meaningless. This will create confusion for Health care providers that will not know what is required of them.

13. I have not reviewed whether LabMD is or was compliant with the HIPAA Security Rule; I suggest only that for HIPAA not to be contradicted and Congressional intent and constitutional process not to be undermined, the information security of HIPAA-covered health care providers must be regulated by an agency with jurisdiction under the properly promulgated HIPAA Security Rule,

which during the time period in question was only the Department of Health and Human Services.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 11 day of April, 2014.



CLIFF BAKER

CERTIFICATE OF SERVICE

This is to certify that, on April 11, 2014, I electronically filed the foregoing **EXPERT OPINION DECLARATION OF CLIFF BAKER** with the Clerk of Court using the CM/ECF system, and served the following by e-mail and U.S. Mail as follows:

LAUREN E. FASCETT, Esq.
Trial Attorney
U.S. Department of Justice
Civil Division
Consumer Protection Branch
450 5th Street, N.W.
Washington, D.C. 20530
Lauren.Fascett@usdoj.gov

This 11th day of April, 2014.

/s/ Burleigh L. Singleton
Counsel for Plaintiff

Notice of Electronic Service

I hereby certify that on September 15, 2016, I filed an electronic copy of the foregoing Respondent LabMD, Inc.'s Reply to Complaint Counsel's Opposition to LabMD's Application for Stay of Final Order Pending Review By A United States Circuit Court of Appeals, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on September 15, 2016, I served via E-Service an electronic copy of the foregoing Respondent LabMD, Inc.'s Reply to Complaint Counsel's Opposition to LabMD's Application for Stay of Final Order Pending Review By A United States Circuit Court of Appeals, upon:

John Krebs
Attorney
Federal Trade Commission
jkrebs@ftc.gov
Complaint

Hallee Morgan
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Jarad Brown
Attorney
Federal Trade Commission
jbrown4@ftc.gov
Complaint

Kent Huntington
Counsel
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Sunni Harris
Esq.
Dinsmore & Shohl LLP
sunni.harris@dinsmore.com
Respondent

Daniel Epstein
Cause of Action
daniel.epstein@causeofaction.org
Respondent

Patrick Massari
Counsel
Cause of Action
patrick.massari@causeofaction.org

Respondent

Alain Sheer
attorney
Federal Trade Commission
asheer@ftc.gov
Complaint

Laura Riposo VanDruff
General Attorney
Federal Trade Commission
lvandruff@ftc.gov
Complaint

Megan Cox
Attorney
Federal Trade Commission
mcox1@ftc.gov
Complaint

Ryan Mehm
Attorney
Federal Trade Commission
rmehm@ftc.gov
Complaint

Erica Marshall
Counsel
Cause of Action
erica.marshall@causeofaction.org
Respondent

Alfred Lechner
President & CEO
Cause of Action Institute
jlechner@causeofaction.org
Respondent

Patrick Massari
Attorney