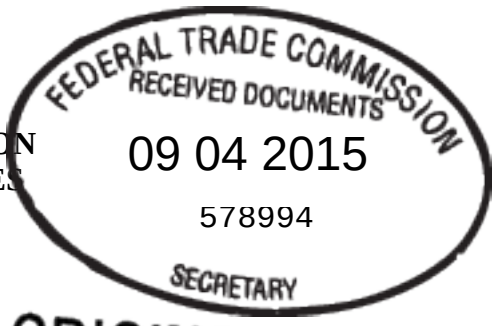
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

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

COMPLAINT COUNSEL'S REPLY TO
RESPONDENT'S PROPOSED CONCLUSIONS OF LAW

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TABLE OF CONTENTS[1]

[1] In accordance with the Court's Order on Post-Trial Briefs, Complaint Counsel has replicated Respondent's headings to aid the reader.

REFERENCE ABBREVIATIONS

References to the parties' proposed findings, conclusions, and replies to proposed findings and conclusions are made using the following abbreviations:

Respondent, LabMD, Inc. – Respondent or LabMD

CCFF – Complaint Counsel's Proposed Findings of Fact

CCCL – Complaint Counsel's Proposed Conclusions of Law

CCRRFF – Complaint Counsel's Reply to Respondent's Proposed Findings of Fact

CCRRCL – Complaint Counsel's Reply to Respondent's Proposed Conclusions of Law

RFF – Respondent's Proposed Findings of Fact

RCL – Respondent's Proposed Conclusions of Law

I. STIPULATIONS OF LAW

1. The acts and practices of Respondent LabMD, Inc. ("LabMD") alleged in the Complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Response to Conclusion No. 1:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2, Stip. 1).

2. The patients of LabMD's physician clients are "consumers" as that term is used in Section 5(n) of Federal Trade Commission Act, 15 U.S.C. § 45(n).

Response to Conclusion No. 2:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2, Stip. 2).

3. Respondent is accused of violating 15 U.S.C. § 45(a), also known as Section 5(a) of the Federal Trade Commission Act.

Response to Conclusion No. 3:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2, Stip. 3).

4. An unfair practice is defined as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition," 15 U.S.C. § 45(n).

Response to Conclusion No. 4:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2, Stip. 4).

5. Complaint Counsel has the burden of proof, except as to factual propositions put forward by another proponent, such as affirmative defenses. Rule 3.43(a); 5 U.S.C. § 556(d). The standard of proof is preponderance of the evidence. *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 157, at *133-*35 (F.T.C. Aug. 5, 2009).

Response to Conclusion No. 5:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2-3, Stip. 5).

6. Complaint Counsel has the burden of proof to prove by a preponderance of the evidence that LabMD's practices are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Response to Conclusion No. 6:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 3, Stip. 6).

7. Complaint Counsel does not seek to enforce the Health Insurance Portability and Accountability Act ("HIPAA") in this case.

Response to Conclusion No. 7:

Complaint Counsel does not dispute this stipulation. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 3, Stip. 7).

II. THE APPOINTMENTS CLAUSE

8. Federal Trade Commission ("FTC" or "Commission") administrative law judges ("ALJs") are "inferior officers" under U.S. Const., art. II., § 2, cl. 2. *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991); *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

Response to Conclusion No. 8:

The proposed conclusion is misleading and a misstatement of law. FTC ALJs are not "inferior officers" under U.S. Const., Art. II., § 2, cl. 2 (the "Appointments Clause") because they have limited functions, are subject to the Commission's plenary authority, and do not issue final decisions. Indeed, the only Court of Appeals to have considered whether ALJs are Inferior Officers concluded that they were not because they did not have the power to issue final decisions. *Landry v. FDIC*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000) (interpreting Supreme

Court's *Freytag* decision as laying "exceptional stress" on the final decision-making power of IRS Special Trial Judges when finding them to be inferior officers).

9. FTC ALJs must be appointed to their position by "the President alone, by the heads of departments, or by the Judiciary." *Buckley,* 424 U.S. at 132.

Response to Conclusion No. 9:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities. The proposed conclusion is misleading to the extent it suggests that FTC ALJs are Inferior Officers whose appointment must comply with the Appointments Clause. FTC ALJs are not Inferior Officers (*see* CCRRCL ¶ 8), and the Appointments Clause does not reach government personnel below the level of inferior officers. *See Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506, n. 9 (2010).

10. FTC ALJs are appointed by the Office of Personnel Management. 16 C.F.R. § 0.14; *see also Office of Administrative Law Judges*, Fed. Trade Comm'n, https://www.ftc.gov/about-ftc/bureaus-offices/office-administrative-law-judges (last visited Aug. 9, 2015) (ALJs are "appointed under the authority of the Office of Personnel Management").

Response to Conclusion No. 10:

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Moreover, the Court should disregard the proposed conclusion because it is not supported by the cited authority. As a statement of fact, it is incorrect. FTC ALJs are not appointed *by* the Office of Personnel Management (OPM), but under the "authority and subject to the prior removal of" OPM. 16 C.F.R. § 0.14. OPM does not have the authority to appoint ALJs for the FTC or agencies like the FTC. 5 C.F.R. § 930.201(e). FTC ALJs are appointed by the Commission from a "list of eligibles" provided by OPM. *See* 5 C.F.R. § 930.204.

11. Because ALJs are "officers" under the Appointments Clause, the "dual for-cause" removal protection afforded to them by statute is an unconstitutional "multilevel protection." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 502 (2010); *see* 5 U.S.C. § 7521(a) (removal action "may be taken" by FTC against an ALJ "for good cause established and determined by the Merit Systems Protection Board"); 5 U.S.C. § 1202(d); 15 U.S.C. § 41 (FTC commissioners removable for cause).

Response to Conclusion No. 11:

The proposed conclusion is misleading and a misstatement of law. FTC ALJs are not Inferior Officers and the Appointments Clause does not apply to them. (*See* CCRRCL ¶¶ 8-9). In *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*,, the Supreme Court specifically refused to issue a blanket rule that all dual for-cause removal protections are unconstitutional, and explicitly excluded ALJs from the scope of its ruling because it recognized that ALJs are not similarly situated to the Board in question. 561 U.S. 477, 492, 507 n.10 (2010) (reasoning that ALJs often perform adjudicative rather than enforcement or policymaking functions, or "possess purely recommendatory powers"); *see also Duka v. SEC*, 2015 WL 1943245, at *8, 10 (S.D.N.Y. Apr. 15, 2015) (rejecting similar dual-level removal protection challenge to SEC ALJs because "Congressional restrictions upon the President's ability to remove 'quasi judicial' agency adjudicators are unlikely to interfere with the President's ability to perform his executive duties"); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2363 (2001) (noting that presidential involving in agency adjudications "would contravene procedural norms and inject an inappropriate influence into the resolution of controversies").

12. As a matter of law, the Appointments Clause has been violated in this case. *See Hill v. SEC*, No. 1:15-cv-01801-LMM, 2015 U.S. Dist. LEXIS 74822, at *41-*42 (N.D. Ga. June 8, 2015).

Response to Conclusion No. 12:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. The proposed conclusion also is misleading and a misstatement of law. (*See* CCRRCL ¶¶ 8-11).

13. Therefore, this case should be dismissed. *Buckley*, 424 U.S. at 132.

Response to Conclusion No. 13:

The Court should disregard the proposed conclusion because it is not supported by the cited authority and is a misstatement of law. *Buckley* does not stand for the proposition that Appointments Clause violations should result in the dismissal of the agency action. To the contrary, the Supreme Court in *Buckley* accorded the past administrative actions and determinations of the FEC, which were found to be unconstitutionally appointed under the Appointments Clause, "de facto validity." *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (also affording the upheld provision that had been challenged in the current proceeding *de facto* validity). The *Buckley* Court also stayed its ruling for 30 days to allow Congress to reconstitute the FEC and to allow the FEC to continue to function in the interim. *Id.* at 142-43. Even assuming *arguendo* that there has been an Appointments Clause violation, which there has not, such a violation only attacks the manner of the evidentiary hearing and does not limit or preclude Respondent's liability under the FTC Act. Thus, even if an Appointments Clause violation were found, it does not warrant the dismissal of the Complaint. Instead, this Court should certify the question of the appropriate remedy to the Commission. 16 C.F.R. § 3.23(b). For example, the Commission's *de novo* review of the Initial Decision may cure any potential Appointments Clause violation. *See Ryder v. United States*, 515 U.S. 177, 187-88 (1995) (finding Court of Military Appeals' subsequent review of decision by an improperly appointed Coast Guard Court of Military Review would not cure an Appointments Clause violation in part because such

review did not apply a de novo review standard). Alternatively, the Commission may decide to cure an alleged Appointments Clause violation by re-litigating the same complaint against Respondent by appointing one or more Commissioners to preside over the administrative hearing. *See id.* (remanding case for new hearing before properly appointed court panel after finding Appointments Clause violation); *Hill v. SEC*, No. 1:15-CV-1801 LMM, 2015 WL 4307088, at *19 (N.D. Ga. June 8, 2015) (acknowledging alleged Appointments Clause violation relating to an upcoming hearing before an SEC ALJ could be "easily cured" by the SEC pursuing the same claim in federal court or in an administrative hearing before an SEC Commissioner); 16 CFR § 3.42 (Commission has discretion to determine whether the Commission, one or more Commissioners, or an ALJ will preside over matter). Thus, an Appointments Clause violation, even if found, would not warrant the dismissal of this case.

III. PREEMPTION

14. An agency may not use a general grant of authority to declare unlawful conduct that is permitted under a later and more specific legislative enactment. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2070-71 (2012); *Credit Suisse Sec. LLC v. Billing*, 551 U.S. 264, 275 (2007).

Response to Conclusion No. 14:

The proposed conclusion is misleading to the extent that it suggests that the Commission has not already rejected the argument that this canon of construction applies in this case. *See* Comm'n Order Denying Resp't's Mot. to Dismiss at 12-13 (Jan. 16, 2014) ("*Credit Suisse* is clearly distinguishable. As LabMD concedes, there was a 'possible conflict between the [securities and antitrust] laws,' creating a 'risk that the specific securities and general antitrust laws, if both applicable, would produce conflicting guidance, requirements, . . . or standards of conduct.' *Id.*"). Because the relevant FTC Act provisions and HIPAA provisions do not

conflict, the same reasoning does not apply. *See* Comm'n Order Denying Resp't's Mot. to Dismiss at 11 (Jan. 16, 2014) ("the patient-information protection requirements of HIPAA are largely consistent with the data security duties that the Commission has enforced pursuant to the FTC Act."). *RadLAX Gateway Hotel* is also distinguishable in that – unlike in the present case, where relevant HIPAA and FTC Act provisions are consistent – there was a clear conflict between two provisions in the Bankruptcy Code, which precluded the interpretation advanced by the petitioners. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071-72 (2012) (denying petitioner's attempt to read Bankruptcy Code provision in a way that permitted conduct that another, more specific provision of the same law prohibited).

15. The Commission's Section 5 authority must be viewed in the light of other relevant statutes, "particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also FTC v. Nat'l Cas. Co.*, 357 U.S. 560, 562-63 (1958) (superseded by statute) (examination of subsequent statute and its legislative history demonstrates that it limits the FTC's Section 5 regulatory authority).

Response to Conclusion No. 15:

The proposed conclusion is misleading to the extent that it suggests that the Commission has not already rejected this argument. *See* Comm'n Order Denying Resp't's Mot. to Dismiss at 10-11 (Jan. 16, 2014). As the Commission stated:

> The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. Thus, one cannot conclude that Congress implicitly repealed or narrowed the scope of an existing statute (*i.e.*, Section 5) by subsequently enacting a new law unless 'the intention of the legislature to repeal [is] clear and manifest . . . . Nothing in HIPAA, HITECH, or any of the other statutes LabMD cites reflects a 'clear and manifest' intent of Congress to restrict the Commission's authority over allegedly 'unfair' data security practices such as those at issue in this case.

Id. (internal citations and quotations omitted)). The Third Circuit has also rejected a challenge based on *Brown & Williamson* to the Commission's power to bring Section 5 cases in the data

security area. *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *7-8 (3d Cir. Aug. 24, 2015).

FTC v. Nat'l Cas. Co., 357 U.S. 560 (1958), is not applicable to this proceeding. The McCarron-Ferguson Act declared that "[n]o Act of Congress shall be construed to . . . supersede any law enacted by any State for the purpose of regulating the business of insurance . . .", and the states at issue had enacted laws regulating the business of insurance. *FTC v. Nat'l Cas. Co.*, 357 U.S. 560, 562 n.2, 564 (1958) (citation omitted). *National Casualty* found that the Commission's authority under the FTC Act was limited only with respect to the business of insurance that state laws regulate, in congruence with Congress's statutory directive. Unlike *National Casualty*, in this proceeding the Commission has explicitly determined that the FTC Act is not preempted, declaring that enforcement of the FTC Act "fully comports with congressional intent under HIPAA," Comm'n Order on Resp't's Mot. to Dismiss at 12 (Jan. 16, 2014).

16. The Department of Health and Human Services ("HHS") has been authorized to regulate medical data security since the 1990s. *See* 42 U.S.C. § 1320d-2(d)(1) ("Security standards for health information").

Response to Conclusion No. 16:

The proposed conclusion is misleading to the extent that it suggests that HHS has exclusive jurisdiction over medical data security; it does not. As the Commission stated:

> LabMD similarly contends that, by enacting HIPAA, Congress vested HHS with "exclusive administrative and enforcement authority with respect to HIPAA-covered entities under these laws." [LabMD Mot. to Dismiss at 11]. That argument is also without merit. To be sure, the Commission cannot enforce HIPAA and does not seek to do so. But nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act.

Comm'n Order Denying Resp't's Mot. to Dismiss at 12 (Jan. 16, 2014).

17. Historically, the Commission has respected HHS' medical company data security authority. HHS states "entities operating as HIPAA covered entities and business associates are

subject to HHS' and not the FTC's, breach notification rule." Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act, 78 Fed. Reg. 5,566, 5,639 (Jan. 25, 2013). The Commission agrees. Health Breach Notification Rule, 74 Fed. Reg. 42,962, 42,963 (Aug. 25, 2009)("[T]he Commission received many comments about the need to harmonize the HHS and FTC rules to simplify compliance burdens and create a level-playing field for HIPAA and non-HIPAA covered entities. Several commenters agreed with the statements in the FTC's NPRM that (1) HIPAA-covered entities should be subject to HHS' breach notification rule and not the FTC's rule; and (2) business associates of HIPAA-covered entities should be subject to HHS' breach notification rule, but only to the extent they are acting as business associates. Accordingly, the FTC adopts as final the provision that the rule 'does not apply to HIPAA-covered entities, or to any other entity to the extent that it engages in activities as a business associate of a HIPAA-covered entity'"); *id.* at 42,9642 ("HIPAA-covered entities and entities that engage in activities as business associates of HIPAA-covered entities will be subject only to HHS' rule and not the FTC's rule . . . .").

Response to Conclusion No. 17:

The proposed conclusion is misleading to the extent that it suggests that the Commission has deferred to HHS' data security authority. On the contrary, the Commission has taken action against companies that are within HHS' jurisdiction. Indeed, the Commission's Order Denying Respondent LabMD's Motion to Dismiss cites to the *CVS* and *RiteAid* cases as examples of joint settlements "stemming from the two agencies' coordinated investigations of the company's failure to securely dispose of documents containing consumers' sensitive financial and medical information." Comm'n Order Denying Resp't's Mot. to Dismiss at 11 n.18 (Jan. 16, 2014). As to the rest of the conclusion, as the Commission's Order Denying LabMD's Motion to Dismiss states, "nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act." *Id.* at 12. And although the FTC Health Breach Notification Rule that LabMD quotes does not apply to HIPAA-covered entities, this does not mean that Section 5 of the FTC Act does not apply to HIPAA-covered entities. *Id.* at 12 n.20 ("LabMD correctly notes that [the FTC Breach Notification Rule] does not apply to HIPAA-covered entities . . . but the conclusion it draws from this fact is unfounded. Significantly, the Complaint in the present proceeding alleges

only statutory violations; it does not allege violations of the FTC's Health Breach Notification Rule.").

18. The evidence in this case, which was not before the Commission when it issued the Order regarding LabMD's Motion to Dismiss at 18, *In the Matter of LabMD, Inc.*, FTC Dkt. No. 9357 (Jan. 16, 2014) (the "MTD Order"), demonstrates that data security acts and practices admittedly permitted by HHS could be declared unlawful by the Commission through ad hoc adjudication. *RadLAX Gateway Hotel*, 132 S. Ct. at 2070-71; *Billing*, 551 U.S. at 275.

Response to Conclusion No. 18:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities. There is no evidence that LabMD's "data security acts and practices" were "admittedly permitted by HHS." Respondent presented no evidence on its compliance with HIPAA, and in fact refused to provide evidence on its HIPAA compliance. (CX0765 (LabMD's Resps. to Second Set of Discovery) at 12-13, Resp. to Interrog. 22 (stating that information regarding whether LabMD complied with HIPAA regulations is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence")). Even if such acts or practices were permitted by HHS, as the Commission stated in its Order Denying LabMD's Motion to Dismiss, "LabMD and other companies may well be obligated to ensure their data security practices comply with both HIPAA and the FTC Act. But so long as the requirements of those statutes do not conflict with one another, a party cannot plausibly assert that, because it complies with one of these laws, it is free to violate the other." Comm'n Order Denying Resp't's Mot. to Dismiss at 13 (Jan. 16, 2014). *RadLAX* and *Credit Suisse Sec. LLC v. Billing* are distinguishable, as discussed in CCRRCL ¶ 14.

IV. APA/§ 57a VIOLATIONS

19. The Commission is bound by the Administrative Procedure Act ("APA").

Response to Conclusion No. 19:

The proposed conclusion is not supported by any cited legal authority, in violation of the Court's Order on Post-Trial Briefs. To the extent the proposed conclusion asserts that the Commission is an "agency" as defined in 5 U.S.C. § 551(1), Complaint Counsel has no specific response.

20. A consent decree is not binding authority or a legally-cognizable "standard" of agency expectations. *Intergraph Corp. v. Intel Corp*., 253 F.3d 695, 698 (Fed. Cir. 2001) (consent orders do "not establish illegal conduct"); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 89 n.13 (2008); Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure Of The Common Law Method And The Case For Formal Agency Guidelines*, 21 Geo. Mason L. Rev. 1287, 1305-06 (2014) ("[T]he Commission does not treat its settlements as precedent, meaning that past decisions do not necessarily indicate how the agency will apply Section 5 in the future.").

Response to Conclusion No. 20:

To the extent that the proposed conclusion asserts that a consent decree does not bind one who is not a party to it, Complaint Counsel has no specific response. However, a consent decree does bind the parties to it. Furthermore, consent decrees also "'constitute a body of experience and informed judgment *to which courts and litigants may properly resort for guidance*.'" *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 621 (D.N.J. 2014), *aff'd* No. 14-3514, 2015 WL 4998121 (3d Cir. Aug. 24, 2015) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (emphasis added by court)); *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *15 (3d Cir. Aug. 24, 2015) ("[C]ourts regularly consider materials that are neither regulations nor adjudications on the merits." (internal quotation omitted)).

21. General statements of policy are prospective and do not create obligations enforceable against third parties like LabMD. *See Am. Bus. Ass'n. v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) ("The agency cannot apply or rely upon a general statement of policy as law because a . . . policy statement announces the agency's tentative intentions for the future.") (citation omitted); *see also Wilderness Soc'y v. Norton*, 434 F.3d 584, 595-96 (D.C. Cir. 2006).

Response to Conclusion No. 21:

The proposed conclusion is misleading to the extent that it suggests that the Commission has issued any "general statements of policy" on data security, as that term is used in the Administrative Procedure Act ("APA"). A "statement[] of general policy" under the APA, 5 U.S.C. § 552(a)(1)(D), is "a statement by an administrative agency announcing motivating factors the agency will consider, or tentative goals toward which it will aim, in determining the resolution of a Substantive question of regulation." *Brown Exp., Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979). It is "a formal method by which an agency can express its views." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). The Commission has not issued any "general statements of policy" on data security, as that term is used in the APA.

22. If FTC truly considers "public statements," "educational materials," and "industry guidance pieces" to be enforceable standards or "statements of general policy," then it necessarily concedes an APA violation. The APA requires agencies to "publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . ." 5 U.S.C. § 552(a)(1)(D).

Response to Conclusion No. 22:

The proposed conclusion is misleading to the extent that it suggests that the Commission has issued any "general statements of policy" on data security, as that term is used in the APA. The Commission has provided guidance to businesses to assist them in complying with Section 5 and to protect consumers. (*See, e.g.*, CCFF ¶¶ 1338-1351 (Commission warnings regarding the dangers presented to businesses and consumers by P2P applications)). The Commission has not issued any "general statements of policy" on data security, as that term is used in the APA. (CCRRCL ¶ 21).

23. The APA further provides that, except to the extent "that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be

adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1)(E).

Response to Conclusion No. 23:

To the extent that the proposed conclusion quotes from 5 U.S.C. § 552(a)(1)(E), Complaint Counsel has no specific response. However, the Commission has not violated the APA in this matter. (*See* CCRRCL ¶¶ 21-22, 35, 89).

24. Therefore, internet postings of "Guides for Business," links to SANS Institute and NIST publications, and similar materials on the Commission's official website do not replace Federal Register publication. *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001).

Response to Conclusion No. 24:

The proposed conclusion is not supported by the authority Respondent cites. *Utility Solid Waste Activities Group. v. E.P.A.* involved EPA's amendment to a published rule without notice and comment. 236 F.3d 749, 752 (D.C. Cir. 2001) ("On June 24, 1999, without notice and comment, EPA amended the PCB Mega Rule."). The court determined that EPA's amendment did not meet the standards for the APA's exceptions to notice and comment rulemaking. *Id.* at 754-55. Respondent's selective quotations, *see, e.g.*, Resp't's Post-Trial Brief at 61-62, do not transform *Utility Solid Waste Activities Group* into a mandate that the Commission publish business guidance in the Federal Register. The Commission has not violated the APA in this matter. (*See* CCRRCL ¶¶ 21-22, 35, 89).

25. The APA bars the Government from enforcing requirements it claims are set forth in the above-described materials absent Federal Register publication. *See* 5 U.S.C. § 552(a).

Response to Conclusion No. 25:

The proposed conclusion is misleading to the extent that it suggests that the Commission has violated the APA in this matter. It has not. (*See* CCRRCL ¶¶ 21-22, 35, 89).

26. As a matter of law, the APA obligates FTC to "separately state and currently publish in the Federal Register for the guidance of the public . . . *statements of general policy or*

interpretations of general applicability formulated and adopted by the agency . . . ." *See* 5 U.S.C. § 552(a)(1)(D) (emphasis added).

Response to Conclusion No. 26:

To the extent that the proposed conclusion quotes a portion of 5 U.S.C. § 552(a)(1)(D), Complaint Counsel has no specific response. However, the Commission has not violated the APA in this matter. (*See* CCRRCL ¶ 21).

27. The APA bars agencies from enforcing statements of general policy and interpretations of general applicability "[e]xcept to the extent that a person has actual and timely notice" by Federal Register publication. *See* 5 U.S.C. § 552(a)(1)(E); *Util. Solid Waste Activities Grp.*, 236 F.3d at 754 (internet notice is not an acceptable substitute for publication in the Federal Register).

Response to Conclusion No. 27:

To the extent that the proposed conclusion quotes from 5 U.S.C. § 552(a)(1)(E), Complaint Counsel has no specific response. However, Respondent's reliance on *Utility Solid Waste Activities Group. v. E.P.A.* is in error, as that case involved EPA's amendment to a published rule without notice and comment, not the enforcement of a statement of general policy or interpretation of general applicability. 236 F.3d 749, 752 (D.C. Cir. 2001). (*See also* CCRRCL ¶ 24; *see also* CCRRCL ¶¶ 21-22, 35, 89 (the Commission has not violated the APA in this matter).

28. 15 U.S.C. § 57a(a)(1) authorizes the Commission to prescribe "interpretive rules and general statements of policy" with respect to unfair acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45 (a)(1)), and "rules" which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45 (a)(1)), except that the Commission shall not have authority to "develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section."

Response to Conclusion No. 28:

To the extent that the proposed conclusion quotes from 15 U.S.C. § 57a(a)(1), Complaint Counsel has no specific response.

29. The Commission publishes general statements of policy at 16 C.F.R. Part 14, but there is none for medical data security.

Response to Conclusion No. 29:

To the extent that the proposed conclusion asserts that general statements of policy are published in 16 C.F.R. Part 14, Complaint Counsel has no specific response. However, Complaint Counsel notes that the Commission has not published a general statement of policy on data security. (CCRRCL ¶¶ 21-22). To the extent Respondent is arguing that "medical data security" is distinct from general data security under the unfairness provision of Section 5, Respondent is incorrect. The reasonableness test applies across industries, and the Commission conducts a fact-specific analysis to determine whether a company's data security practices are unfair under Section 5. (CCRRCL ¶¶ 85, 86). In addition, the Commission has already ruled that HIPAA does not preempt the FTC Act's application or enforcement. Comm'n Order Denying Resp't's Mot. to Dismiss at 11-12 (Jan. 16, 2014); CCRRCL ¶ 98.

30. The Commission publishes guides for business. *See, e.g.*, 16 C.F.R. pt. 251.

Response to Conclusion No. 30:

Complaint Counsel has no specific response.

31. The Commission publishes trade rules for business. *See, e.g.*, 16 C.F.R. pt. 455.

Response to Conclusion No. 31:

Complaint Counsel has no specific response.

32. The Commission cites as "standards" in this case materials that have not been published in the Federal Register in violation of 5 U.S.C. § 552(a)(1)(D). *See* Complaint Counsel's Pre-Trial Brief at 13-14, 18-20, *In the Matter of LabMD, Inc.*, FTC Dkt. 9357 (May 6, 2014) (citations omitted).

Response to Conclusion No. 32:

The proposed conclusion misquotes Complaint Counsel's Pre-Trial Brief, which does not characterize the materials it cites as "standards." In addition, the Commission has not violated the APA in this matter. (*See* CCRRCL ¶¶ 21-22, 35, 89).

33. The Commission has created applied data security standards as if they had been promulgated as a guide or trade rule. *Compare* Fed. Trade Comm'n, "Start With Security," https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business (June 2015); Fed. Trade Comm'n, "Information Compromise and the Risk of Identity Theft: Guidance for Your Business," https://www.ftc.gov/tips-advice/business-center/guidance/information-compromise-risk-identity-theft-guidance-your (June 2004) (directing businesses to preferred contractors); 16 C.F.R. § 14.9 (titled "Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials" and warning "[a]ny respondent who fails to comply with [the specified] requirement may be the subject of a civil penalty or other law enforcement proceeding for violating the terms of a Commission cease-and-desist order or rule"); 16 C.F.R. § 453.1 (funeral rule definitions).

Response to Conclusion No. 33:

To the extent that the proposed conclusion asserts that the Commission has provided guidance to businesses on complying with Section 5, as illustrated by the publications cited by Respondent in RCL ¶ 33, Complaint Counsel has no specific response. However, the Commission has not issued any rules or statements of general policy[2] on data security standards. (CCRRCL ¶¶ 21, 22).

34. The Commission's use of adjudication to set or apply supposedly preexisting medical data security standards that might add to or alter existing APA-promulgated HIPAA regulations or guidance, based on materials not previously published in the Federal Register is an abuse of discretion and contrary to law under the APA. 5 U.S.C. § 552(a)(1)(D).

[2] The term "guide" does not appear in 15 U.S.C. § 57a(a)(1), which permits the Commission to issue interpretive rules and general statements of policy. The Commission does produce guides and guidance for business, but such guides are not interpretive rules or general statements of policy under 15 U.S.C. § 57a.

Response to Conclusion No. 34:

The proposed conclusion is misleading to the extent it suggests that it is inappropriate for the Commission to proceed by adjudication, and it is misleading to the extent that it suggests that enforcement of Section 5 affects HIPAA regulations or guidance. The Commission properly proceeded by adjudication in this matter. (CCRRCL ¶¶ 35, 89, 93). Furthermore, Section 5 is distinct from, and enforced separately from, HIPAA. "[T]he FTC may proceed against unfair practices even if those practices violate some other statute that the FTC lacks authority to administer." *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). HIPAA and the FTC Act are not in conflict. *See* Comm'n Order Denying Resp't's Mot. to Dismiss at 10-13 (Jan. 16, 2014). (*See also* CCRRCL ¶¶ 85-86, 98 (FTC Act not preempted by HIPAA)).

35. FTC may proceed by adjudication only in cases where it is enforcing discrete violations of existing laws and where the effective scope of the impact of the case will be relatively small and by § 57a procedures if it seeks to change the law and establish rules of widespread application. *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010-11 (9th Cir. 1981).

Response to Conclusion No. 35:

The proposed conclusion is misleading to the extent it suggests that it is inappropriate for the Commission to proceed by adjudication. *Ford* is distinguishable in that the Commission's action was the first to challenge the dealership's conduct as violating a particular law, and the Commission's order would have affected forty-nine states' Uniform Commercial Code counterparts of that law. *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981) (stating that "this adjudication is the first agency action against a dealer for violating ORS 79.5040," "the U.C.C. counterpart of ORS 79.5040 is enacted in 49 states," and "[t]o allow the order to stand as presently written . . . would create a national interpretation of U.C.C. s 9-504"). This adjudication does not "change existing law" but is entirely consistent with Section 5 and the Commission's previously announced data security cases. (CCRRCL ¶ 38; CCCL ¶¶ 19-20).

The Commission properly proceeded by adjudication in this matter. The Supreme Court ruled that agencies "retain power to deal with [] problems on a case-by-case basis." *SEC v. Chenery*, 332 U.S. 194, 203 (1947). This applies particularly where "the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Id.* As the Commission recognized, "complex questions relating to data security practices in an online environment are particularly well-suited to case-by-case development." Comm'n Order on Mot. to Dismiss at 14 (Jan. 16, 2014); *see also* FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, *available at* https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition (noting that Congress "left the development of Section 5 to the Federal Trade Commission as an expert administrative body, which would apply the statute on a flexible case-by-case basis, subject to judicial review").

36. Adjudication deals with what the law was; rulemaking deals with what the law will be. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (citations omitted).

Response to Conclusion No. 36:

To the extent the proposed conclusion paraphrases Justice Scalia's concurrence in *Bowen*, Complaint Counsel has no specific response. However, the proposed conclusion is misleading to the extent it suggests that it is inappropriate for the Commission to proceed by adjudication. The Commission properly proceeded by adjudication in this matter. (*See* CCRRCL ¶¶ 35, 89, 93).

37. The function of filling in the interstices of the FTC Act should be performed, as much as possible, "*through this quasi-legislative promulgation of rules to be applied in the future.*'" *See id.*

Response to Conclusion No. 37:

The proposed conclusion is misleading to the extent it suggests that it is inappropriate for the Commission to proceed by adjudication. The Commission properly proceeded by adjudication in this matter. (*See* CCRRCL ¶¶ 35, 89, 93).

38. As a matter of law, the Commission's adjudication is arbitrary and capricious. *Ford Motor Co.*, 673 F.2d at 1010-11 (citation omitted).

Response to Conclusion No. 38:

The Court should disregard the proposed conclusion because it is not supported by the cited authority and is a misstatement of law. In applying the general reasonableness test of unfairness to LabMD's data security practices, this adjudication does not "change existing law," *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1010 (9th Cir. 1981), but is entirely consistent with Section 5 and the Commission's previously announced data security cases. (CCCL ¶¶ 19-20). Moreover, neither the opinion nor Judge Reinhardt's dissent in *Ford* characterize the Commission's adjudication as arbitrary and capricious. *See Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981). Furthermore, the Commission properly proceeded by adjudication in this matter. (*See* CCRRCL ¶¶ 35, 89).

39. Due to the communications between Congress and the Commission regarding this case, the APA required Complaint Counsel to place into the record all *ex parte* communications. 5 U.S.C. § 557(d)(1)(A); *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220-22 (D.C. Cir. 2011); *see also United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1213 (D.C. Cir. 1980) (APA prohibits off-the-record communication between agency decision maker and any other person about a fact in issue); *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966) .

Response to Conclusion No. 39:

The proposed conclusion is misleading to the extent it suggests that the law of this case pertaining to ex parte communications has not already been decided. *See* Comm'n Op. & Order Denying Resp't's Amended 2d Mot. to Disqualify Chairwoman Edith Ramirez at 1-2 (Aug. 14, 2015) (rejecting Respondent's allegations). The statutory provisions to which Respondent cites

relate to "member[s] of the body comprising the agency, administrative law judge or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding." 5 U.S.C. § 557(d)(1)(A). Specifically, the APA and the Commission's corresponding Rules of Practice prohibit individuals involved in the Commission's decisional process from participating in *ex parte* communications with individuals who are not a party to the proceeding "relevant to the merits" of the proceeding. *Id.*; 16 C.F.R. § 4.7(b)(1).

The provisions of the APA governing *ex parte* communications in agency adjudications are designed to protect an administrative litigant's right to "know[] the arguments presented to a decisionmaker" in order that the litigant can "respond effectively and ensure that its position is fairly considered." *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982). They are "common-sense guidelines" to ensure fair decision-making, not "woodenly applied rules." *Id.* LabMD had timely knowledge of the Oversight Committee's letters and any arguments they presented, and asked the Administrative Law Judge to admit them into evidence. *See* Resp't's Mot. to Admit RX-542 (June 16, 2014) (moving to admit the June 11, 2014 letter into evidence); Resp't's Mot. to Admit RX-543–RX-548 (Dec. 23, 2014) (Public Version) (moving to admit the December 1, 2014 letter into evidence, among other documents); Resp't's Mot. to Admit Select Exs. (June 12, 2015) (moving to admit into evidence various exhibits, including the July 18, 2014 letter).

Finally, even if the Commission had not already determined the APA was not violated, to the extent Respondent claims Complaint Counsel should take any specific action, it is a misstatement of law. The statute requires "a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding" to place such communication on the

record. 5 U.S.C. § 557(d)(1)(C). Complaint Counsel may not "reasonably be expected to be involved in the decisional process" of this proceeding.

40. Respondent filed motions regarding the disqualification of FTC commissioners on December 17, 2013, April 27, 2015, May 15, 2015, and July 15, 2015, all of which were wrongfully denied as a matter of law.

Response to Conclusion No. 40:

To the extent that the proposed conclusion recounts the dates of its motions, Complaint Counsel has no specific response. However, Respondent's assertion that the motions were wrongly denied as a matter of law is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

41. LabMD's business model offered groundbreaking benefits to doctors and patients, delivering pathology results to doctors electronically at unprecedented speed, allowing them to more quickly tell anxiously waiting patients whether they had cancer and to begin treatment immediately if needed. However, FTC did not submit into evidence a reasoned countervailing benefit analysis as required by law. *FCC v. Fox Television Stations, Inc*., 556 U. S. 502, 515 (2009) (noting "the requirement that an agency provide reasoned explanation for its action").

Response to Conclusion No. 41:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. *FCC v. Fox Television Stations, Inc.* concerned enforcement application of an agency policy to conduct that occurred before the policy change. 556 U.S. 502, 509-10 (2009). The Court's observation related to that policy change, not to the agency's burden of proof in a litigation. *Id.* at 515 ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.")

Furthermore, LabMD's unreasonable data security practices were not offset by countervailing benefits to consumers or competition. Countervailing benefits are determined based on the specific practice at issue in a complaint, in this instance unreasonable data security, not the overall operation of a business. *See FTC v. Accusearch, Inc*., No. 06-CV-105-D, 2007

WL 4356786, at *8 (D. Wyo. Sept. 28, 2007), *aff'd*, 570 F.3d 1187 (10th Cir. 2009) ("While there may be countervailing benefits to some of the information and services provided by 'data brokers' such as *Abika.com*, there are no countervailing benefits to consumers or competition derived from the specific practice of illicitly obtaining and selling confidential consumer phone records." (emphasis original)); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988) (upholding Commission finding of no countervailing benefits because an increase in fees "was not accompanied" by an increased level or quality of service); Statement of Comm'r Maureen K. Ohlhausen, *In re Apple, Inc.*, No. 112-3018 at 2 (Jan. 15, 2014) (reiterating that countervailing benefit determination is made by "compar[ing] that harm to any benefits from that particular practice"). In the cybersecurity context, the cost-benefit analysis "considers a number of relevant factors, including the probability and expected size of reasonably unavoidable harms to consumers given a certain level of cybersecurity and the costs to consumers that would arise from investment in stronger cybersecurity." *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *13 (3d Cir. Aug. 24, 2015).

LabMD holds the sensitive Personal Information of 750,000 consumers, and provided *no* services to over 100,000 of them. (CCFF ¶¶ 12, 71, 78-79). "'[W]hen a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition,'" the countervailing benefits prong of the unfairness test is "easily satisfied." *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008) (quoting *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal 2000)). The cost to correct many of LabMD's security failings was low, in many cases requiring only employee time to implement reasonable data security practices. (*See generally* CCFF ¶¶ 1113-1185 (§ 5 LabMD Did Not Correct Its Security Failures Despite the Availability of Free and Low-Cost

Measures)). The low cost indicates that correcting these security failures would not have reduced the level of services provided to consumers. Where an unfair practice does not provide any advantages in the marketplace, any benefits that may accrue are "small." *See FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008).

Furthermore, the countervailing benefit analysis is a "tradeoff" that must be "sufficient to offset the human injuries involved." *Int'l Harvester Co.*, Docket No. 9147, 104 F.T.C. 949, 1984 WL 565290, at *90 (1984). As the value of the consumer data held by a company increases, as is the case with the Personal Information held by LabMD (*see* CCFF ¶¶ 1667-1671, 1714-1719 (the type of information LabMD held is valuable to identity thieves)), the offsetting benefits must be correspondingly higher. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("[T]he proscriptions in [Section] 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business.'") (citations omitted); *Brock v. Teamsters Local Union No. 863*, 113 F.R.D. 32, 34 (D.N.J. 1986) (reasonableness under prudent man standard "tried on the individual facts of [the] case" in light of standards developed in case law); *In re Zappos.com, Inc.*, No. 3:12-cv-00325-RCJ-VPC, 2013 WL 4830497, at *3-4 (D. Nev. Sept. 9, 2013) (applying "reasonable and prudent person" standard in negligence case for failure to safeguard electronically held data). The human cost of subjecting consumers to a likelihood of harm in the form of identity theft and identity fraud is high, and the burden of adopting low cost reasonable data security measures is low. (*See generally* CCFF ¶¶ 1472-1798 (§ 8 LabMD's Data Security Practices Caused or a Likely to Cause Substantial Injury to Consumers That is Not Reasonably Avoidable by the Consumers Themselves and Are Not Outweighed by Countervailing Benefits to Consumers or Competition), ¶¶ 1113-1185 (§ 5 LabMD Did Not Correct Its Security Failures Despite the Availability of Free and Low Cost Measures)).

42. If the Commission exercised enforcement authority based on information that Tiversa provided, notwithstanding Tiversa's economic interest therein, and without independent verification that Tiversa's information was accurate, then it violated the APA. *XP Vehicles, Inc. v. DOE*, 2015 U.S. Dist. LEXIS 90998, *94-*100 (D.D.C. July 14, 2015) (court held that a plaintiff alleging adverse government action taken against it, without clear standards or processes, for the benefit of government cronies, stated a claim for which relief could be granted).

Response to Conclusion No. 42:

The Court should disregard the proposed conclusion because it not supported by the cited authorities and a misstatement of law. Even assuming that the "Commission exercised enforcement authority based on information that Tiversa provided, notwithstanding Tiversa's economic interest therein, and without independent verification that Tiversa's information was accurate" – which it did not – the Commission did not violate the APA. The sole authority to which Respondent cites, *XP Vehicles*, stands only for the proposition that an APA claim survives a motion to dismiss where an agency's explanation for its decision was "mere pretext" for political cronyism, and where the agency's decision-making process was contrary to applicable criteria set forth in agency regulations. *XP Vehicles, Inc. v. DOE*, No. 13-cv-0037 (KBJ), 2015 U.S. Dist. LEXIS 90998, at *94-100 (D.D.C. July 14, 2015). *XP Vehicles* makes no reference to evaluating a third-party witness's economic interests, nor does it impose a requirement that an agency independently verify a third-party witness's information before initiating an investigation.

By contrast, the decision to enforce (or refrain from enforcing) a statute is committed to the agency's "absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Unlike the DOE's statutory and regulatory criteria for evaluating loan applications, the FTC's unfairness program is limited only by the factors of 45 U.S.C. § 45(n), which have been established in this matter. (CCFF ¶¶ 382-1185, 1354-1798). "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of

that discretion, there is 'law to apply' under [the APA], and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of [the APA]." *Heckler*, 470 U.S. at 834-35. Agencies exercising enforcement authority necessarily must have discretion to use that discretion to target particular companies, even if other, untargeted companies are engaging in similar practices. *Reese Bros. v. U.S. Postal Serv.*, 905 F. Supp. 2d 223, 257 (D.D.C. 2012) ("The failure to assess deficiencies against other mailers who were using the nonprofit rate while operating pursuant to similar contracts does not pose the same problem as agencies generally have broad discretion in the exercise of their enforcement powers.").

Nor is it improper for an agency to act on information from a third party that may have a financial incentive for the agency to pursue the investigation. Agencies routinely act on information from third parties that may have ulterior motives in bringing a violation of the law to an agency's attention. *Osborne v. Grussing*, 477 F.3d 1002, 1007 (8th Cir. 2007) ("[R]egulatory and law enforcement agencies routinely act on the basis of information provided by private parties who harbor a grudge or who hope to benefit personally from their complaints, such as jealous competitors, disgruntled former employees, confidential informants, and cooperating co-conspirators. When such a complaint results in enforcement action, we do not impute the complainant's ulterior motive to the government enforcers."). Indeed, the idea that law enforcement benefits from individuals who may have ulterior, financial motivations is the predicate for the whistleblower provision of the False Claims Act, a program that resulted in the return of billions of dollars to the federal government. *See* Department of Justice, Civil Division, Fraud Statistics (Dec. 23, 2013), *available at* http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf.

Finally, Respondent offers no legal support – nor can it – for the proposition that it is a *per se* violation of the APA for an agency to fail to independently verify information received from a third party. Moreover, myriad evidence "independently verifies" that LabMD lacked reasonable data security, (*see, e.g.*, CCFF ¶¶ 382-1110), and it is undisputed that the 1718 File was available for sharing on a P2P network and was downloaded from that network by a third party, (CCFF ¶¶ 1393-1396).

V. COMPLAINT COUNSEL HAS FAILED TO PROVE SECTION 5(n) CAUSATION AND SUBSTANTIAL INJURY

A. Construction of Section 5: General Principles

43. "[T]he Commission has only such jurisdiction and authority as Congress has conferred upon it by the Federal Trade Commission Act." *Cmty. Blood Bank v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969) (citations omitted).

Response to Conclusion No. 43:

The proposed conclusion misquotes the cited authority. The actual quotation from the case is "the Commission has only such jurisdiction as Congress has conferred upon it by the Federal Trade Commission Act." *Cmty. Blood Bank of the Kan. City Area, Inc. v. FTC*, 405 F.2d 1011, 1015 (8th Cir. 1969). As corrected, Complaint Counsel has no specific response to the proposed conclusion.

44. FTC exercises only Congressionally-delegated administrative functions and not judicial powers. *FTC v. Eastman Kodak*, 274 U.S. 619, 623 (1927).

Response to Conclusion No. 44:

To the extent the proposed conclusion paraphrases from *Eastman Kodak*, Complaint Counsel has no specific response.

45. Section 5, titled "Unfair methods of competition unlawful; prevention by Commission," must be construed not only by reference to the language itself, but also by "the specific context in which that language is used, and the broader context of the statute as a whole." *Yates v. United States*, 135 S. Ct. 1074, 1081-83 (2015) (construing term "tangible object" in 18 U.S.C.

§ 1519 in broader context of Sarbanes-Oxley and noting section title and placement, so §1519 was read to cover only tangible objects "one can use to record or preserve information" and not a fish); *see also id.* at 1090 (Alito, J., concurring) ("[M]y analysis is influenced by §1519's title . . . . Titles can be useful devices to resolve 'doubt about the meaning of a statute.'") (citations omitted).

Response to Conclusion No. 45:

To the extent the proposed conclusion quotes from *Yates v. United States*, 135 S. Ct. 1074 (2015), Complaint Counsel has no specific response.

46. "[B]oth [§ 7 of the Clayton Act and § 5 of the Federal Trade Commission Act] were enacted by the 63d Congress, and both were designed to deal with closely related aspects of the same problem – the protection of free and fair competition in the Nation's marketplaces." *United States v. Am. Bldg. Maintenance Indus.*, 422 U.S. 271, 277 (1975).

Response to Conclusion No. 46:

To the extent the proposed conclusion quotes from *United States v. Am. Bldg. Maint. Indus*., 422 U.S. 271 (1975), Complaint Counsel has no specific response. However, to the extent that the proposed suggests that Complaint Counsel must prove a generalized impact on competition, it is not supported by the cited authorities and is a misstatement of law. (CCRRCL ¶ 47).

47. For FTC to lawfully exercise its Section 5 unfairness authority (as limited by Section 5(n)) against a given act or practice, it must prove that the targeted act or practice has a generalized, adverse impact on competition or consumers and connect to the "protection of free and fair competition in the Nation's markets." *See Yates*, 135 S. Ct. at 1082-83, 1085 ("[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'") (citation omitted); *Am. Bldg. Maintenance Indus.*, 422 U.S. at 277; S. Rep. No. 75-221 at 2 ("[W]here it is not a question of a purely private controversy, and where the acts and practices are unfair or deceptive to the public generally, they should be stopped regardless of their effect upon competitors. This is the sole purpose and effect of the chief amendment of section 5."); J. Howard Beales, Former Dir., Fed. Trade Comm'n, Speech: The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, at § II (May 30, 2003) ("The Commission . . . is now giving unfairness a more prominent role as a powerful tool for the Commission to analyze and attack a wider range of practices that may not involve deception but nonetheless cause *widespread and significant consumer harm*") (emphasis added), *available at* https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection; Hon. Julie Brill, Comm'r, Fed. Trade Comm'n, Responses to Sen. Kelly Ayotte (QFR), U.S. S. Comm. on

Commerce, Sci. & Transp.: Privacy and Data Security: Protecting Consumers in the Modem World at 223 (June 19, 2011), *available at* http://www.governmentattic.org/13docs/FTC-QFR_2009-2014.pdf ("***The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers***. As the Chairman explained in his testimony before the Senate Judiciary Committee last summer, 'Of (*sic*) course, ***in using our Section 5 authority the Commission will focus on bringing cases where there is clear harm to the competitive process and to consumers.' That is, any case the Commission brings under the broader authority of Section 5 will be based on demonstrable harm to consumers or competition.***") (emphasis added).

Response to Conclusion No. 47:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities. The proposed conclusion is erroneous because Respondent seeks to add, without precedent or any other legal authority, an entirely new limitation to the definition of unfairness that is not found in Section 5(n) or anywhere else in Section 5. The Commission defined unfairness in a 1980 policy statement. Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *appended to Int'l Harvester Co.*,104 F.T.C. 949, 1984 WL 565290, at *95 (1984) (Unfairness Statement). In 1994, Congress codified the Unfairness Statement in Section 5(n) of the FTC Act. *See* H.R. Rep. 103-617 at 12 (1994). By adopting the Unfairness Statement, Congress decided to constrain the Commission's unfairness authority with—and *only* with—the limitations set forth in Section 5(n). Section 5(n)—which Respondent admits "controls here," Resp't's Post-Trial Brief at 68-69—requires that Complaint Counsel prove by preponderance of the evidence that LabMD's practices cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. (CCCL ¶ 3; *see also* CCRRCL ¶ 87). There is nothing in the statute or any relevant case law that suggests that Complaint Counsel must further prove "a generalized, adverse impact on competition or consumers" or that the LabMD's practices "connect to the 'protection of free and fair competition in the Nation's markets." Congress, courts, and the Commission have applied

Section 5 to unfair practices for decades and none has ever suggested that the term should be limited as Respondent proposes.

Respondent's appeal to general statutory interpretation techniques, *see, e.g.*, *Yates v. U.S.*, 135 S. Ct. 1074, 1082-83, 1085, and to speeches by former FTC staff, *see, e.g.*, J. Howard Beales, Speech: The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection, at § II (May 30, 2003), cannot introduce entirely new requirements that are not suggested by the language of the statute. Section 5(n) "is the most precise definition of unfairness articulated by either the Commission or Congress." *Am. Fin. Servs. Ass'n. v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). Respondent's attempt to add to the definition additional limitations is erroneous and without legal authority. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)). In addition, Commissioner Brill's Responses to Senator Ayotte are inapplicable to this case because (1) her testimony relates to "unfair methods of competition" under Section 5, rather than "unfair . . . acts or practices," the allegation in this case, Hon. Julie Brill, Comm'r, Fed. Trade Comm'n, Responses to Sen. Kelly Ayotte (QFR), U.S. S. Comm. on Commerce, Sci. & Transp.: Privacy and Data Security: Protecting Consumers in the Modem World at 223 (June 19, 2011) at 222-23, *available at* http://www.governmentattic.org/13docs/FTC-QFR_2009-2014.pdf, and (2) the testimony is inapposite to the burden of proof here, which is defined by Section 5(n).

48. Section 5(n) provides: "The Commission lacks authority to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

Response to Conclusion No. 48:

The proposed conclusion of law misquotes Section 5(n) of the FTC Act. The proper quotation is: "The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

As quoted correctly, Complaint Counsel has no specific response to this conclusion.

49. Section 5's language "implies the enactment of a standard of proof." *See Steadman v. SEC*, 450 U.S. 91, 98 (1981).

Response to Conclusion No. 49:

The proposed conclusion is misleading to the extent it suggests that some standard of proof other than that set forth in Section 5(n) and the preponderance of the evidence should apply. The preponderance of the evidence standard applies in this case. (CCCL ¶ 2; JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2-3; *see also* CCRRCL ¶ 87 (the language of Section 5(n) itself sets forth the standard of proof for the Commission to declare an act or practice "unfair")). *Steadman* does not suggest otherwise. In *Steadman*, the petitioner argued that the Administrative Procedure Act's requirement that agency decisions be based on "reliable, probative, and substantial evidence" meant that the SEC must meet a clear-and-convincing standard of proof in its administrative proceedings. *Steadman v. SEC*, 450 U.S. 91, 95-97 (1981). The court rejected this argument and held that the proper standard of proof was preponderance of the evidence. *Id.* at 102.

50. Section 5(n) was enacted to cabin, not expand, the Commission's use of unfairness authority and should be construed accordingly. *See* S. Comm. Rep. 103-130, FTC Act of 1993 (Aug. 24, 1993) (stating that "[t]his section amends section 5 of the FTC Act to limit unlawful 'unfair acts or practices' to only those which cause or are likely to cause substantial injury to

consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition" and that "substantial injury" is "not intended to encompass merely trivial or speculative harm"); Statement of Rep. Moorehead, Congressional Record Volume 140, Number 98 (Monday, July 25, 1994) ("Taken as a whole, these new criteria defining the unfairness standard should provide a strong bulwark against potential abuses of the unfairness standard by an overzealous FTC--a phenomenon we last observed in the late 1970's"); Beales, *supra* at § II (former Director of FTC's Bureau of Consumer Protection describing how Congress "reigned in" Commission "abuse" of its Section 5 unfairness authority).

Response to Conclusion No. 50:

The proposed conclusion is misleading to the extent that it suggests that by placing the constraints on the Commission's unfairness authority found in Section 5(n), Congress somehow placed limits beyond those found in the statute. The Commission defined unfairness in a 1980 policy statement. Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *appended to Int'l Harvester Co.*,104 F.T.C. 949, 1984 WL 565290, at *95 (1984) (Unfairness Statement). Congress set limits to the Commission's unfairness authority by adopting the limits on unfairness authority that the Commission set forth in the Unfairness Statement and no other constraints. Section 5(n) "is the most precise definition of unfairness articulated by either the Commission or Congress." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). Respondent's attempt to add to the definition with additional limitations is erroneous and without legal authority. The authorities cited by Respondent for the proposed conclusion provide no support for further limiting the definition of unfairness.

51. The operative terms in Sections 5(a) and 5(n), including "unfair" and "likely," are undefined. The Commission has not promulgated definitional regulations or guidance. Therefore, a common meaning construction is proper. *FDIC v. Meyer*, 510 U.S. 471, 477 (1994).

Response to Conclusion No. 51:

To the extent that the proposed conclusion asserts that the term "likely" is not specifically defined in Section 5 of the FTC Act, Complaint Counsel has no specific response.

The proposed conclusion is erroneous however, to the extent that it suggests that the term "unfair" is not defined by the FTC Act. Section 5(n) defines an unfair practice as one that "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see also* JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2, Stip. 4 (accepting this definition of an unfair practice). Respondent admits that "Section 5(n) . . . controls here." Resp't's Post-Trial Brief at 68-69. Section 5(n) has been recognized as "the most precise definition of unfairness articulated by either the Commission or Congress." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985). Furthermore, the Commission held that Section 5(n) defines the elements of unfairness under Section 5, and provides adequate constitutional notice. Comm'n Order Denying Resp't's Mot. to Dismiss at 16-19 (Jan. 16, 2014).

The proposed conclusion is also erroneous to the extent that it states that the "common meaning" of "unfair" should supplant the statutory definition of "unfair." "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words." *Yates v. U.S.*, 135 S. Ct. 1074, 1081 (2015). Where, as here, the statute provides a definition and sufficient context for understanding a term, it is not necessary to resort to a dictionary definition. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'") (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989)).

The proposed conclusion is also erroneous in that it states that the Commission has not offered guidance on the definition of unfairness. The Commission defined unfairness in a 1980 policy statement. Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *appended to Int'l Harvester Co.*,104 F.T.C. 949, 1984 WL 565290, at *95 (1984) (Unfairness Statement). The Unfairness Statement is a thorough discussion of the Commission's unfairness authority. In 1994, Congress codified the Unfairness Statement in Section 5(n) of the FTC Act. *See* H.R. Rep. 103-617 at 12 (1994).

52. Webster's primary definition of "unfair" is "marked by injustice, partiality, or deception: unjust." *See* Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/unfair (last visited Aug. 9, 2015).

Response to Conclusion No. 52:

To the extent that the proposed conclusion asserts that this is the first definition of "unfair" in the online version of the Merriam-Webster dictionary, Complaint Counsel has no specific response. Complaint Counsel disagrees, however, that this is relevant to the unfairness analysis under Section 5. (*See* CCRRCL ¶ 51 (explaining how "unfair" is defined by the FTC Act)).

53. Webster's primary definition of "likely" is "having a high probability of occurring or being true: very probable (rain is likely today)." *See* Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/likely (last visited Aug. 9, 2015).

Response to Conclusion No. 53:

Respondent's appeals to dictionary definitions cannot overcome the clear language of the requirements set forth in Section 5(n). "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words." *Yates v. U.S.*, 135 S. Ct. 1074, 1081 (2015). Where, as here, the statute provides a definition and sufficient context for understanding a term, it is not necessary to resort to a dictionary definition. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("Our inquiry must cease if the statutory language is

unambiguous and 'the statutory scheme is coherent and consistent.'" (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989))); *see also* Comm'n Order Denying Resp't's Mot. to Dismiss at 16 (Jan. 16, 2014) ("[T]he three-part statutory standard governing whether an act or practices is 'unfair' set forth in Section 5(n) . . . is sufficient to give fair notice of what conduct is prohibited."); CCRRCL ¶ 51.

To the extent that the proposed conclusion asserts that this is the first definition of "likely" in the online version of the Merriam-Webster dictionary, Complaint Counsel has no specific response.

54. The Ninth Circuit has defined "likely" as "probable." *See Sw. Sunsites v. FTC*, 785 F.2d 1431, 1436 (9th Cir. 1985). Webster's defines "probable" to mean "supported by evidence strong enough to establish presumption but not proof." Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/probable (last visited Aug. 9, 2015).

Response to Conclusion No. 54:

To the extent that the proposed conclusion suggests that the word "likely" means "probable," Complaint Counsel has no specific response. However, to the extent that it suggests that the Miriam Webster definition of "probable" should, in turn, replace the definition of "likely," the proposed conclusion sets forth no legal authority to support this novel interpretative technique. (*See* CCRRCL ¶ 51, 53).

55. Section 5(a)'s common meaning requires Complaint Counsel to allege and prove by a preponderance of the evidence that the data security acts and practices identified in the Complaint were "unfair" – that is, marked by injustice, partiality, or deception. *See* 15 U.S.C. §§ 45(a), (n); *Yates*, 135 S. Ct. at 1081-83, 1091; Hearings, 16 C.F.R. § 3.43; Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/unfair (last visited Aug. 9, 2015). However, it has not done so and therefore judgment for the Respondent is appropriate.

Response to Conclusion No. 55:

The proposed conclusion is a misstatement of law to the extent that it asserts that the clear statutory language of Section 5 should be replaced by Respondent's preferred dictionary definition, thereby restricting Section 5's prohibition of unfair practices to those that are "marked

by injustice, partiality, or deception." (*See* CCRRCL ¶ 51, 53). In the Commission's 1980 Unfairness Statement, "the theory of immoral or unscrupulous conduct was abandoned altogether" by the Commission as an independent basis of liability in assessing whether a company's practices were "unfair." *International Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *88 n. 43 (1984). Applying the Unfairness Statement, the Commission held in *International Harvester* that a company's *negligent* failure to notify consumers about hazards in its product constituted an unfair act or practice even in the absence of "a deliberate act on the part of the seller." *Id.* at *87.

Courts have consistently refused to add requirements to the unfairness test set forth in Section 5(n) of the FTC Act. *See FTC v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010) ("[C]onsumers are injured for purposes of the Act not solely through the machinations of those with ill intentions, but also through the actions of those whose practices facilitate, or contribute to, ill intentioned schemes if the injury was a predictable consequence of those actions."); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1363 (11th Cir. 1988) (holding that a breach of contract could constitute an unfair practice, whether or not it "involve[d] some sort of deceptive or fraudulent behavior."); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 982 (D.C. Cir. 1985) (holding that Section 5 is not limited to "conduct involving deception, coercion or the withholding of material information.").

Accordingly, the proposed conclusion's statement that "judgement for the Respondent is appropriate" because Complaint Counsel has failed to meet Respondent's erroneous standard is also incorrect.

56. Section 5(n)'s common meaning verb tense requires Complaint Counsel to prove by at least a preponderance of the evidence that each given act or practice "causes" in the present or is "likely to cause" in the future substantial injury to consumers. 15 U.S.C. § 45(n); 1 U.S.C. § 1 (words used in the present tense include the future as well as the present); *Carr v. United States*,

560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach" and "[b]y implication, then, the Dictionary Act [1 U.S.C. § 1] instructs that the present tense generally does not include the past"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past . . ., but it did not choose this readily available option"); *Steadman*, 450 U.S. at 98.

Response to Conclusion No. 56:

The proposed conclusion is misleading to the extent that it suggests that Respondent's interpretation of the verb tense in Section 5(n) controls. The Commission has interpreted Section 5 to apply in this case where LabMD's practices "caused or were likely to cause" consumer injury, contrary to Respondent's verb tense interpretation. Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014) (holding that the complaint alleges harm because "actual and potential data breaches it attributes to LabMD's data security practices caused or were likely to cause cognizable, 'substantial injury' to consumers"). Furthermore, the disclosures of Personal Information held by LabMD are likely to cause consumer harm in the future. (CCCL ¶¶ 24-27; *see, e.g.*, CCFF ¶¶ 1722-1770 (analyzing likely harm to consumers from the Sacramento Day Sheets)). To the extent Respondent's argument relates to the notice order, Complaint Counsel has proven that there is "some cognizable danger of recurrent violation." *FTC v. Accusearch*, 570 F.3d 1187, 1201 (10th Cir. 2009) (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *see* CCCL ¶¶ 57-71.

57. Section 5(n)'s common meaning verb tense does not authorize the Commission to declare unfair and unlawful a past act or practice because a statute's "undeviating use of the present tense" is a "striking indic[ator]" of its "prospective orientation." 15 U.S.C. § 45(n); 1 U.S.C. § 1; *Carr*, 560 U.S. at 44; *Gwaltney*, 484 U.S. at 59.

Response to Conclusion No. 57:

The proposed conclusion is misleading to the extent that it suggests that Respondent's interpretation of the verb tense in Section 5(n) controls. Section 5 permits the Commission to pursue an action for past acts or practices. *See, e.g.*, *POM Wonderful LLC v. FTC*, 777 F.3d 478,

483, 505 (D.C. Cir. 2015) (finding Commission order valid for a complaint issued in 2010 involving advertisements from 2003 to 2010). Furthermore, the Commission has already ruled that Section 5 applies in this case where LabMD's actions "caused or were likely to cause" consumer injury, contrary to Respondent's verb tense interpretation. Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014) (holding that the complaint alleges harm because "actual and potential data breaches it attributes to LabMD's data security practices caused or were likely to cause cognizable, 'substantial injury' to consumers").

In addition, the cases Respondent cites in support of its conclusion are distinguishable. *Gwaltney* pertains to violations of the Clean Water Act, which includes a provision to give an alleged violator "an opportunity to bring itself into complete compliance with the Act," and in that context, if suits were permitted to target wholly past violations, "the requirement of notice to the alleged violator becomes gratuitous." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59-60 (1987). The FTC Act has no such similar provision that would be rendered gratuitous by applying Section 5 to actions that "caused or were likely to cause" consumer injury. *Abbott v. Abbott*, 560 U.S. 1 (2010), the case at 560 U.S. 44, is an inapposite case about international child abduction that does not mention common meanings or verb tenses. Regardless, *Carr v. United States*, 560 U.S. 438 (2010), does not support Respondent's position. In *Carr*, the Supreme Court was interpreting a statute of prospective application, and determined the present tense was used by Congress to indicate that prospective application. (*See* CCRRCL ¶ 58).

58. Even if Section 5, as cabined by Section 5(n), authorizes the Commission to reach past acts or practices, Section 5(n), based on the ordinary meaning of its language and verb tense, prevents it from declaring an act or practice unfair and unlawful and issue a cease and desist order unless Complaint Counsel proves by at least a preponderance of the evidence that each challenged act or practice is "likely" (*i.e.*, probable or highly probable) to reoccur and then "likely to cause" substantial consumer injury. 15 U.S.C. §45(n); *Carr*, 560 U.S. at 448-49;

Gwaltney, 484 U.S. at 59; *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violation and, of course, it can be utilized even without a showing of past wrongs. But . . . [t]he necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.") (citation omitted); *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110-11 (2d Cir. 1984) (holding FTC failed to bear its burden and justify relief because "speculative and conjectural" allegations were not sufficient to justify equitable relief against a terminated violation); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 370 (9th Cir. 1982) (the "ultimate question is the likelihood of the petitioner committing the sort of unfair practices they prohibit" in the future).

Response to Conclusion No. 58:

Section 5(n) on its face does not require that Complaint Counsel prove by a preponderance of the evidence that a challenged act or practice is likely to recur. 15 U.S.C. § 45(n). Respondent's claims regarding the likelihood of recurrence misstates the law, and the cases Respondent cites are inapposite to the claim in its finding.

In *Carr*, the Supreme Court was interpreting a statute of prospective application, and determined the present tense was used by Congress to indicate that prospective application. *Carr v. United States*, 560 U.S. 438, 449 (2010) ("[T]he only way to avoid an incongruity among neighboring verbs would be to construe the phrase 'resides i[n] Indian country' to encompass persons who once resided in Indian country but who left before SORNA's enactment and have not since returned—an implausible reading . . . ."). Section 5(n) was added to the FTC Act in 1994; the Supreme Court's decision regarding the prospective application of a newly-enacted statute in *Carr* is not applicable. PL 103–312, August 26, 1994, 108 Stat 1691. *Gwaltney* addressed the jurisdictional requirement to allow citizen suits to proceed under an environmental law. The Court noted that under the statute "[a] citizen suit may be brought only for violation of a permit limitation 'which is in effect' under the Act." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987). The statute required a citizen to give a 60 notice of intent to sue, the Court found the notice period was to provide the alleged violator "an

opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Id*. at 60. Section 5 does not have a notice provision, nor any provision that excuses a violator from enforcement for *ex post* conduct.

Further, Respondent's reliance on *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984), is misplaced. In *Borg-Warner*, the Second Circuit explicitly declined to review the Commission's "substantive legal rulings," *i.e.*, its determination that the conduct at issue in the case had violated the law, and reviewed only the appropriateness of injunctive relief as a remedy. *Id.* at 110. *Borg-Warner* did not add a new element of proof to Section 5 violations.

To the extent Respondent is attempting to argue that injunctive relief is inappropriate on the basis of *Borg-Warner*, the violations in that case were not "flagrant or longstanding." *Id*. at 111. The court determined the petitioner was completely out of the industry alleged to have violated the law and had stopped the alleged conduct long before the Commission decided the case. *Id*. In this case, however, the evidence shows that LabMD has a long history of failing to provide reasonable data security for the Personal Information it maintain (CCFF ¶¶ 397-1110), has no intent to dissolve as a Georgia corporation (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 3), and intends to employ the same policies and procedures to information in its possession as it employed in the past, (CX0765 (LabMD's Resps. to Second Set of Discovery) at 5-6 (Resp. to Req. 38), 7 (Resp. to Interrog. 12)). As the *Borg-Warner* court recognized, "[t]he appropriateness of injunctive relief necessarily varies from case to case, and relatively slight factual differences may justify different treatment. *Borg-Warner*, 746 F.2d at 111; *see also* CCRRCL ¶¶ 227-232 (fencing-in relief is appropriate in this case).

After a violation has been proven, it is Respondent—not Complaint Counsel—that bears a heavy burden to prove that no permanent injunction is warranted because there is "no

reasonable expectation" of future repetitions of the wrongful conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953) (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 448 (2d Cir. 1945)); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (Respondent bears the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."); CCCL ¶¶ 60-69. The commission of past illegal conduct is highly suggestive of the likelihood of future violations. *FTC v. Five-Star Auto Club*, 97 F.2d 502, 536 (S.D.N.Y. 2000) (citing *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975)); *FTC v. U.S. Oil and Gas Corp.*, No. 83-1702-CIV-WMH, 1987 U.S. Dist. LEXIS 16137, at *51 (S.D. Fla. July 10, 1987). Respondent's use of dictionary definitions does not change the clear authority that Respondent must prove no reasonable expectation of repeating the same conduct.

59. Section 5 remedies are prospective and preventative rather than compensatory, punitive, or structural. *See* 15 U.S.C. § 45(b) (authorizing cease and desist order); *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010) ("[A] cease-and-desist order is 'purely remedial and preventative' and not a 'penalty' or 'forfeiture.'") (citing *Drath v. FTC*, 239 F.2d 452, 454 (D.C. Cir. 1956)).

Response to Conclusion No. 59:

The proposed conclusion is a misstatement of law. Sections (l) and (m) of Section 5 provide for monetary penalties in certain circumstances. 15 U.S.C. § 45(l), (m).

However, to the extent Respondent is referring to the Notice Order, Complaint Counsel is not seeking a punitive or compensatory remedy in this proceeding.

60. As a matter of law, Complaint Counsel must prove by a preponderance of the evidence that the allegedly unfair and unlawful data security acts and practices identified in the Complaint are unfair to consumers generally and/or affected enough consumers to implicate or affect free and fair competition in the market generally. 15 U.S.C. §§ 45(a), (n); *Yates*, 135 S. Ct. at 1085, 1091; *Am. Bldg. Maintenance Indus.*, 422 U.S. at 277; Hearings, 16 C.F.R. § 3.43 (2015); Beales, *supra* (unfairness authority is "a powerful tool for the Commission" to attack a particular Respondent's practices "that may not involve deception but nonetheless cause *widespread and significant consumer harm*") (emphasis added).

Response to Conclusion No. 60:

The proposed conclusion is erroneous because Respondent seeks to add, without precedent or any other legal authority, an entirely new limitation to the definition of unfairness that is not found in Section 5(n) or anywhere else in Section 5. (CCRRCL ¶ 47 (addressing substantively identical Proposed Conclusion 47)).

B. Burden of Proof: Standard

61. This Court serves as fact-finder and Complaint Counsel is not entitled to any favorable inferences. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-65, 1170 (11th Cir. 2005).

Response to Conclusion No. 61:

The proposed conclusion should not be adopted because the case cited involves the standard of review on appeal to a federal court and is inapplicable at this stage in this case. *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-65, 1070 (11th Cir. 2005).

62. Complaint Counsel bears the burden of proving each element of its case by a preponderance of the evidence. *In re N.C. Bd. of Dental Exam'rs*, No. 9343, 2011 FTC LEXIS 137, *10-*11 (F.T.C. July 14, 2011); Hearings, 16 C.F.R. § 3.43.

Response to Conclusion No. 62:

Complaint Counsel has no specific response.

63. The preponderance of evidence standard applied by the Commission in this case arguably conflicts with a common-meaning construction of Section 5(n) with respect to acts or practices that are alleged unfair and unlawful due to the risk of future substantial consumer injury. *See* 15 U.S.C. § 45(n); *Steadman,* 450 U.S. at 98; Hearings, 16 C.F.R. § 3.43.

Response to Conclusion No. 63:

The proposed conclusion is erroneous because nothing in Section 5(n), "arguably" or otherwise, requires anything other than the preponderance of the evidence standard be applied in this case. The proper standard of proof in unfairness cases is preponderance of the evidence. (CCCL ¶ 2; JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2-3). None of the

authorities that Respondent cites suggest otherwise. *See, e.g.*, *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (applying the preponderance of the evidence standard).

64. Because Section 5(n) uses the phrase "likely to cause" Complaint Counsel should be required to meet the clear and convincing burden of proof with respect to future injury. 15 U.S.C. § 45(n); *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (describing clear and convincing standard); *Steadman*, 450 U.S. at 98 (statutory language creates standard of proof).

Response to Conclusion No. 64:

The proposed conclusion is erroneous because the proper standard of proof in this case is preponderance of the evidence. (CCCL ¶ 2; JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 2-3). Respondent fails to provide any support for its extraordinary claim that the phrase "likely to cause" somehow means that the clear and convincing standard should apply. None of the authorities to which Respondent cites this claim. The authorities to which Respondent cites consist only of the statute itself, a description of the clear and convincing standard, and a case in which the court examined language in the APA and decided to apply the preponderance of the evidence standard. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981) (applying the preponderance of the evidence standard).

C. Causation

65. Section 5 and Section 5(n) must be construed based on ordinary meaning. *Meyer*, 510 U.S. at 477.

Response to Conclusion No. 65:

The proposed conclusion is erroneous to the extent that it suggests that the ordinary meaning of the terms in Section 5 of the FTC Act is the only relevant consideration in interpreting the statute's meaning. "Whether a statutory term is unambiguous . . . does not turn solely on dictionary definitions of its component words." *Yates v. U.S.*, 135 S. Ct. 1074, 1081 (2015). Rather the meaning of terms in a statute "is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the

broader context of the statute as a whole." *Id.* at 1081-82 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (alterations in original).

66. Section 5(n) was enacted to limit FTC's abuse of its unfairness authority and should be construed accordingly. *See Yates*, 135 S. Ct. at 1082-85, 1091; S. Com. Rep. 103-130, FTC Act of 1993 (Aug. 24, 1993); Statement of Rep. Moorehead, Congressional Record Volume 140, Number 98 (Monday, July 25, 1994); Beales, *supra* at § II (Congress "reigned in" Commission "abuse" of Section 5 unfairness authority).

Response to Conclusion No. 66:

The proposed conclusion is misleading to the extent that it implies that by placing the constraints on the Commission's unfairness authority found in Section 5(n), Congress somehow placed limits beyond those found in the statute. (CCRRCL ¶ 50 (addressing substantively identical Proposed Conclusion 50)). Statements of a single member of Congress and a former director of the Bureau of Consumer Protection are not evidence of Congressional intent.

67. As a matter of law, Complaint Counsel was required to allege and prove by a preponderance of the evidence that the data security acts and practices identified in the Complaint were "unfair" – that is, marked by injustice, partiality, or deception. *See* 15 U.S.C. §§ 45(a), (n); *Yates*, 135 S. Ct. at 1081-83, 1091; *Carr*, 560 U.S. at 44; *Meyer*, 510 U.S. at 477; Hearings, 16 C.F.R. § 3.43; Merriam-Webster's Dictionary, http://www.merriam-webster.com/dictionary/unfair (last visited Aug. 9, 2015). Complaint Counsel has not done so and judgment for Respondent should be granted.

Response to Conclusion No. 67:

The proposed conclusion is erroneous because it would replace the clear statutory language of Section 5 with Respondent's preferred dictionary definition and restrict Section 5's prohibition of unfair practices to those that are "marked by injustice, partiality, or deception." This is counter to both the statute and case law. (CCRRCL ¶ 55 (addressing substantively identical Proposed Conclusion 55)).

68. As a matter of law, Complaint Counsel must allege and prove by a preponderance of the evidence that the unfair and unlawful data security acts and practices identified in the Complaint are unfair to consumers generally and/or affected enough consumers to implicate or affect free and fair competition in the market generally. 15 U.S.C. §§ 45(a), (n); *Yates*, 135 S. Ct. at 1085, 1091; *Am. Bldg. Maintenance Indus.*, 422 U.S. at 277; Hearings, 16 C.F.R.

§ 3.43;; Beales, *supra* (unfairness authority is "a powerful tool for the Commission" to attack a particular Respondent's practices that "cause *widespread and significant consumer harm*") (emphasis added). Complaint Counsel has not done so and judgment for Respondent is proper as a matter of law.

Response to Conclusion No. 68:

The proposed conclusion is erroneous because Respondent seeks to add, without precedent or any other legal authority, an entirely new limitation to the definition of unfairness that is not found in Section 5(n) or anywhere else in Section 5. (CCRRCL ¶ 47 (addressing substantively identical Proposed Conclusion 47)).

69. Complaint Counsel must prove by a preponderance of the evidence that each of the allegedly unfair and unlawful acts or practices identified in the Complaint currently "causes" or is "likely to cause" substantial injury to consumers. *See* 15 U.S.C. § 15(n); 1 U.S.C. § 1; *Carr*, 560 U.S. at 448; *Gwaltney*, 484 U.S. at 57; *Steadman*, 450 U.S. at 98; Compl. ¶ 22 ("As set forth in Paragraphs 6 through 21, respondent's [*sic*] failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information . . . *caused, or is likely to cause*, substantial injury to consumers . . . .") (emphasis added).

Response to Conclusion No. 69:

The Commission has interpreted Section 5 to apply in this case where LabMD's actions "caused or were likely to cause" consumer injury, contrary to Respondent's verb tense interpretation. (CCRRCL ¶ 56). Paragraph 22 of the complaint alleges that LabMD failed to "employ reasonable and appropriate measures to prevent unauthorized access to personal information;" this is the unfair act or practice the complaint alleges violates Section 5. (Compl. ¶¶ 22-23).

70. The plain language of Section 5(n) does not authorize the Commission to declare past conduct unfair and unlawful and, because Complaint Counsel has failed to prove by a preponderance of the evidence that any of the challenged acts or practices occurred after 2010, judgment for Respondent is appropriate as a matter of law. 15 U.S.C. § 45(n); 1 U.S.C. § 1 ; *Carr*, 560 U.S. at 448; *Meyer*, 510 U.S. at 477; *Gwaltney*, 484 U.S. at 59; *W. T. Grant Co.*, 345 U.S. at 633; *Borg-Warner Corp.*, 746 F.2d at 110-11.

Response to Conclusion No. 70:

Section 5 permits the Commission to pursue an action for past acts or practices. (CCRRCL ¶ 57).

71. If Section 5(n) allows the Commission to declare past acts or practices unfair and unlawful, then Complaint Counsel must show by a preponderance of the evidence that such acts or practices are "likely to cause" substantial consumer injury in the future. *See* 15 U.S.C. § 15(n). Complaint Counsel does allege that the acts or practices identified in the Complaint are "likely to cause" substantial injury in the future. However, Complaint Counsel has failed to prove by a preponderance of the evidence that the allegedly unfair and unlawful acts or practices are "likely" to reoccur. Consequently, judgment for Respondent as a matter of law is appropriate. *See* 15 U.S.C. § 15(n); 1 U.S.C. § 1; *Carr*, 560 U.S. at 448; *Meyer*, 510 U.S. at 477; *Gwaltney*, 484 U.S. at 59; *W. T. Grant Co.*, 345 U.S. at 633; *Borg-Warner Corp.*, 746 F.2d at 110-11; *see also WHX v. SEC*, 362 F.3d 854, 861 (D.C. Cir. 2004) ("WHX committed (at most) a single, isolated violation of the rule, it immediately withdrew the offending condition once the Commission had made its official position clear, and the Commission has offered no reason to doubt WHX's assurances that it will not violate the rule in the future. In light of these factors, none of which the Commission seems to have considered seriously, the imposition of the cease-and-desist order seems all the more gratuitous"); *see also FTC v. Colgate-Palmolive Co., et al.*, 380 U.S. 374, 920 (1965) ("In this case the respondents produced three different commercials which employed the same deceptive practice. This we believe gave the Commission a sufficient basis for believing that the respondents would be inclined to use similar commercials with respect to the other products they advertise."); *NLRB v. Express Publ'g*, 312 U.S. 426, 436-37 (1941).

Response to Conclusion No. 71:

Contrary to Respondent's contention that Section 5 requires that Complaint Counsel show that LabMD's acts or practices are likely to cause injury in the future, the Commission has interpreted Section 5 to apply in this case where LabMD's actions "caused or were likely to cause" consumer injury. (CCRRCL ¶ 56). Nor does Section 5(n) require that Complaint Counsel prove by a preponderance of the evidence that a challenged act or practice is likely to recur. (CCRRCL ¶ 58).

To the extent that, as the cited cases suggest, Respondent is suggesting that injunctive relief is not appropriate here because it has ceased operation as an active laboratory, this contention is incorrect. LabMD's retention of Personal Information, continued operation of a

computer network, and observed physical security issues demonstrate that "'there exists some cognizable danger of recurrent violation.'" *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (quoting *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)); *see also FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1087-88 (C.D. Cal. 2012) (finding permanent injunction appropriate where defendant continued to work in same business field, even though no longer involved in the same type of conduct); *FTC v. RCA Credit Servs.*, LLC, 727 F. Supp. 2d 1320, 1337 (M.D. Fla. 2010) (finding that defendant's new business venture in a similar industry "presented significant opportunities for similar violations"); *FTC v. Bronson Partners, LLC*, 674 F. Supp. 2d 373, 393-94 (D. Conn. 2009) (imposing a permanent injunction where discontinued conduct was "obvious and widespread" rather than "a single instance"). Furthermore, "[a] 'court's power to grant injunctive relief survives the discontinuance of the illegal conduct.'" *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009) (quoting *W.T. Grant Co.*, 345 U.S. at 633).

D. Substantial Injury

72. Section 5(n) requires Complaint Counsel to prove that a challenged act or practice is "likely" (probable) to cause "substantial injury" to consumers that is not reasonably avoidable by them or outweighed by countervailing benefits. 15 U.S.C. § 45(n); *Meyer*, 510 U.S. at 477.

Response to Conclusion No. 72:

The proposed conclusion is not supported by the cited authority because it misstates Complaint Counsel's burden of proof. Complaint Counsel's burden is to prove that the "act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n); *see also* CCCL ¶ 3. In addition, the cite to *Meyer*, which relates to the United States' statutory waiver of sovereign immunity and submission to federal court jurisdiction, has no bearing on the proposed conclusion.

73. "The Commission is not concerned with trivial or merely speculative harms." Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co*., 104 F.T.C. 949, 1984 FTC LEXIS 2, at *308-*09 (F.T.C. Dec. 21, 1984) (emphasis added); *accord Reilly v. Ceridian Corp.*, 664 F.3d 38, 44-46 (3d Cir. 2011); Beales, *supra* (unfairness authority aimed at "*widespread and significant consumer harm*") (emphasis added).

Response to Conclusion No. 73:

Complaint Counsel has no specific response.

74. FTC's Policy Statement on Unfairness provides that "[i]n most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction." Fed. Trade Comm'n, *FTC Policy Statement on Unfairness*, https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (last visited August 9, 2015).

Response to Conclusion No. 74:

The proposed conclusion is misleading to the extent that it suggests that only monetary harms can satisfy Section 5's injury or likelihood of injury requirement. The Unfairness Statement also states that "[u]nwarranted health and safety risks may also support a finding of unfairness." *Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *97 (1984) (Unfairness Statement). Other forms of significant harm can also satisfy this requirement. (CCCL ¶ 35).

75. As a matter of law, Complaint Counsel must allege and prove by a preponderance of the evidence that the allegedly unfair and unlawful data security acts and practices identified in the Complaint to cause substantial consumer injury are unfair to consumers generally and/or affected enough consumers to implicate or affect free and fair competition in the market generally. 15 U.S.C. §§ 45(a), (n); Hearings, 16 C.F.R. § 3.43 (2015);; *Yates*, 135 S. Ct. at 1085, 1091; *Am. Bldg. Maintenance Indus.*, 422 U.S. at 277; Beales, *supra* (unfairness authority is "a powerful tool for the Commission" to attack a particular Respondent's practices "that may not involve deception but nonetheless cause *widespread and significant consumer harm*") (emphasis added).

Response to Conclusion No. 75:

The proposed conclusion is erroneous because Respondent seeks to add, without precedent or any other legal authority, an entirely new limitation to the definition of unfairness

that is not found in Section 5(n) or anywhere else in Section 5. (CCRRCL ¶ 47, (addressing substantively identical Proposed Conclusion 47)).

76. Established judicial principles help FTC "ascertain whether a particular form of conduct does in fact tend to harm consumers." *In re Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *313 (citation omitted).

Response to Conclusion No. 76:

To the extent the proposed conclusion is a quotation from the cited authority, Complaint Counsel has no specific response. To the extent the proposed conclusion asserts an additional burden that Complaint Counsel must prove, it is a misstatement of law. (*See* CCRRCL ¶ 47).

77. To prove "substantial injury" in this case as a matter of law, Complaint Counsel must first prove *both* actual data breaches *and* that LabMD's data security practices were "unreasonable" for medical companies during the relevant time frame. *See* 15 U.S.C. § 45(n); *Fabi Const. Co. v. SOL*, 508 F.3d 1077, 1088 (D.C. Cir. 2007) (industry standards for building construction company applied); *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983) (industry standards for pyrotechnic industry applied); *S&H Riggers & Erectors v. OSHRC*, 659 F.2d 1273, 1280-83 (5th Cir. 1981) (reasonable-person standard divorced from relevant industry standards or regulations violates due process); MTD Order at 18.

Response to Conclusion No. 77:

The Court should disregard the proposed conclusion because it is unsupported and a misstatement of law. "Actual data breaches" or proof thereof is not a requirement for Respondent's practices to be unfair in violation of Section 5. CCCL ¶ 24; Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014); *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *6 (3d Cir. Aug. 24, 2015) ("[T]he FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs."); CCRRCL ¶ 78. Complaint Counsel's burden of proof is that stated in Section 5(n), and Respondent's citations to other administrative settings do not create additional burdens of proof. (CCRRCL ¶¶ 97-99, 144).

78. As a matter of law, proof of an actual data breach is a necessary but not sufficient condition for "substantial injury" as a matter of law under Section 5(n). According to the Commission:

> Notably, the Complaint's allegations that LabMD's data security failures led to actual security breaches, if proven, would lend support to the claim that the firm's data security procedures caused, or were likely to cause, harms to consumers – but the mere fact that such breaches occurred, standing alone, would not necessarily establish that LabMD engaged in 'unfair . . . acts or practices.' . . . [T]he mere fact that data breaches actually occurred is not sufficient to show a company failed to have reasonable "we will need to determine whether the 'substantial injury' element is satisfied by considering not only whether the facts [of actual data breaches] alleged in the Complaint actually occurred but also whether LabMD's data security procedures were 'reasonable' in light of the circumstances.

MTD Order at 18-19 (citations omitted); *cf. FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 609 (D. N.J. 2014) (FTC alleged three actual data breaches leading to "the compromise of more than 619,000 consumer payment card account numbers, the exportation of many of those account numbers to a domain registered in Russia, fraudulent charges on many consumers' accounts, and more than $10.6 million in fraud loss. Consumers and businesses suffered financial injury, including, but not limited to, unreimbursed fraudulent charges, increased costs, and lost access to funds or credit. Consumers and businesses also expended time and money resolving fraudulent charges and mitigating subsequent harm.").

Response to Conclusion No. 78:

The Court should disregard the proposed conclusion because it is contradicted by the cited authorities and a misstatement of law. The Commission's Order, which the proposed conclusion quotes, *directly contradicts* the proposed conclusion: the Commission stated that "occurrences of actual data security breaches or 'actual, completed economic harms' ([LabMD Mot. to Dismiss] at 29) are not necessary to substantiate that the firm's data security activities caused or likely caused consumer injury, and thus constituted 'unfair . . . acts or practices.'" (Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014); *see also* CCCL ¶¶ 24-25, 29). The proposed conclusion includes a misleading quotation of the Commission's Order, adding "[of actual data breaches]" in a way that is not true to the quoted statement. Comm'n Order Denying Resp't's Mot. to Dismiss at 18-19 (Jan. 16, 2014).

Furthermore, the citation to *FTC v. Wyndham Worldwide Corp*. does not support the proposed conclusion. The citation is to the court's paraphrase of the complaint's allegations in the "Factual Background" of its opinion. *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 607-09 (D.N.J. 2014), *aff'd* No. 14-3514, 2015 WL 4998121 (3d Cir. Aug. 24, 2015). The allegations of the FTC's complaint in *Wyndham* do not stand for the proposed conclusion. Finally, the Third Circuit, in reviewing the *Wyndham* decision cited, determined that "the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs." *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *6 (3d Cir. Aug. 24, 2015).

79. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that either of the Security Incidents alleged in the Complaint constituted an actual data breach. *See* MTD Order at 18-19; *Wyndham*, 10 F. Supp. 3d at 609.

Response to Conclusion No. 79:

The Court should disregard the proposed conclusion because it is unsupported and a misstatement of law. The cited authorities do not support the proposition. In addition, whether the Security Incidents alleged in the Complaint ¶¶ 17-21 qualify as "actual data breaches"—a term not used in the Complaint or either of the cited sources —is irrelevant to whether LabMD is in violation of Section 5. (CCRRCL ¶ 78). The proposed conclusion is also contrary to the law to the extent it asserts that Complaint Counsel must prove "an actual data breach." (CCRRCL ¶¶ 77-78).

80. Speculation about possible identity theft and fraud does not satisfy Section 5(n)'s substantial injury requirement as a matter of law. *See* Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in In re Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *308-*09 (emphasis added); *accord Reilly*, 664 F.3d at 44-46; *cf. Wyndham*, 10 F. Supp. 3d at 609.

Response to Conclusion No. 80:

The proposed conclusion is misleading to the extent it suggests that the substantial injury caused or likely to be caused by Respondent's practices is "speculation" or only "possible," or that a risk of identity theft and fraud is "speculation" or merely "possible" as a matter of law. Complaint Counsel agrees that "trivial or merely speculative harms" do not satisfy Section 5(n) substantial injury. *Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *97 (1984) (Unfairness Statement). However, Section 5(n) applies to practices that are "likely to cause substantial injury to consumers." 15 U.S.C. § 45(n); CCCL ¶ 26; *see also* Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014); CCCL ¶ 29 (quoting *Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *101 n.12 (1984) (Unfairness Statement) ("A practice is unfair if it causes or is likely to cause 'a small amount of harm to a large number of people, or if it raises a significant risk of concrete harm.'"). The additional cited authorities do not support the proposed conclusion. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 44-46 (3d Cir. 2011) (addressing whether costs of credit monitoring create standing under Article III); *FTC v. Wyndham Worldwide Corp*., 10 F. Supp. 3d 602, 609 (D.N.J. 2014) (listing alleged harms in "Factual Background" section). To the extent Respondent is arguing for an "actual data breach" standard, that unsupported proposition is addressed above. (*See* CCRRCL ¶¶ 77-78).

81. Established judicial principles suggest "substantial injury" under Section 5(n) must at least be more than an "injury in fact," that is, the invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). While the test for constitutional standing is low, *see, e.g.*, *Blunt v. Lower Marion Sch. Dist*., 767 F.3d 247, 278 (3rd Cir. 2014) (requiring only "some specific, identifiable trifle of injury"), Section 5(n) contains two additional requirements: the injury must be (1) "substantial," which, to have any meaning, must be something more than the injury required by Article III; and, (2) not "reasonably avoidable by consumers themselves." 15 U.S.C. § 45(n).

Response to Conclusion No. 81:

To the extent the proposed conclusion quotes from *Lujan v. Defenders of Wildlife, Blunt v. Lower Marion Sch. Dist.*, and Section 5(n), Complaint Counsel has no specific response. To the extent the proposed conclusion argues that Section 5(n) substantial injury must be "something more" than "injury in fact" under Article III, it is unsupported and a misstatement of law. There is no authority for the proposition that Section 5(n) substantial injury must be "something more" than "injury in fact" required by Article III. Unlike injury in fact, Section 5(n) applies to practices that are "likely to cause substantial injury to consumers." 15 U.S.C. § 45(n); CCCL ¶ 26; *see also* Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014); CCCL ¶ 29 (quoting *Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *101 n.12 (1984) (Unfairness Statement) ("A practice is unfair if it causes or is likely to cause 'a small amount of harm to a large number of people, or if it raises a significant risk of concrete harm.'").

Further, Complaint Counsel is not obligated to prove Article III standing. *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) ("Article III's standing requirement does not apply to agency proceedings. . . ."); *FTC v. CyberSpy Software, LLC*, 2009 WL 455417, at *1 (M.D. Fla. Feb. 23, 2009) (Order denying motion for summary judgment) ("Congress has conferred standing on the FTC to pursue the sort of claims raised here."); *SEC v. Rogers*, 283 Fed. App'x 242, 243 (5th Cir. 2008) ("Congress may confer standing on federal agencies to bring enforcement actions under its statutes."); *Dir., Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 133 (1995) (describing how Congress can confer standing on federal agencies to enforce statutes without infringing Article III).

82. In data breach cases where no misuse is proven there has been no injury as a matter of law. *Reilly,* 664 F.3d at 44.

Response to Conclusion No. 82:

The Court should disregard the proposed conclusion because it is unsupported and a misstatement of law. "[A]ctual, completed economic harms are not necessary to substantiate that [a] firm's data security activities caused or likely caused consumer injury, and thus constituted unfair . . . acts or practices." Comm'n Order Denying Resp't's Mot. to Dismiss at 19 (Jan. 16, 2014) (internal citations and quotations omitted); *see also FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *6 (3d Cir. Aug. 24, 2015) ("[T]he FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs."); CCCL ¶¶ 24-26, 29; CCRRCL ¶¶ 77-78. In addition, the cited authority relates only to whether plaintiffs have Article III standing, and is therefore inapplicable to this case. *Reilly v. Ceridian Corp.*, 664 F.3d 38, 41-43, 46 (3d Cir. 2011); CCRRCL ¶ 81.

83. An "injury" is not actionable under Section 5(n) "if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1168-69 (9th Cir. 2012). The issue "not whether subsequent mitigation was convenient or costless, but whether it was reasonably possible." *Id.* at 1169. As a matter of law, speculation about the potential time and money consumers could spend resolving fraudulent charges cannot satisfy Section 5(n), or even confer standing under Article III. *See id.*; *Reilly*, 664 F.3d at 46 (alleged time and money expenditures to monitor financial information do not establish standing, "because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than alleged 'increased risk of injury' claims"); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007) ("[L]ost data" cases "clearly reject the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit.") (citation omitted). That a plaintiff has willingly incurred costs to protect against an alleged increased risk of identity theft is not enough to demonstrate a "concrete and particularized" or "actual or imminent" injury. *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 28-33 (D.D.C. May 9, 2014) (listing cases).

Response to Conclusion No. 83:

The proposed conclusion is erroneous in that it states that costs that consumers incur in remediating problems caused by a party's conduct do not constitute "injury" under Section 5. A practice meets the injury requirement of unfairness under Section 5 if it causes or is likely to

cause substantial injury to consumers, 15 U.S.C. § 45(n), including if it causes or is likely to cause "a small harm to a large number of people, or if it raises a significant risk of concrete harm." (CCCL ¶ 29 (quoting *Int'l Harvester Co.*, 104 FTC 949, 1984 WL 565290, at *101 n.12 (1984) (Unfairness Statement))). Acts or practices also cause substantial harm when consumers must spend a considerable amount of time and resources remediating problems caused by a party's conduct, such as closing compromised bank accounts. (CCCL ¶ 35 (citing, *inter alia*, *Remijas v. Neiman Marcus Group, LLC*, No. 14-3122, 2015 U.S. App. LEXIS 12487 at *9 (7th Cir. July 20, 2015) (observing in a data breach involving credit cards, "there are identifiable costs associated with the process of sorting things out"), *13-14 (lost time and money spent by consumers protecting themselves from future identity theft "easily qualifies as a concrete injury"), *21 (finding that mitigation expenses and future injury are judicially redressable)). At least one court has specifically rejected Respondent's argument that remediation costs do not constitute injury. *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1158 (9th Cir. 2010). In *Neovi*, the defendant argued that because consumers could mitigate the harm caused by defendant's actions after the harm had occurred, the injury was reasonably avoidable and did not satisfy Section 5(n). *Id.* at 1158. The Court rejected this argument, adopting the trial court's holding that injury was not reasonably avoidable where some consumers might be unaware of the injury, and the consumers that did notice the injury could mitigate the harm only through a "substantial investment of time, trouble, aggravation, and money." *Id.*; *cf. FTC v. Direct Benefits Group, LLC*, 2013 WL 3771322, at *14 (M.D. Fla. July 18, 2013) ("[T]he fact that many customers were able to—eventually—obtain refunds from Defendants does not render the injury avoidable.").

Further, Respondent's reliance on *Davis v. HSBC Bank Nevada* for the above-stated proposition is misplaced. *Davis* involved a putative class action in which the individual plaintiff

sought various relief under California law, including California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* ("UCL"). 691 F.3d 1152, 1158-59 (2012). To be unlawful under the UCL, practices must violate another law. *Id.* at 1168. Davis argued that the challenged practice, charging an annual fee on a credit card without sufficient notice, violated 12 C.F.R. § 7.4008(c), which prohibits national banks from engaging in unfair or deceptive practices as defined in Section 5 of the FTC Act. *Id.* at 1168. The Ninth Circuit concluded that the plaintiff could have reasonably avoided the annual charge by simply reading the terms and conditions of the credit card before applying for the credit card, or by canceling within 90 days after signing up for the credit card. *Id.* at 1169.

Such an analysis does not apply in this case, where many consumers would have no way of avoiding harm prior to the injury, and no reliable way of learning of the injury, and therefore would lack awareness about potential avenues to mitigate harms that they had no reliable way of learning about in the first place. (CCFF ¶¶ 1708-1711, 1773-74, 1785-87).

Respondent's reliance on cases involving individual plaintiffs seeking relief for data breaches is likewise misplaced. First, these cases address only whether individuals have Article III standing to bring cases in which they cannot show actual injury and are therefore inapplicable to this case. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 41-43 (2011); *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 6 (D.D.C. 2007); *Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 28-34 (D.D.C. May 9, 2014). Congress has conferred Article III standing on the Commission to enforce Section 5. *See FTC v. CyberSpy Software, LLC*, 2009 WL 455417, at *1 (M.D. Fla. Feb. 23, 2009) (Order denying motion to dismiss) ("Congress has conferred standing on the FTC to pursue the sort of claims raised here."); *SEC v. Rogers*, 283 Fed. App'x. 242, 243 (5th Cir. 2008) ("Congress may confer standing on federal

agencies to bring enforcement actions under its statutes."); *Dir., Office of Workers' Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 133 (1995) (describing how Congress can confer standing on federal agencies to enforce statutes without infringing Article III); *see also Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527-28 (9th Cir. 1997) ("Article III's standing requirement does not apply to agency proceedings. . . .").

Second, none of the cases stand for the proposition that costs incurred in correcting actual harm caused by a defendant's action do not constitute injury. Instead, the cited portions of each case hold only that cost incurred by purchasing credit monitoring to detect possible future harm does not constitute injury for Article III purposes. *See Reilly*, 664 F.3d at 46 ("[C]osts incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than alleged 'increased risk of injury' which forms the basis for Appellants' claims . . . .") (citation omitted); *Randolph*, 486 F. Supp. 2d at 8 (noting authorities rejecting proposition "that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit") (citation omitted); *Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d at 26 ("The cost of credit monitoring and other preventive measures . . . cannot create standing."). Contrary to these holdings, as discussed above, courts have found that subsequent mitigation of harm does not render injury "reasonably avoidable" under Section 5. *See, e.g.*, *Neovi*, 604 F.3d at 1158.

VI. LEGAL STANDARDS FOR "REASONABLENESS"

84. Complaint Counsel must prove by a preponderance of the evidence that there was an actual data breach *and*, if one occurred, that consumers suffer substantial injury *and* that LabMD's data security practices are "unreasonable." *See* MTD Order at 18-19; *HSBC Bank Nevada*, 691 F.3d at 1169; *Reilly*, 664 F.3d at 44-46.

Response to Conclusion No. 84:

The proposed conclusion is unsupported and a misstatement of law to the extent it asserts that Complaint Counsel must prove the existence of "an actual data breach" and "that consumers suffer substantial injury." (CCRRCL ¶¶ 78-79 (Complaint Counsel does not need to prove an "actual data breach"); CCCL ¶ 3 (quoting JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 3 ("Complaint Counsel has the burden of proof to prove by a preponderance of evidence that LabMD's practices are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.")).

To the extent the proposed conclusion asserts that Complaint Counsel must prove that Respondent's data security practices are unreasonable, Complaint Counsel has no specific response.

85. The Commission states "unreasonableness" is a "factual question that can be addressed only on the basis of evidence" but provides no additional guidance. MTD Order at 19.

Response to Conclusion No. 85:

The proposed finding is misleading. The Commission's Order Denying Respondent's Motion to Dismiss explains how the reasonableness test is applied in this matter. Comm'n Order Denying Resp't's Mot. to Dismiss at 18 (Jan. 16, 2014) (stating that "the Complaint contains allegations that LabMD implemented unreasonable data security measures," including "acts of commission, such as installing Limewire . . . on a billing manager's computer," and "acts of omission, such as failing to institute any of a range of readily-available safeguards that could have helped prevent data breaches.") (internal quotations omitted). The Order also explains how the Commission has applied the test of reasonableness to the issue of data security in previous cases. *Id.* at 18 n.23 ("affirming, in resolving three cases concerning data security practices

alleged to violate the Fair Credit Reporting Act, that [the Commission] had 'applied the standard that is consistent with its other data security cases – that of reasonable security. This reasonableness standard is flexible and recognizes that there is no such thing as perfect security.'") (quoting *In re SettlementOne Credit Corp.*, File No. 082 3209, Letter to Stuart K. Pratt, Consumer Data Industry Association, from Donald S. Clark, Secretary, by Direction of the Commission, at 2 (Aug. 17, 2011) (http://www.ftc.gov/sites/default/files/documents/cases/2011/08/110819lettercdia_1.pdf)).

The unfairness definition in the FTC Act, 15 U.S.C. § 45(n), "is sufficient to give fair notice of what conduct is prohibited." Comm'n Order Denying Resp't's Mot. to Dismiss at 16 (Jan. 16, 2014). Moreover, the Commission is not required to promulgate rules relating to data security before enforcing Section 5 of the FTC Act in the data security context. *Id.* at 14-15; *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 619 (D.N.J. 2014), *aff'd* No. 14-3514, 2015 WL 4998121 (3d Cir. Aug. 24, 2015) (finding that precedent does not "require[] the FTC to formally publish a regulation before bringing an enforcement action under Section 5's unfairness prong"); *POM Wonderful LLC v. FTC*, 777 F.3d 478, 497 (D.C. Cir. 2015) (affirming that the Commission "validly proceeded by adjudication" and is not required to engage in rulemaking even where an administration decision may "affect agency policy and have general prospective application" (citations omitted)).

In addition to the unfairness definition in Section 5, the Commission has issued "many public complaints and consent agreements" that "'constitute a body of experience and informed judgment *to which courts and litigants may properly resort for guidance*.'" *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602, 621 (D.N.J. 2014), *aff'd*, 2015 WL 4998121 (3d Cir. Aug. 24, 2015) (quoting *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (emphasis added by

court)); *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *15 (3d Cir. Aug. 24, 2015) (noting that courts "regularly consider materials that are neither regulations nor 'adjudications on the merits'" in reviewing fair notice claims).

The data security test under Section 5 is reasonableness: "The touchstone of the Commission's approach to data security is reasonableness: a company's data security measures must be reasonable and appropriate in light of the sensitivity and volume of consumer information it holds, the size and complexity of its business, and the cost of the available tools to improve security and reduce vulnerabilities." Comm'n Statement Marking 50th Data Sec. Settlement (Jan 31, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf.

Objective standards of reasonableness are common in the law, and do not violate fair notice requirements. *See, e.g.*, *Brooks v. Vill. of Ridgefield Park*, 185 F.3d 130, 137 (3d Cir. 1999) (employer must act as a "reasonably prudent man" would have acted to satisfy Fair Labor Standards Act) (quoting *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 92 (2d Cir. 1953); *Cape & Vineyard Div. of New Bedford Gas v. Occupational Safety and Health Review Comm'n*, 512 F.2d 1148, 1152 n.5 (1st Cir. 1975) ("objective, reasonable man" standard applies to use of protective equipment under OSHA regulations); *Brock v. Teamsters Local Union No. 863*, 113 F.R.D. 32, 34 (D.N.J. 1986) (reasonableness is determined under a "prudent man" standard, an objective standard which requires that each situation be "tried on the individual facts of th[e] case, and in light of the standard as developed in the case law"); *Romala Stone, Inc. v. Home Depot U.S.A., Inc.*, 2007 WL 6381488, at *27-28 (N.D. Ga. Apr. 2, 2007), *partially adopted by* 2007 WL 2904110 (N.D. Ga. Oct. 1, 2007) (collecting examples of "reasonable man"-type standards from patent, trademark, criminal, judicial recusal, and contract jurisprudence).

Indeed, negligence law already imposes the same standard of care, including for data security practices. *See In re Zappos.com, Inc.*, 2013 WL 4830497, at *3-4 (D. Nev. Sept. 9, 2013 (applying "reasonable and prudent person" standard in negligence case for failure to safeguard electronically held data). The Section 5(n) factors parallel the basic considerations that inform tort liability under the same circumstances.

Duties to act "reasonably" and to follow similarly general standards of conduct are ubiquitous in statutory law as well. For example, restraints of trade under the Sherman Act are often assessed under a fact-specific "rule of reason," *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007), yet violations are subject to automatic treble damages. *See* 15 U.S.C. § 15(a). In addition, the FCC polices the obligation of common carriers to offer "just and reasonable" rates and terms of service. 47 U.S.C. § 201(b). In both of those contexts, companies can be subject to sanctions under guideposts no more specific than Section 5.

Furthermore, "[w]hen Congress created the Federal Trade Commission in 1914 and charted its power and responsibility…, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase 'unfair methods of competition' … by enumerating the particular practices to which it was intended to apply." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-240 (1972) (citing S. Rep. No. 63-597 at 13). As initially enacted in 1914, Section 5 of the FTC Act prohibited only "unfair methods of competition." 38 Stat. 717, 719 (1914). In 1938, Congress broadened Section 5 to also cover "unfair or deceptive acts or practices in commerce," 52 Stat. 111 (1938). The 1938 amendment is now the main source of the FTC's consumer protection authority (as distinct from its antitrust authority). "Congress' intent was affirmatively to grant the Commission authority to protect consumers as well as competitors." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 966 (D.C. Cir. 1985). The term "unfair" thus means

the same in the 1938 amendments as in the original 1914 enactment. *See Sperry*, 405 U.S. at 244. Thus, instead of "attempt[ing] to define the many and variable unfair practices which prevail in commerce and to forbid their continuance," Congress adopted "a general declaration condemning unfair practices" and "le[ft] it to the commission to determine what practices were unfair." S. Rep. 63-597 at 13. "[T]here were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others." *Id*. As the House Conference Report put it, "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *Am. Fin. Servs. Ass'n*, 767 F.2d at 966 (quoting H.R. Rep. No. 63-1142 at 19 (1914) (Conf. Rep.)). In short, Congress "expressly declined to delineate" the "particular acts or practices" deemed unfair, *id.* at 969, preferring instead to give the FTC "broad discretionary authority … to define unfair practices on a flexible and incremental basis," *id.* at 967. As a result, courts have "adopted a malleable view of the Commission's authority" to interpret and apply the term "unfair." *Id.* at 967-968. "The takeaway is that Congress designed the term as a 'flexible concept with evolving content' and 'intentionally left [its] development . . . to the Commission." *FTC v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *3 (3d Cir. Aug. 24, 2015) (citations omitted).

"As the Supreme Court has recognized, '[b]roadly worded constitutional and statutory provisions necessarily have been given concrete meaning and application by a process of case-by-case judicial decision in the common-law tradition.'" Comm'n Order Denying Resp't's Mot. to Dismiss at 17 (Jan. 16, 2014) (quoting *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 (1981)). Congress "intentionally left development of the term 'unfair' to the

Commission rather than attempting to define" specific practices. *Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) (quoting S. Rep. No. 63-597 at 13 (1914)). Congress had a "crystal clear" intent that the term should have "sweep and flexibility," *Sperry*, 405 U.S. at 241, and should remain "a flexible concept with evolving content," *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 353 (1941); *accord In re Smith*, 866 F.2d 576, 581 (3d Cir. 1989) ("[s]tatutes prohibiting unfair trade practices and acts have routinely been interpreted to be flexible and adaptable to respond to human inventiveness").

86. Medical data security "reasonableness" under Section 5 as a matter of law is a matter of first impression.

Response to Conclusion No. 86:

The proposed conclusion is unsupported by any legal authority or record in violation of the Court's Order on Post-Trial Briefs.

Furthermore, the proposed conclusion is misleading in that there is no distinct "medical data security 'reasonableness'" under Section 5. Rather, reasonableness is the "touchstone of the Commission's approach to data security," and it applies across industries. Regardless of the industry in which the company operates, the Commission assesses whether a company's data security measures are reasonable and appropriate in light of "the sensitivity and volume of consumer information [a company] holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities." *See* Comm'n Statement Marking 50th Data Sec. Settlement (Jan 31, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf; *see also* CCRRCL ¶ 87.

It is particularly relevant that courts have upheld Section 5's prohibition of "unfair . . . acts or practices" as a flexible prohibition that applies *across* industries. *See, e.g., FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972) (applying Section 5 to trading stamps); *FTC v.*

Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (applying Section 5 to televised commercial for shaving cream, and stating that "the proscriptions in [Section] 5 are flexible"); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392 (1953) (applying Section 5 to exclusive film-screening agreements); *FTC v. Neovi*, 604 F.3d 1150 (9th Cir. 2010) (applying Section 5 to online check-processing); *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009) (applying Section 5 to online sale of phone records). Congress deliberatively delegated broad power to the FTC under Section 5 to address unanticipated practices in a changing economy. (*See* CCCL ¶13; CCRRCL ¶ 87).

87. Section 5(n) does not define "unreasonable" data security acts or practices, or even use the term. Therefore, there is no statutory basis for a "reasonableness" determination. *See Steadman*, 450 U.S. at 98. However, the MTD Order, though erroneous, is law of the case.

Response to Conclusion No. 87:

Respondent's conclusory argument that the entire Commission Order Denying Respondent's Motion to Dismiss is erroneous is unsupported by any legal authority or record as required by the Court's Order on Post-Trial Briefs, and therefore Complaint Counsel cannot respond with specificity. However, as Respondent concedes, the Commission's Order Denying Respondent's Motion to Dismiss is the law of the case.

As explained in CCRRCL ¶ 85, duties to act "reasonably" and to follow similarly general standards of conduct are ubiquitous in statutory law as well. (CCRRCL ¶ 85 (providing example such as assessment of restraints of trade under a fact-specific "rule of reason" and FCC enforcement of obligation of common carriers to offer "just and reasonable" rates and terms of service"). Section 5 was intended to give the FTC "broad discretionary authority . . . to define unfair practices on a flexible and incremental basis," *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985). As a result, courts have "adopted a malleable view of the Commission's

authority" to interpret and apply the term "unfair." *Id.* at 967-68. (*See also* CCRRCL ¶ 85 (providing history of Section 5).

Section 5 requires evaluating potential injury, the likelihood of that injury, and the cost of taking precautions to prevent that injury. 15 U.S.C. § 45(n). It is no more challenging to apply that balancing test in the context of companies' data security practices than it is in the context of companies' duties of care related to other business practices.

88. As a matter of law, FTC does not have the power to declare – for the first time through adjudication – conduct that is permitted by and compliant with HHS's preexisting regulatory scheme, promulgated under HIPAA/HITECH in accordance with an act of Congress, unfair and unlawful under Section 5(n). *See Fabi Const. Co.*, 508 F.3d at 1088; *ABA v. FTC*, 430 F.3d 457, 469-72 (D.C. Cir. 2005); *Satellite Broad. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *Gates & Fox v. OSHRC*, 790 F.2d 154, 156-57 (D.C. Cir. 1986); Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 Fed. Reg. 5,566, 5,644 (Jan. 25, 2013) (encouraging covered entities to use encryption safe-harbor); Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,462, 82,543 (Dec. 28, 2000) (discussing safe-harbor).

Response to Conclusion No. 88:

The Court should disregard the proposed conclusion because it is not supported by the authorities stated and is a misstatement of law. First, the Commission has the power to declare acts unfair through adjudication. *See* Comm'n Order Denying LabMD's Mot. to Dismiss at 14 (Jan. 16, 2014) (LabMD's position that the Commission must first issue regulations before an adjudication of a novel issue "conflicts with longstanding case law confirming that administrative agencies may – indeed, must – enforce statutes that Congress has directed them to implement, regardless whether they have issued regulations addressing the specific conduct at issue."); CCRRCL ¶¶ 35-37.

Second, there is no evidence that LabMD's conduct is "permitted by and compliant with" HHS's preexisting regulatory scheme. Respondent presented no evidence on its compliance with HIPAA, and has admitted that the question of its HIPAA compliance is irrelevant to this case.

(CX0765 (LabMD's Resps. to 2d Set of Discovery) at 12-13, Resp. to Interrog. 22 (stating that information regarding whether LabMD complied with HIPAA regulations is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence")).

Finally, the cited cases are all irrelevant. The Commission distinguished *ABA v. FTC* in its Order Denying Respondent LabMD's Motion to Dismiss by noting that the statutory text in this case, "unfair. . .acts or practices," conveys a far broader scope of interpretative flexibility than the term "financial institution" at issue in that case. Comm'n Order Denying LabMD's Mot. to Dismiss at 5 (Jan. 16, 2014). The other cases cited also involve interpretations of highly-specific regulatory language, where the agencies expanded the language or announced an interpretation for the first time in litigation, without any advance notice. Here, the statutory text at issue – "unfair . . . acts or practices" allows for great interpretive flexibility, and the agency has long interpreted the language to cover unreasonable security practices. (CCRRCL ¶ 87).

89. As a matter of law, FTC should have published in the Federal Register applicable guides or policy statements prior to commencing regulation, as it has often done. *See* 16 C.F.R. § 14.9 (titled "Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials," establishing same and warning "[a]ny respondent who fails to comply with [the specified] requirement may be the subject of a civil penalty or other law enforcement proceeding for violating the terms of a Commission cease-and-desist order or rule"); 16 C.F.R. § 453.1 (funeral rule definitions); *see also* 15 U.S.C. 57a(a).

Response to Conclusion No. 89:

The Court should disregard the proposed conclusion because it is not supported by the authorities cited and is a misstatement of law. While the cited statute provides that the Commission "may prescribe interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 57a(a)(1), it does not require their publication. Nor does the statute contain any reference to "guides."

90. FTC may proceed by adjudication only in cases where it is enforcing discrete violations of existing laws and where the effective scope of the impact of the case will be relatively small

and by § 57a procedures if it seeks to change the law and establish rules of widespread application. *Ford Motor Co.*, 673 F.2d 1008, 1010-11 (9th Cir. 1981).

Response to Conclusion No. 90:

The Court should disregard the proposed conclusion because it is not supported by the authority cited and is a misstatement of law. (CCRRCL ¶ 35 (addressing identical Proposed Conclusion 35)).

91. Adjudication deals with what the law was; rulemaking deals with what the law will be. *Bowen*, 488 U.S. at 221 (1988) (Scalia, J., concurring).

Response to Conclusion No. 91:

To the extent this proposed conclusion is intended to suggest that the Commission did not properly proceed by adjudication in this matter, the proposed conclusion is a misstatement of law. The Commission properly proceeded by adjudication in this matter. (CCRRCL ¶ 35*; see also* CCRRCL ¶ 36 (addressing identical proposed conclusion 36)).

To the extent the proposed conclusion restates a quote from Justice Scalia's concurrence in *Bowen*, Complaint Counsel has no specific response.

92. The function of filling in the interstices of the FTC Act should be performed, as much as possible, "*through this quasi-legislative promulgation of rules to be applied in the future*." *See id.* (emphasis in original).

Response to Conclusion No. 92:

To the extent this proposed conclusion is intended to suggest that the Commission did not properly proceed by adjudication in this matter, the proposed conclusion is a misstatement of law. The Commission properly proceeded by adjudication in this matter. (CCRRCL ¶ 35).

93. As a matter of law, the Commission's adjudication is arbitrary and capricious. *Ford Motor Co.*, 673 F.2d at 1010-11 (citation omitted).

Response to Conclusion No. 93:

The Court should disregard the proposed conclusion because it is not supported by the authority cited and is a misstatement of law. (CCRRCL ¶ 38 (addressing identical Proposed Conclusion 38)).

94. Complaint Counsel's failure to prove by a preponderance of the evidence that LabMD's data security currently violates, or is likely to violate in the future HIPAA/HITECH regulatory requirements, means that it has not proven unreasonableness as a matter of law.

Response to Conclusion No. 94:

The Court should disregard the proposed conclusion because it is unsupported by any legal authority or record as required by the Court's Order on Post-Trial Briefs.

Further, the proposed conclusion is unsupported because Respondent presented no evidence on its compliance with HIPAA, and admitted that information concerning its compliance or non-compliance with HIPAA was irrelevant in this case. (CX0765 (LabMD's Resps. to Second Set of Discovery) at 12-13, Resp. to Interrog. 22 (stating that information regarding whether LabMD complied with HIPAA regulations is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence")). The Commission has already rejected the proposition that HIPAA prevents enforcement of Section 5 of the FTC Act against entities regulated by covered by HIPAA. Comm'n Order Denying Resp't's Mot. to Dismiss at 11-12 (Jan. 16, 2014) ("HIPAA evinces no congressional intent to preserve anyone's ability to engage in inadequate data security practices that unreasonably injure consumers in violation of the FTC Act, and enforcement of that Act thus fully comports with congressional intent under HIPAA."); *see* also CCRRCL ¶¶ 88, 98.

95. A data security hearing under Section 5 is governed solely by the ordinary meaning of Section 5(a) and Section 5(n).

Response to Conclusion No. 95:

The proposed conclusion is erroneous to the extent that it suggests that the ordinary meaning of the terms in Section 5 of the FTC Act is the only relevant consideration in interpreting the statute's meaning. (CCRRCL ¶ 65 (addressing substantively identical Proposed Finding 65)).

96. Complaint Counsel's position is that "[t]he enforcement of OSHA's General Duty Clause in Department of Labor administrative courts may provide the best analogy to a data security administrative hearing under Section 5 of the FTC Act. *See, e.g.*, *Fabi Construction Co.*, 508 F.3d at 1088 (D.C. Cir. 2007) (considering a number of factors to determine whether defendant met its "general duty," including whether defendant followed third-party technical drawings, whether defendant complied with industry standards, and expert opinion); Complaint Counsel's Response In Opposition to Respondent's Motion to Dismiss Complaint at 19 n.12, *In the Matter of LabMD, Inc.*, FTC Dkt. 9357 (Nov. 22, 2013).

Response to Conclusion No. 96:

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. Respondent accurately quotes from Complaint Counsel's Response In Opposition to Respondent's Motion to Dismiss Complaint to state that the enforcement of OSHA's General Duty Clause in Department of Labor administrative courts may be analogous in some ways to a data security administrative hearing under Section 5 of the FTC Act. However, to the extent that Respondent attempts to turn "analogy" into "equivalence" in an effort to impose additional burdens upon the Commission in establishing a violation of Section 5, that attempt is misguided and inappropriate. The enforcement of OSHA's General Duty Clause does not constrain the Commission's enforcement of Section 5, nor could it.

As set forth in the Federal Trade Commission's Operating Manual, administrative proceedings, including those involving data security are "governed generally by the provisions of the Administrative Procedure Act, Subchapter II -- Administrative Procedures -- of Chapter 5 of Title 5 of the United States Code and, specifically, by Rules 3.1 to 3.72 and 4.1 to 4.7 of the

Commission's adjudicative rules . . . which comport with the requirements of the Act." (Federal Trade Commission, Operating Manual, Chapter Ten, Administrative Litigation, 10.3, *available at* https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals). In addition, of course, the FTC Act, Commission complaints and consent decrees, approved testimony to Congress, and other legal precedent are also relevant. (CCRRCL ¶ 87).

OSHA's legal framework is inapposite. The Commission analyzes practices using a reasonableness test to determine whether those acts or practices are unfair in violation of Section 5, and Congress gave the FTC "broad discretionary authority . . . to define unfair practices on a flexible, incremental basis." *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985). Congress created the Commission to prevent unfair methods of competition in commerce, and expanded its authority to proscribe unfair and deceptive acts and practices. Congress did not direct the FTC promulgate standards upon its inception as it directed the Secretary of Labor to do in the context of OSHA. *See* 29 U.S.C. § 655(a), (b)(1)-(4) (directing the Secretary of Labor to "promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard . . ." within two years of the OSH Act's enactment and to engage in notice and comment rulemaking thereafter to establish new standards).

97. Reasonableness is not whatever requirement the Commission determines, *post facto*, to have applied as if it were drafting a regulation. Rather, reasonableness is an objective test which must be determined on the basis of evidence in the record and "industry standards" are concrete and discernible standards applicable to a given company in its particular line of business. *See Fabi Constr. Co.*, 508 F.3d at 1084 (industry standards for a building construction company applied); *Ensign-Bickford Co.*, 717 F.2d at 1422 (industry standards for the pyrotechnic industry applied); *S&H Riggers*, 659 F.2d at 1280-83 (reasonable-person standard divorced from relevant industry standards or regulations violates due process); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1333 (6th Cir. 1978) ("[U]nless we embrace the untenable assumption that industry has been habitually disregarding a known legal requirement, we must conclude that the average employer has been unaware that the regulations required point of operation guarding.").

Response to Conclusion No. 97:

To the extent that LabMD is arguing that the Commission or any other federal agency must conduct an *ex ante* fact-specific analysis of every conceivable future case is absurd on its face and is unsupported by any legal authority or citation record, in violation of the Court's Order on Post-Trial Briefs. (*See* CCRRCL ¶ 87 (discussing reasonableness test)). Indeed, the very cases Respondent cites are illustrative of the necessity of conducting a case-by-case, fact-specific assessment *after* an alleged violation has taken place.

The OSHA cases cited by Respondent have no bearing on the FTC's application of Section 5. (CCRRCL ¶ 96).

98. LabMD is, as a matter of law, a HIPAA-covered entity and the relevant standards are those in effect for the medical industry and applicable to HIPAA-regulated entities. 45 C.F.R. § 160.103; *Fabi Constr. Co.*, 508 F.3d at 1084; *Ensign-Bickford Co.*, 717 F.2d at 1422; *S&H Riggers*, 659 F.2d at 1280-83 (reasonable-person standard divorced from relevant industry standards or regulations violates due process); *Diebold, Inc.*, 585 F.2d at 1333.

Response to Conclusion No. 98:

This is a conspicuous attempt to make the same failed argument LabMD made to the Commission, that "HIPAA's comprehensive framework governing 'patient-information data-security practices' by HIPAA-regulated entities somehow trumps the application of the FTC Act to that category of practices." Comm'n Order Denying Resp't's Mot. to Dismiss at 11-12 (Jan. 16, 2014) (internal citation omitted). The Commission already rejected that argument, stating:

> HIPAA evinces no congressional intent to preserve anyone's ability to engage in inadequate data security practices that unreasonably injure consumers in violation of the FTC Act, and enforcement of that Act thus fully comports with congressional intent under HIPAA. . . . The Commission cannot enforce HIPAA and does not seek to do so. But nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act.

Id. at 12 (footnotes omitted). And:

> LabMD and other companies may well be obligated to ensure their data security practices comply with both HIPAA and the FTC Act. But so long as the

> requirements of those statutes do not conflict with one another, a party cannot plausibly assert that, because it complies with one of these laws, it is free to violate the other.

Id. at 13.

99. Industry standards and customs are not entirely determinative of reasonableness because there may be instances where a whole industry has been negligent. *See Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 723 (4th Cir. 1979) ("[T]he appropriate inquiry is whether under the circumstances a reasonably prudent employer familiar with steel erection would have protected against the hazard of falling by the means specified in the citation.").

Response to Conclusion No. 99:

The proposed conclusion is irrelevant because there has been no argument made by either party that any industry has been negligent. The proper test to apply to LabMD's data security is "reasonableness." (CCRRCL ¶¶ 86-87). The cited case is inapposite because OSHA's legal framework and requirements are inapposite to the unfairness analysis set forth in Section 5(n). (CCRRCL ¶¶ 96-97).

100. However, such negligence on the part of a whole industry cannot be lightly presumed and must be proven. *Diebold*, 585 F.2d at 1333.

Response to Conclusion No. 100:

The proposed conclusion is irrelevant because there has been no argument made by either party that any industry has been negligent.

101. Applicable medical industry standards were and are readily available. *See* 45 C.F.R. §§ 164.400-414 (breach notification rule); Health Insurance Reform: Security Standards, 68 Fed. Reg. 8344 (Feb. 20, 2003); Fed. Trade Comm'n, "Complying with the FTC's Health Breach Notification Rule," https://www.ftc.gov/tips-advice/business-center/guidance/complying-ftcs-health-breach-notification-rule (last visited August 9, 2015); Dep't of Health & Human Servs., "HIPAA Security Series: Security 101 for Covered Entities," http://www.hhs.gov/ocr/privacy/hipaa/administrative/securityrule/security101.pdf (last accessed Aug. 9, 2015).

Response to Conclusion No. 101:

This is not a proposed conclusion of law because it does not expound on any legal standard or proposition. As a statement of fact, it is misleading because this matter is about the

reasonableness of Respondent's data security practices, while the cited regulation, 45 C.F.R. §§ 164.400-414, and one of the guidance pieces, (Fed. Trade Comm'n, "Complying with the FTC's Health Breach Notification Rule," https://www.ftc.gov/tips-advice/business-center/guidance/complying-ftcs-health-breach-notification-rule), pertain to post-breach notifications, which address much different issues than *ex ante* data security practices.

The legal test of reasonableness applies across industries, and the Commission conducts a fact-specific analysis to determine whether a company's data security practices were unfair under Section 5. (CCRRCL ¶¶ 86-87).

102. LabMD and all other covered entities in the medical industry must follow HIPAA, HITECH, and HHS PHI data security regulations. *See, e.g.*, Applicability of Security Standards for the Protection of Electronic Protected Health Information, 45 C.F.R. § 164.302 ("A covered entity or business associate must comply with the applicable standards, implementation specifications, and requirements of this subpart with respect to electronic protected health information of a covered entity."); 45 C.F.R. § 160.103 (definition of a "covered entity").

Response to Conclusion No. 102:

Whether LabMD must follow HIPAA, HITECH, or HHS PHI data security regulations is irrelevant to this case because it must still comply with the FTC Act. Comm'n Order Denying Resp't's Mot. to Dismiss at 12 (Jan. 16, 2014) (dismissing LabMD's argument that HHS has exclusive authority over HIPAA covered entities as "without merit," and noting that "nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act."); CCRRCL ¶ 98.

103. LabMD has not violated HIPAA/HITECH. *See* Complaint Counsel's Amended Response To LabMD, Inc.'s First Set Of Requests For Admission, *In the Matter of LabMD*, Dkt. No. 9357, Responses No. 7 and No. 8, at pp. 8-9, appended to Complaint Counsel's Motion to Amend Complaint Counsel's Response to Respondent's First Set of Requests for Admission (Apr. 1, 2014); *see also* Compl., *In the Matter of LabMD*, Dkt. No. 9357 (Aug. 28, 2013).

Response to Conclusion No. 103:

The Court should disregard the proposed conclusion because it is irrelevant and not supported by the cited authorities. Respondent's HIPAA compliance or lack thereof is irrelevant to this proceeding, as Respondent has conceded. (CCRRCL ¶ 98). Furthermore, to the extent LabMD is citing to documents filed by Complaint Counsel for the proposition that LabMD did not violate HIPAA/HITECH, these documents do not support that proposition. The Complaint in this case does not mention HIPAA or HI-TECH, let alone state that LabMD has not violated those statutes. The cited responses to LabMD's Requests for Admission simply affirm that the Complaint in this case does not mention HIPAA or HI-TECH, and confirm that the FTC is not alleging violations of statutes outside the four corners of the Complaint.

104. As a matter of law, it is arbitrary, capricious, contrary to law, and a violation of due process for Complaint Counsel to allege and/or the Commission to determine unreasonableness without specific reference to HIPAA/HITECH standards and regulations. *See Fabi Constr. Co.*, 508 F.3d at 1084; *Ensign-Bickford Co.*, 717 F.2d at 1422; *S&H Riggers*, 659 F.2d at 1280-83.

Response to Conclusion No. 104:

The Court should disregard the proposed conclusion because HIPAA and HITECH are irrelevant to this case. (CCRRCL ¶ 98). In addition, the proposed conclusion is not supported by the cited authorities.

105. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that the entire medical industry was negligent or that HIPAA/HITECH regulations and standards were or are inadequate. *See Diebold, Inc*, 585 F.2d at 1336.

Response to Conclusion No. 105:

The proposed conclusion is irrelevant. The negligence of "the entire medical industry" is not at issue in this case. The relevant question is whether LabMD's data security was reasonable. (CCRRCL ¶ 87). To the extent LabMD is arguing that its practices are in

accordance with those of the entire medical industry, LabMD has presented no evidence on this issue. Nor is the adequacy of HIPAA or HITECH at issue in this case. (CCRRCL ¶ 98).

106. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's compliance with the HIPAA/HITECH regulations and standards causes or is likely to cause substantial harm to consumers.

Response to Conclusion No. 106:

Whether LabMD complies with HIPAA or HITECH is irrelevant to this case because it must still comply with the FTC Act. Comm'n Order Denying Resp't's Mot. to Dismiss at 12 (Jan. 16, 2014) (dismissing LabMD's argument that HHS has exclusive authority over HIPAA covered entities as "without merit," and noting that "nothing in HIPAA or in HHS's rules negates the Commission's authority to enforce the FTC Act."); CCRRCL ¶ 98.

107. As a matter of law, if Respondent reasonably relied on experts to design and implement its information technology system, then its data security practices cannot be "unreasonable." *See R.P. Carbone Constr. Co. v. OSHRC,* 166 F.3d 815, 819-20 (6th Cir. 1998) (reasonable reliance on subcontractors who were experts relieves contractor from liability) (citation omitted).

Response to Conclusion No. 107:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities, and is a misstatement of law.

First, to the extent the proposed conclusion asserts that LabMD reasonably relied on experts, it is a proposition finding of fact, not law, which is not supported by citations to the record and contradicted by the weight of evidence. To the extent the proposed finding implies that LabMD relied on *external* IT experts, it is contrary to the evidence: LabMD managed its network using in-house IT employees and did not rely on outside service providers for its network security from at least 2006. (CCFF ¶¶ 173, 175, 178, 182-183, 185-186, 188, 190; CX0737 (Hill Rebuttal Report) ¶ 24). The evidence shows that APT ceased providing services altogether to LabMD in or around March 2007. (CCFF ¶¶ 182, 190). In late 2006 and 2007,

LabMD replaced APT's services with additional internal IT employees that it hired. (CCFF ¶ 190). Furthermore, Christopher Maire testified that LabMD did not use outside contractors during his tenure as a IT employee for LabMD, which began in mid-2007. (CX0724 (Maire, Dep. at 105); CCFF ¶¶ 357-358). Accordingly, LabMD's argument rests on a flawed premise, as it did not rely on outside experts for most of the relevant time period. To the extent that LabMD is referring to its use of internal IT staff, this argument is unsupported by the law. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) ("It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." (citations omitted)).

Second, in support of this proposed conclusion, LabMD relies on a highly distinguishable case involving the Occupational Safety and Health Act (OSHA). *R.P. Carbone Constr. Co v. OSHRC*, 166 F.3d 815, 819-820 (6th Cir. 1998)). This case involves technical interpretations of workplace safety requirements and regulations that have no applicability to LabMD's utilization of certain IT contractors in limited circumstances. *Id.* Moreover, LabMD mischaracterizes the law by stating that "reasonable reliance on subcontractors who were experts relieves contractor from liability." Rather, courts interpreting OSHA have acknowledged that a primary contractor's reliance on a specialist to prevent hazards outside the contractor's area of knowledge *and over which the primary contractor has little to no control* may in certain circumstances negate the primary contractor's liability under OSHA (emphasis added). *See Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1083 (D.C. Cir. 2007) (finding that primary contractor was not entitled to rely on subcontractor to relieve itself of OSHA liability following parking garage collapse); *R.P. Carbone Constr. Co.*, 166 F.3d at 818-820 (affirming $1,500 citation for OSHA

violation against general contractor for failing to comply with worker-safety requirements involving fall protection and prevention measures).

Finally, assuming, *arguendo*, that this principle could extend outside of the OSHA context, it has no application here. LabMD has offered no evidence that it did not exercise control over the external IT experts it employed in limited instances. In fact, the record demonstrates the opposite. For instance, LabMD engaged APT to monitor LabMD only in response to problems, such as those related to Internet speed and connectivity. (CCFF ¶ 185). Indeed, LabMD's own Findings of Fact establish that LabMD shared IT functions with APT and did not relinquish control to APT. (RFF ¶ 157). Further, to the extent that LabMD's argument is premised on its own internal IT staff, it is laughable to suggest that LabMD exercised no control over its own IT staff. (*See, e.g.*, CCFF ¶¶ 313, 338 (IT employees reported to supervisors); CX0001 (LabMD Employee Handbook Rev. June 2004) (setting forth rules for employee conduct)).

VII. CONSTITUTIONAL DUE PROCESS VIOLATIONS

108. FTC is constrained by due process. *See Withrow*, 421 U.S. 35, 47 (1975); *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 305-06 (1924). This means that the Fourth Amendment applies. *See generally Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967) (protecting businesses subjected to regulatory searches); *OFCCP v. Bank of Am.*, 97-OFC-16, Admin. Review Bd.'s Decision and Order of Remand (Dep't of Labor Mar. 31, 2003) (protecting businesses from agency searches).

Response to Conclusion No. 108:

To the extent the proposed conclusion purports to be a rule of law, it is not fully supported by the authorities cited, because *Camara* does not address businesses being subject to regulatory searches, *see Camara v. Mun. Court of City & Cnty. of S.F.*, 387 U.S. 523, 525 (1967); *Gibson* does not address the Fourth Amendment, *see Gibson v. Berryhill*, 411 U.S. 564,

578, 579 (1973); and *OFCCP* doesn't "protect businesses from agency searches" but rather affirms in dicta that the Fourth Amendment's requirements apply to a search of a business by an administrative agency, *see In re Office of Fed. Contract Compliance Programs v. Bank of America*, 2003 WL 1736803, at *8 (DOL Adm. Rev. Bd. Mar. 31, 2003).

Furthermore, the Commission has resolved all of LabMD's due process claims, and thus the proposed conclusions are irrelevant and should not be adopted. (*See* Comm'n Order Denying Resp't's Mot. to Dismiss (Jan. 16, 2014); Comm'n Order Denying Resp't's Motion for Summ. Decision (May 19, 2014)).

109. The Commission must maintain the appearance of impartiality, free from the taint of prejudgment. *Pillsbury Co.*, 354 F.2d at 964 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954); *Aera Energy LLC*, 642 F.3d at 221 ("[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."); *United States v. Fensterwald*, 553 F.2d 231, 232 (D.C. Cir. 1977).

Response to Conclusion No. 109:

To the extent the proposed conclusion purports to be a rule of law, it is not fully supported by the authorities cited, because *Pillsbury* is the only case in which the *Commission's* appearance is at issue, *Pillsbury Co. v. F.T.C.*, 354 F.2d 952, 964 (5th Cir. 1966); *Accardi* pertains to literal prejudgment in the context of a deportation, where the Attorney General dictated a Board's decision, which is not analogous to the matter at hand, *see United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954); and whatever support *Fensterwald* offers is indirect, as the court's holding pertains to discovery and was premised upon a factual record that has no analog here, *United States v. Fensterwald*, 553 F.2d 231, 232 (D.C. Cir. 1977). To the extent the proposed conclusion is a quotation from *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220-21 (D.C. Cir. 2011), Complaint Counsel has no response.

Furthermore, the Commission has resolved all of LabMD's due process claims, and thus the proposed conclusions are irrelevant and should not be adopted. *See* Comm'n Order Denying Resp't's Mot. to Dismiss at 15-17 (Jan. 16, 2014); Comm'n Order Denying Resp't's Mot. for Summary Decision at 9-10 (May 19, 2014).

110. The Commission owed LabMD a fair and honest process. *See Maness v. Meyers*, 419 U.S. 449, 463-64 (1975) (Fifth Amendment applies to administrative proceedings); *Nec Corp. v. United States*, 151 F.3d 1361, 1370 (Fed. Cir. 1998); *see also In re Murchison*, 349 U.S. 133, 136 (1955). This rule applies with equal force in administrative proceedings. *See Gibson*, 411 U.S. at 579.

Response to Conclusion No. 110:

To the extent the proposed conclusion purports to be a rule of law, it is not fully supported by the authorities cited, because the Court in *Gibson* does not articulate a "rule" regarding a fair and honest processes but rather states that "[i]t has also come to be the prevailing view that '*(m)ost of the law concerning disqualification because of interest* applies with equal force to . . . administrative adjudicators," and the case stands for the proposition that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes," which is something not at issue here. *Gibson v. Berryhill*, 411 U.S. 564, 578, 579 (1973) (quoting K. Davis, Administrative Law Text s 12.04, p. 250 (1972). The Court in *Murchison* did not address administrative proceedings, and whatever support it offers is in dicta; its only due process holding was that "it was a violation of due process for the 'judge-grand jury' to try [the very persons accused as a result of his investigations],'" which does not apply here. *In re Murchison*, 349 U.S. 133, 136-137, 139 (1955).

Complaint Counsel notes that LabMD's due process rights have not been injured in this proceeding, and no evidence should be excluded. (CCRRCL ¶¶ 112, 114-115). Furthermore, the Commission has resolved all of LabMD's due process claims, and thus the proposed conclusions are irrelevant and should not be adopted. *See* Comm'n Order Denying Resp't's Mot. to Dismiss

at 15-17 (Jan. 16, 2014); Comm'n Order Denying Resp't's Mot. for Summ. Decision at 9-10 (May 19, 2014).

111. "The doctrine that the federal government should not be permitted to avail itself of its own wrongdoing is yet good law." *Oliva-Ramos v. Att'y Gen. of the United States*, 694 F.3d 259 (3rd Cir. 2012) (the exclusionary rule is permitted in federal administrative proceedings if evidence is obtained as a result of an egregious constitutional violation"); *EEOC v. Red Arrow Corp.*, 392 F. Supp. 64 (E.D. Mo. 1974) (After court was informed EEOC placed a newspaper ad charging defendant with racial discrimination and soliciting plaintiffs/witnesses, it ruled "[s]uch conduct is wholly and totally reprehensible and is inconsistent with the high standard of conduct required from an officer of the Court. This Court has never and shall never countenance such demeanor on the part of an attorney for to do so would undermine the very bulwarks of our jurisprudential heritage. . . . all fruits of the aforesaid impermissible publication will not be admissible in evidence in this action"); *see generally* Richard M. Re, *The Due Process Exclusionary Rule*, 127 Harv. L. Rev. 1885 (2014) (exclusionary rule is truly a due process rule).

Response to Conclusion No. 111:

To the extent the proposed conclusion purports to be a rule of law, it is not supported by the authority cited, because none of the cases Respondent cites contains the initial quotation. The parenthetical attributed to the court in *Oliva-Ramos* is also not supported, because the court's holding in *Oliva-Ramos* pertained to deportation/removal proceedings involving egregious or widespread Fourth Amendment violations, not to "administrative proceedings" more generally. *See Oliva-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259, 275 (3d Cir. 2012). Likewise, Respondent does not explain how the parentheticals it attributes to the *EEOC* case and the article by Richard Re article pertain to the matter at hand.

Regardless, LabMD's due process rights have not been injured in this proceeding, and no evidence should be excluded. (CCRRCL ¶¶ 112, 114-115). Furthermore, the Commission has resolved all of LabMD's due process claims, and thus the proposed conclusions are irrelevant and should not be adopted. *See* Comm'n Order Denying Resp't's Mot. to Dismiss at 15-17 (Jan. 16, 2014); Comm'n Order Denying Resp't's Mot. for Summ. Decision at 9-10 (May 19, 2014).

A. FTC/Tiversa Collaboration

112. Due process is offended if Complaint Counsel or its experts are allowed to rely on evidence obtained illegally or wrongfully or on any of the fruits thereof. *Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 651 (5th Cir. 1977); *Knoll Assocs. v. FTC*, 397 F.2d 530, 537 (7th Cir. 1968) (remanding case to FTC with instructions to reconsider without documents and testimony given or produced by or through witness who stole materials from respondent); *see also Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 125 (1956); *Rochin v. California*, 342 U.S. 165, 172-74 (1952).

Response to Conclusion No. 112:

The proposed conclusion is a misstatement of the law. As an initial matter, the Commission has already considered this question, and determined that the case should not be dismissed based on allegations regarding the provenance of evidence. In its ruling on LabMD's Motion for Summary Decision, the Commission wrote:

> [E]ven if we accepted as true the claims that Tiversa retrieved the Insurance Aging File without LabMD's knowledge or consent . . . , that Tiversa improperly passed on that file to Professor Johnson or others . . . , and that Tiversa touted its unique technology . . . , these facts would not resolve the ultimate questions we must decide in this case. In particular, they would not compel us, as a matter of law, to dismiss the allegations in the Complaint that LabMD failed to implement reasonable and appropriate data security and that such failure caused, or was likely to cause, unavoidable and unjustified harm to consumers. To the contrary, LabMD's factual contentions concerning Tiversa and the Sacramento Police Department are fully consistent with the Complaint's allegations that LabMD failed to implement reasonable and appropriate data security procedures.

Comm'n Order Denying Resp't's Mot. for Summ. Decision at 6-7 (May 19, 2014).

Furthermore, numerous courts have held in a Fourth Amendment analysis that there is no reasonable expectation of privacy in files made available for sharing on a P2P network. *See, e.g., U.S. v. Norman*, 448 Fed. App'x. 895, 897 (11th Cir. 2011); *U.S. v. Stults*, 575 F.3d 834, 843 (8th Cir. 2009); *U.S. v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008).

In any government investigation, the investigated party is protected by the Fourth Amendment's prohibitions on unreasonable searches and seizures, *Knoll Assocs., Inc. v. FTC*, 397 F.2d 530, 533 (7th Cir. 1968), and by the Due Process clause of the Constitution, *Atlantic*

Richfield Co. v. FTC, 546 F.2d 646, 647-48 (5th Cir. 1977). These protections apply to civil investigations as well as criminal. *Id*.

If the government obtains evidence improperly or illegally, a civil party is entitled to have such evidence and its fruits excluded from a proceeding. *Atlantic Richfield*, 546 F.2d at 651. However, the Fourth Amendment protects only against government action, not actions of a private party. *U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984) (Fourth Amendment is "wholly inapplicable" to searches by private parties); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Actions of a private party cannot violate the Fourth Amendment, even if the private party later gives any evidence obtained to the government. *See, e.g., U.S. v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) ("[W]here a private person delivers the fruits of his private search to police, that evidence is not excludable at trial on the basis that it was procured without a search warrant.").

113. Complaint Counsel may not use false evidence provided by a deceitful informant in this proceeding. *See Giglio v. United States*, 405 U.S. 150, 153 (1972) (presentation of known false evidence is incompatible with rudimentary demands of justice); *Morris v. Ylst*, 447 F.3d 735, 744 (9th Cir. 2006) (suspected perjury requires an investigation and this "duty to act 'is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it'").

Response to Conclusion No. 113:

The proposed conclusion is irrelevant as Complaint Counsel does not seek to introduce false evidence in this matter. Respondent has stipulated to the authenticity of the 1718 File, and has stipulated that the 1718 File, along with more than 900 other files, was available for sharing through LimeWire on the Billing Computer. (CCFF ¶¶ 1354-1358, 1367-1370).

114. Evidence illegally obtained is properly excluded in administrative proceedings. *Marshall v. Barlow's, Inc*., 436 U.S. 307 (1978); *Donovan v. Sarasota Concrete Co*., 693 F.2d 1061 (11th Cir. 1982) (OSHA citation hearing); *United States v. Widow Brown's Inn of Plumsteadville, Inc*., 1992 OCAHO LEXIS 3, 44, ALJ's Decision and Order (Dep't of Justice Exec. Office for Immigration Review Jan. 15, 1992).

Response to Conclusion No. 114:

The proposed conclusion is irrelevant and misleading. As stated above, the Fourth Amendment protects only against government action, not actions of a private party. *U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984) (Fourth Amendment is "wholly inapplicable" to searches by private parties); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). Actions of a private party cannot violate the Fourth Amendment, even if the private party later gives any evidence obtained to the government. *See, e.g.*, *U.S. v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) ("[W]here a private person delivers the fruits of his private search to police, that evidence is not excludable at trial on the basis that it was procured without a search warrant."). Evidence that was not obtained by the government is not subject to exclusion. *Clutter*, 914 F.2d at 778 ("[T]he exclusionary rule of the Fourth Amendment does not apply to a search and seizure by a private person not acting in collusion with law enforcement officials . . . ."). The cases relied upon by Respondent are inapposite; each of the cases Respondent cites involved searches conducted by government employees. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (OSHA inspector); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982) (OSHA citation hearing) (OSHA compliance officer); *U.S. v. Widow Brown's Inn of Plumsteadville, Inc*., 1992 OCAHO LEXIS 3, 44, ALJ's Decision and Order (Dep't of Justice Exec. Office for Immigration Review Jan. 15, 1992) (INS agents).

115. As the court held in *Knoll*:

> We hold that we have not only the power but the duty to apply constitutional restraints when pertinent to any proceeding of which we have jurisdiction, such as a statutory review of a federal commission decision. At stake here is the ordered concept of liberty of which Mr. Justice Holmes spoke in his dissenting opinion in Olmstead v. United States, 'apart from the Constitution the Government ought not to use evidence obtained and only obtainable by a criminal act.' In the same case, Mr. Justice Brandeis, likewise dissenting, said at 479: 'Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by

> men of zeal, well-meaning but without understanding.' And, at 485, Mr. Justice Brandeis added: 'Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' This principle, thus announced in dissenting opinions, has since been recognized by the Supreme Court as presently the law of the land. *Elkins v. United States*, 364 U.S. 206, 223, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960).

Knoll Assocs., 397 F.2d at 536-537.

Response to Conclusion No. 115:

The proposed conclusion is irrelevant and misleading. Only where the government directs or participates in a private party's unlawful search or seizure, may the action be attributed to the government and present a possible violation of the Fourth Amendment. In *Knoll Associates*, the court found that a private party stole documents for the purpose of assisting Commission counsel, 397 F.2d at 533-34, and that Commission counsel knew the documents were stolen. *Id.* at 537. The court concluded that "where . . . there is undenied evidence of a theft of corporate documents on behalf of the government for use in a then pending proceeding against the corporate owner of what was stolen, such theft . . . is . . . the equivalent of a search and seizure." *Id.* at 535 (internal quotations and citations omitted). The facts here do not support that similar inference.

"Misconduct by other actors is a proper target of the exclusionary rule only insofar as those others are 'adjuncts to the law enforcement team.'" *U.S. v. Herring*, 492 F.3d 1212, 1217 (11th Cir. 2007) (quoting *Arizona v. Evans*, 514 U.S. 1, 15 (1995). The Fourth Amendment protects an expectation of privacy against unreasonable government intrusion, not "the mere expectation . . . that certain facts will not come to the attention of the authorities." *Jacobsen*, 466 U.S. at 122. In this instance, the time lapse of over a year between when Tiversa first contacted

LabMD and provided the 1718 File to it and when the FTC sought the file from Tiversa through process indicates that Tiversa was not acting at the direction of or in conjunction with the Commission[3] when it obtained the file.[4] This falls squarely within the Supreme Court's holding in *Jacobsen* and *Burdeau*.

Therefore, even if Tiversa obtained the evidence in violation of the law, a question that need not be resolved, the Fourth Amendment does not mandate that the evidence be excluded in the FTC's proceeding against LabMD. *Clutter*, 914 F.2d at 778 ("[T]he exclusionary rule of the Fourth Amendment does not apply to a search and seizure by a private person not acting in collusion with law enforcement officials . . . .") This is in accord with Eleventh Circuit's observation in *Herring* that the purpose of the exclusionary rule is deterrence of government misconduct. *Herring*, 492 F.3d at 1216 (citing *U.S. v. Janis*, 428 U.S. 433 (1976)). Where the government did not participate in the seizure of the evidence, exclusion does not accomplish a deterrent purpose.

116. During the relevant time (2008-2010), Ga. Code Ann. § 16-9-92(11) provided that "Without authority includes the use of a computer or computer network in a manner that exceeds any right or permission granted by the owner of the computer or computer network."

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[3] In February 2008, Mr. Wallace downloaded the 1718 File from a P2P network. (Wallace, Tr. 1393-95; RX551). In May 2008, LabMD was informed the 1718 File was available on a P2P network and provided with a copy of the 1718 File downloaded from the P2P network. (CCFF ¶ 1395.) Mr. Wallace testified that LabMD was contacted about the 1718 File in an attempt to gain their business, and at a later time information about the 1718 File was provided to the FTC through a Civil Investigative Demand, which occurred in 2009. (Wallace, Tr. 1352-1353,1361-1362, 1365, 1376-1377; RX545; RX551).

[4] Professor Johnson also confirmed that the FTC did not participate in his research involving the 1718 File. CX0721 (Johnson Dep.) at 95.

Response to Conclusion No. 116:

Complaint Counsel does not dispute the content of Respondent's quotation, but notes that the proper citation is Ga. Code Ann. § 16-9-92(18), rather than (11), per the 2005 revision of the law effected by 2005 Georgia Laws Act 46 (S.B. 62). The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115). In addition, the record does not show that anyone violated this law in connection with Complaint Counsel's investigation or prosecution of this case. (CCRRCL ¶ 117).

117. Ga. Code. Ann. § 16-9-93(a) provided that any person who uses a computer or computer network with knowledge that such use is without authority and with the intention of "(1) Taking or appropriating any property of another, whether or not with the intention of depriving the owner of possession; (2) Obtaining property by any deceitful means or artful practice; or (3) Converting property to such person's use in violation of an agreement or other known legal obligation to make a specified application or disposition of such property" shall be "guilty of the crime of computer theft."

Response to Conclusion No. 117:

The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115). Furthermore, there is no evidence that this law was violated by anyone connected to this case. All the reported cases interpreting the "with knowledge" and "without authority" prongs of the statute concern parties that had a pre-existing relationship with one another, such as employer/employee. This indicates that specific knowledge of lack of authority is a necessary element for a violation of the statute. *See, e.g.*, *Fugarino v State*, 531 S.E.2d 187, 189 (Ga. Ct. App. 2000) (employee's vindictive actions indicated knowledge of lack of authority); *DuCom v State*, 654 S.E.2d 670 (Ga. Ct. App. 2008) (employee admitted she did not have authority to take data); *Vurv Tech. LLC v. Kenexa Corp.*, 2009 WL 2171042, at *5 (N.D. Ga. 2009) (employees downloaded files after forming intent to leave company); *Ware v. Am. Recovery Solutions Servs., Inc.*, 749 S.E.2d 775,

779 (Ga. Ct. App. 2013) (software developer disabled software after dispute over payment); *Putters v. Rmax Operating, LLC*, No. 1:13–CV–3382–TWT, 2014 WL 1466902, at *4 (N.D. Ga. Apr. 15, 2014) (complaint alleged employee knew he did not have authority). Where there is no indicated of knowledge of lack of authority, courts have declined to apply the law. *See, e.g.*, *Hodges v. Collins*, No. 5:12–CV–202 (MTT), 2013 WL 557183, at *14-15 (M.D. Ga. 2013) (employee regularly had authority to read supervisor's email); *Sitton v. Print Direction*, 718 S.E.2d 532 (Ga. Ct. App. 2011) (supervisor had authority to read email on employee's personal computer in employer's workplace).

As explained by Complaint Counsel's rebuttal expert Clay Shields, the Peer-to-Peer network ("P2P") operates through peers sharing files with other peers on the same network. (CX0738 (Shields Rebuttal Report) ¶¶ 14-15, 22; Shields, Tr. 834 ("The querying peer ends up with information about a file that's being shared and then it can download.")). The peer's sharing folder is similar to placing a box labeled "FREE" outside one's house with items for passersby take. (Johnson, Tr. 762, 781). Any peer who participates in the P2P network and copies files from another peers shared folder is not acting "without authority," and does not have knowledge that such use is without authority.

118. Ga. Code. Ann. § 16-9-93(b) provided "Any person who uses a computer or computer network with knowledge that such use is without authority" and with the intention of "any way removing, either temporarily or permanently any" data shall be "guilty of the crime of computer trespass."

Response to Conclusion No. 118:

The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115). Furthermore, the record does not show that any person violated this law in connection with Complaint Counsel's investigation or prosecution of this case. (CCRRCL ¶ 117).

119. Ga. Code. Ann. § 16-9-93(c) provided "Any person who uses a computer or computer network with the intention of examining any . . . medical . . . or personal data relating to any other person with knowledge that such examination is without authority shall be guilty of the crime of computer invasion of privacy."

Response to Conclusion No. 119:

The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115). Furthermore, the record does not show that any person violated this law in connection with Complaint Counsel's investigation or prosecution of this case. (CCRRCL ¶ 117).

120. Ga. Code. Ann. § 16-9-93(h) provided "Any person convicted of the crime of computer theft, computer trespass, computer invasion of privacy, or computer forgery shall be fined not more than $50,000.00 or imprisoned not more than 15 years, or both."

Response to Conclusion No. 120:

The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115). Furthermore, the record does not show that any person violated this law in connection with Complaint Counsel's investigation or prosecution of this case. (CCRRCL ¶ 117).

121. During the relevant time (2008-2010), 18 U.S.C. § 1030 prohibited unauthorized computer access to commit fraud and 18 U.S.C. § 1343 prohibited wire fraud.

Response to Conclusion No. 121:

The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115).

Furthermore, the record does not show that any person violated this law in connection with Complaint Counsel's investigation or prosecution of this case. (CCRRCL ¶ 117).

18 U.S.C. § 1030 is the federal Computer Fraud and Abuse Act ("CFAA"). The CFAA, like the Georgia CSPA, is a criminal statute that permits civil suits for violations. It, too, prohibits accessing a computer "without authorization." 18 U.S.C. § 1030(a)(2),[5] (4).[6] Courts have consistently held that accessing publicly available information, including a P2P sharing folder, is not "without authorization." *See, e.g.*, *Motown Record Co. L.P. v. Kovalcik*, No. 07-CV-4702, 2009 WL 455137, at *3 (E.D. Pa. 2009) ("The fact that the accessed files were in the [P2P] share folder negates the second element under the statute that Plaintiffs acted without authorization or exceeded the authorization given to them. No authorization was needed since the files accessed were accessible to the general public."); *Loud Records LLC v. Minervini*, 621 F. Supp. 2d 672, 678 (W.D. Wisc. 2009) (finding that "because the [P2P] files that plaintiffs allegedly accessed were accessible by the public, any allegation . . . that plaintiffs acted without authorization is tenuous at best"); *see also Cvent v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 933 (E.D. Va. 2010) (no violation of CFAA where a competitor copied content from a website to which "the entire world was given unimpeded access").

18 U.S.C. § 1343 is the federal criminal wire fraud statute and it contains three necessary elements: (1) the existence of a scheme to defraud; (2) the use of wire, radio, or television in interstate commerce to further the scheme; and (3) a specific intent to defraud. *See United States*

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[5] **(a)** Whoever--**(2)** intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--**(C)** information from any protected computer; shall be punished as provided in subsection (c) of this section.

[6] **(a)** Whoever--**(4)** knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period; shall be punished as provided in subsection (c) of this section.

v. Pelisamen, 641 F.3d 399, 409 (9th Cir. 2011). Respondent has not alleged any facts that relate to the three required elements of wire fraud.

122. During the relevant time (2008-2010), 42 U.S.C. § 1320d-5 provided "A person who knowingly and in violation of this part . . . obtains individually identifiable health information relating to an individual; or . . . discloses individually identifiable health information to another person, shall be punished" with fines and imprisonment, including $100,000 and 5 years imprisonment for "false pretenses" conduct and, if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, a fine of not more than $250,000, and imprisonment of not more than 10 years, or both.

Response to Conclusion No. 122:

The proposed conclusion is irrelevant because the 1718 File was not obtained by the government or anyone acting at the government's direction. (CCRRCL ¶ 115). In addition, the proper citation for this statute is 42 U.S.C. § 1320d-6 rather than 1320d-5. The record does not show that any person violated this law in connection with Complaint Counsel's investigation or prosecution of this case. (*See* CCRRCL ¶¶ 123-125 (addressing substantive arguments regarding application of 42 U.S.C. § 1320d-6)).

123. Tiversa unlawfully obtained the 1718 File. *See* 18 U.S.C. § 1030; 18 U.S.C. § 1343; 42 U.S.C. § 1320d-6; Ga. Code Ann. §§ 16-9-93 (2008).

Response to Conclusion No. 123:

The Court should disregard the proposed conclusion because the proposed conclusion is unsupported and a misstatement of law. The proposed conclusion fails because neither CFAA nor the Georgia CSPA prevent accessing publicly available information, including a P2P sharing folder. (CCRRCL ¶ 121 (addressing 18 U.S.C. § 1030 and Ga. Code Ann. §§ 16-9-93)). Likewise, Respondent has not alleged facts to support the three required elements of wire fraud,

18 U.S.C. § 1343[7]: (1) the existence of a scheme to defraud; (2) the use of wire, radio, or television in interstate commerce to further the scheme; and (3) a specific intent to defraud. *See United States v. Pelisamen*, 641 F.3d 399, 409 (9th Cir. 2011). Finally, Respondent's citation to the HIPAA statute is similarly inapposite. The U.S. Department of Justice, Office of Legal Counsel has opined that the provisions of 42 U.S.C. § 1320d-6 apply only to "covered entities," which include health plans, health care clearinghouses, certain health care providers and Medicare prescription drug card sponsors. *See* Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6, 29 Op. O.L.C. 76, 81 (2005) (stating that non-covered entities cannot directly violate 42 U.S.C. § 1320d-6 because it "simply does not apply to them"). To the extent that the proposed conclusion contends as an issue of fact that Tiversa is a covered entity, there is no evidence in the record – nor has Respondent otherwise asserted – that Tiversa is a covered entity, as defined by the statute and implementing regulations. *See* 42 U.S.C. § 1320d-1; 45 C.F.R. pt. 160.

124. Johnson and Dartmouth unlawfully obtained the 1718 File in violation of 42 U.S.C. § 1320d-6 because they did not have permission to do so from any consumer or patient listed therein.

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[7] 18 U.S.C. § 1343 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.").

Response to Conclusion No. 124:

The Court should disregard the proposed conclusion because the proposed conclusion is unsupported and a misstatement of law. The provisions of 42 U.S.C. § 1320d-6 apply only to "covered entities." (CCRRCL ¶ 123). To the extent that the proposed conclusion contends as an issue of fact that Johnson or Dartmouth is a covered entity, there is no evidence in the record – nor has Respondent otherwise asserted – that either is a covered entity, as defined by the statute and implementing regulations. *See* 42 U.S.C. § 1320d-1; 45 C.F.R. pts. 160 and 164, subpts. A and E.

125. Tiversa unlawfully disclosed the 1718 File to the Privacy Institute. 42 U.S.C. § 1320d-6.

Response to Conclusion No. 125:

The Court should disregard the proposed conclusion because the proposed conclusion is unsupported and a misstatement of law. The provisions of 42 U.S.C. § 1320d-6 apply only to "covered entities." (CCRRCL ¶ 123). To the extent that the proposed conclusion contends as an issue of fact that Tiversa or the Privacy Institute is a covered entity, there is no evidence in the record – nor has Respondent otherwise asserted – that either is a covered entity, as defined by the statute and implementing regulations. *See* 42 U.S.C. § 1320d-1; 45 C.F.R. pts. 160 and 164, subpts. A and E.

126. Allowing Complaint Counsel to use *any* of the evidence it obtained in this case violates LabMD's due process rights as a matter of law because *all* of its evidence is directly derived from unlawful conduct by Tiversa and FTC with respect to the 1718 File. *See Knoll Assocs.*, 397 F.2d at 536-537; *Interstate Commerce Com. v. Baird*, 194 U.S. 25, 45 (1902) (noting that the Fourth and Fifth Amendments "run almost into each other").

Response to Conclusion No. 126:

LabMD's due process rights have not been injured in this proceeding, and no evidence should be excluded. (*See* CCRRCL ¶¶ 108, 110-112, 114-115).

To the extent the proposed conclusion puts forth a factual assertion that the FTC has engaged in unlawful conduct, Complaint Counsel denies the allegation, and Respondent has failed to present any evidence in support of it.

127. Tiversa is FTC's "agent" as a matter of law. *See United States v. Johnson*, 196 F. Supp. 2d 795, 863 (N.D. Iowa 2002) ("[I]mplicit prearrangement between the government and an informant to gather information in return for a benefit establishes the informant's agency."); *Blum v. Yaretsky*, 457 U.S. 991 (1982). Therefore, the Fourth Amendment applies here.

Response to Conclusion No. 127:

The Court should disregard the proposed conclusion because it is unsupported and a misstatement of law. Tiversa is a third-party witness lacking any special relationship to the Commission. Respondent's contention to the contrary is belied by the very case to which it cites, which was subsequently reversed by the Court of Appeals for the Eighth Circuit.[8] Specifically, the Eighth Circuit held that the reasoning Respondent asks this Court to adopt was wrong as a matter of law. In a Sixth Amendment analysis, the Eighth Circuit held that "An informant becomes a government agent . . . only when the informant has been instructed . . . to get information about the particular defendant. To the extent that there was an agreement between [the purported agent] and the government, there is no evidence to suggest it had anything to do with [the defendant]." *United States v. Johnson*, 338 F.3d 918, 921 (8th Cir. 2003) (citing *Moore v. United States*, 178 F.3d 994 (8th Cir 1999) (internal citation and quotations omitted)).

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[8] Respondent's citation to *Blum* is inapposite and Respondent provides no pinpoint citation to guide Complaint Counsel or the Court's analysis. However, to the extent that *Blum* may be applicable, it supports Complaint Counsel's position that Tiversa is a third-party without any special relationship to the Commission. Specifically, in the Fourteenth Amendment context, the Supreme Court held that the government "can be held responsible for a private decision *only* when it has exercised *coercive power* or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982) (citations omitted) (emphasis added). The evidentiary record contains no evidence whatsoever of such conduct by the Commission or its staff.

Applied to the facts of this case, in which the Sixth Amendment is in no way implicated, the evidentiary record contains no evidence of an agreement between Tiversa and the Commission, and there is no evidence that even suggests that the Commission instructed Tiversa to obtain information regarding LabMD. (*See* CCFF ¶¶ 1393-1394). To the contrary, the time lapse of over a year between when Tiversa first contacted LabMD and provided the 1718 File to it and when the FTC sought the file through process indicates that Tiversa was not acting at the direction of or in conjunction with the Commission[9] when it obtained the file.[10]

Actions of a private party cannot violate the Fourth Amendment, even if the private party later gives any evidence obtained to the government. *See, e.g.*, *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) ("[W]here a private person delivers the fruits of his private search to police, that evidence is not excludable at trial on the basis that it was procured without a search warrant."); *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984) (Fourth Amendment is "wholly inapplicable" to searches by private parties); *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

To the extent that the Fourth Amendment applies – which it does not – numerous courts have held in a Fourth Amendment analysis that there is no reasonable expectation of privacy in files made available for sharing on a P2P network. *See, e.g.*, *United States v. Norman*, 448 Fed.

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[9] In February 2008, Mr. Wallace downloaded the 1718 File from a P2P network. (Wallace, Tr. 1393-95; RX551). In May 2008, LabMD was informed the 1718 File was available on a P2P network and provided with a copy of the 1718 File downloaded from the P2P network. (CCFF ¶ 1395.) Mr. Wallace testified that LabMD was contacted about the 1718 File in an attempt to gain their business, and at a later time information about the 1718 File was provided to the FTC through a Civil Investigative Demand, which occurred in 2009. (Wallace, Tr. 1352-1353,1361-1362, 1365, 1376-1377; RX545; RX551).

[10] Professor Johnson also confirmed that the FTC did not participate in his research involving the 1718 File. (CX0721 (Johnson, Dep. at 95).

App'x. 895, 897 (11th Cir. 2011); *United States v. Stults*, 575 F.3d 834, 842-43 (8th Cir. 2009); *United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008). Moreover, it is law of the case that the provenance of the 1718 File is not dispositive of the Complaint's allegations:

> [E]ven if we accepted as true the claims that Tiversa retrieved the Insurance Aging File without LabMD's knowledge or consent . . . , that Tiversa improperly passed on that file to Professor Johnson or others . . . , and that Tiversa touted its unique technology . . . , these facts would not resolve the ultimate questions we must decide in this case. In particular, they would not compel us, as a matter of law, to dismiss the allegations in the Complaint that LabMD failed to implement reasonable and appropriate data security and that such failure caused, or was likely to cause, unavoidable and unjustified harm to consumers. To the contrary, LabMD's factual contentions concerning Tiversa and the Sacramento Police Department are fully consistent with the Complaint's allegations that LabMD failed to implement reasonable and appropriate data security procedures.

Comm'n Order Denying Resp't's Mot. For Summ. Decision at 6-7 (May 19, 2014).

There is no Fourth Amendment violation in this case resulting from Tiversa's actions.

128. Due process also is offended as a matter of law because the record shows Tiversa disclosed to Complaint Counsel in 2009 that the true origin of the 1718 File was LabMD in Atlanta, Georgia, and so Complaint Counsel and FTC knew or should have known that CX 0019 and Boback's testimony in support thereof, were false and perjured. Nevertheless, Complaint Counsel's expert witnesses rendered reports and gave testimony based on the false evidence and perjured testimony.

Response to Conclusion No. 128:

The Court should disregard the proposed conclusion as it is unsupported by any legal authority, as required by the Court's Order on Pre-Trial Briefs. Moreover, the proposed conclusion is a misstatement of the law. LabMD's due process rights are not implicated by Tiversa's actions. (*See* CCRRCL ¶ 129). As a statement of fact, the proposed conclusion is unsupported by the evidentiary record. Tiversa did not inform Complaint Counsel that Tiversa had downloaded the file from LabMD's servers. (CX0020 (Tiversa: Properties of Insurance Aging File found); CX0019 (Tiversa: List of 4 IP Addresses where Insurance Aging File found); CX0703 (Boback, Dep. at 38-42)). While the spreadsheet that Complaint Counsel received in

2009 did identify an Atlanta IP address associated with LabMD, it did not indicate that Tiversa had downloaded the file from that IP address. To the contrary, when Complaint Counsel asked Tiversa's Rule 3.33 designee about the Atlanta IP address, Mr. Boback stated that Tiversa's research indicated that this had been the original source of the 1718 File, but that Tiversa had not downloaded the file from that IP address. (CX0703 (Boback, Dep. at 41-42)).

129. Due process is also offended as a matter of law because FTC abdicated its duty to investigate or corroborate Tiversa's conduct or allegations. *In re Big Ridge, Inc*., 36 FMSHRC 1677, 1739 (FMSHRC June 19, 2014) (Mine Safety and Health Review Commission excluded tainted evidence and found otherwise insufficient evidence to show violation of law); *United States v. Brown*, 500 F.3d 48, 56 (1st Cir. 2007) (authorities must "act with due diligence to reduce the risk of a mendacious or misguided informant").

Response to Conclusion No. 129:

The Court should disregard the proposed conclusion because it is unsupported and a misstatement of law. In support of its extraordinary contention that an agency violates due process by insufficiently "investigat[ing] or corroborat[ing]" the "conduct or allegations" of a third-party witness, Respondent relies on the *In re Big Ridge, Inc.* decision from the Federal Mine Safety and Health Review Commission. This assertion is strange, because the *Big Ridge* decision did not involve a third-party witness. Instead, in *Big Ridge*, a Federal Mine Safety and Health Review Commission Administrative Law Judge determined that the Mine Safety and Health Administration's failure to have accommodated a mine operator's statutory "walkaround" rights, *see* 30 U.S.C. § 813(f), violated due process. *In re Big Ridge, Inc*., 36 FMSHRC 1677, 2014 WL 2920572, at *45-48 (FMSHRC June 19, 2014). LabMD does not – and it cannot – identify an analogous right that the Commission denied it in this matter.

United States v. Brown is also inapposite. *Brown* stands for the unremarkable proposition that, to avoid violating the Fourth Amendment, a criminal law enforcement officer must consider whether an informant's information possesses "adequate indicia of reliability." *United States v.*

Brown, 500 F.3d 48, 54 (1st Cir. 2007) (citing *Alabama v. White*, 496 U.S. 325, 332 (1990)). In *Brown*, the court found that the due diligence requirement could be satisfied even without "eliminate[ing] the risk that an informant is providing erroneous information." *Id.* at 56. In any case, Complaint Counsel has established that LabMD's data security practices were unreasonable independent of any information received from Tiversa. (*See, e.g.*, CCFF ¶¶ 382-1110).

130. As a matter of law, FTC had a heightened duty to employ its Consumer Guard and Internet Lab and to take other reasonable measures to ensure Tiversa's claims were accurate and that Tiversa had not itself violated 42 U.S.C. § 1320d-6 before taking action against Respondent. *See Brown*, 500 F.3d at 56 (authorities must "act with due diligence to reduce the risk of a mendacious or misguided informant"); *United States v. Winchenbach*, 197 F.3d 548, 556 (1st Cir. 1999); *see also Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (in order to use evidence that has been acquired in a prohibited way, the government must have independent source for unlawfully obtained evidence).

Response to Conclusion No. 130:

The Court should disregard the proposed conclusion because it is unsupported and a misstatement of law. None of the cases cited support the proposition that the FTC has a duty, much less a "heightened duty," to use particular resources or unspecified measures to ensure that Tiversa's claims were accurate. These cases instead recite the uncontroversial proposition that the exclusionary rule precludes reliance on evidence gained from a violation of the Fourth Amendment. *United States v. Brown*, 500 F.3d 48, 56 (1st Cir. 2007); *United States v. Winchenbach*, 197 F.3d 548, 552-56 (1st Cir. 1999); *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). The Fourth Amendment is not implicated by Tiversa's actions because a private party's actions cannot violate the Fourth Amendment, even if the private party later gives any evidence it obtains to the government. *See, e.g.*, *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) ("[W]here a private person delivers the fruits of his private search to police, that evidence is not excludable at trial on the basis that it was procured without a search warrant."). In addition, numerous courts have held, in a Fourth Amendment analysis, that there is no

reasonable expectation of privacy in files made available for sharing on a P2P network. *See, e.g., United States v. Norman*, 448 Fed. App'x. 895, 897 (11th Cir. 2011); *United States v. Stults*, 575 F.3d 834, 842-43 (8th Cir. 2009); *United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008); *see also* CCRRCL ¶¶ 122-125 (applicability of 42 U.S.C. § 1320d-6 to Tiversa), ¶ 127 (Fourth Amendment).

131. However, FTC failed to exercise even reasonable due diligence, much less enforce its own subpoena, instead waiting until the close of its case-in-chief to seek leave to investigate the 1718 File's origins and verify Tiversa's and Boback's claims. *See* Compl. Counsel Mot. for Leave to Issue Subpoenas for Rebuttal Evidence at 4 (requesting information regarding "*how, when and where Tiversa found the 1718 File on P2P networks*") (emphasis added). As a matter of law, this violated Respondent's due process rights.

Response to Conclusion No. 131:

The Court should disregard the proposed conclusion because it does not expound on any legal standard or proposition. Moreover, it is unsupported by any legal authority, as required by the Court's Order on Pre-Trial Briefs. As a statement of fact, the proposed conclusion is unsupported by the evidentiary record. Complaint Counsel timely deposed a Rule 3.33 designee of Tiversa Holding Corporation (CX0703 (Boback Dep.)), and Complaint Counsel's reliance upon that designee's sworn testimony was not inappropriate, much less constitutionally infirm.

132. Any evidence obtained illegally or improperly in the course of FTC's investigation, and the fruits thereof, should be excluded from the record. *Atlantic Richfield Co.*, 546 F.2d at 651; *FTC v. Page*, 378 F. Supp. 1052, 1056 (N.D. Ga. 1974) (recognizing deterrence of governmental lawlessness would be served by application of the exclusionary rule regardless of the criminal or administrative nature of the proceedings involved, and regardless of the personal or corporate nature of the party aggrieved by the unlawful seizure).

Response to Conclusion No. 132:

The Court should disregard the proposed conclusion because LabMD's due process rights have not been injured in this proceeding, and no evidence should be excluded. (*See* CCRRCL ¶¶ 112, 114-115).

133. Due process is offended as a matter of law by Complaint Counsel's reliance on the civil investigative deposition of Curt Kaloustian. District of Columbia Rule of Professional Conduct 4.2; *United States ex rel. Mueller v. Eckerd Corp.,* 35 F. Supp. 2d 896 (M.D. Fla. 1999); *Camden v. State of Maryland,* 910 F. Supp. 1115 (D. Md. 1996) (prohibiting *ex parte* contact with the former employee of a organizational party when the lawyer knows that the former employee was extensively exposed to privileged information); *see also* FTC Operating Manual § 3.3.6.3 ("[I]t is customary to contact counsel prior to dealing with employees [of represented parties]."), *available at* https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf. Therefore, as a matter of law Complaint Counsel may not rely on his testimony or on any evidence derivative thereof, including the relevant opinions of Dr. Hill's expert opinion.

Response to Conclusion No. 133:

The Court should disregard the proposed conclusion because it is not supported by the citations and is a misstatement of the law.

Complaint Counsel did not violate due process or Commission rules when it conducted an investigational hearing of former LabMD employee, Curt Kaloustian, without LabMD counsel present. Complaint Counsel complied fully with all applicable rules of professional responsibility and the Commission's Rules of Practice governing Investigational Hearings when it deposed Curt Kaloustian, a former employee of LabMD, on May 3, 2013. Because the investigational hearing was proper, it is appropriate for Complaint Counsel and Dr. Hill to rely on Mr. Kaloustian's testimony and any derivative evidence. The exclusionary rule does not prevent Complaint Counsel and its experts from relying evidence obtained during the investigational hearing.

The investigational hearing did not offend due process because Complaint Counsel fully complied with all applicable Commission Rules for investigational hearings. While it is customary to contact counsel prior to dealing with *employees* of a represented party, FTC Operating Manual § 3.3.6.3, *available at* https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf, Mr. Kaloustian is not and was not at the time of the investigational hearing an employee of LabMD, and he had no continuing

relationship with the company. (CCFF ¶ 349 (Kaloustian's employment with LabMD ended in April or May 2009); CX0735 (Kaloustian, IHT at 1 (Investigational Hearing conducted May 3, 2013), 7-9 (no continuing relationship)).

LabMD misstates the law by citing the section of the Operating Manual regarding communication with current employees. The FTC Operating Manual does not require Complaint Counsel to notify opposing counsel when it interviews former employees or third party witnesses. *See* FTC Operating Manual § 3.6.7.6.3.2, *available at* https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf. Witnesses have the right to proceed with or without counsel. Comm'n Rule of Practice 2.9(b), 16 C.F.R. § 2.9(b). Mr. Kaloustian was informed that he was permitted to have counsel present, and he proceeded without counsel. (CX0735 (Kaloustian, IHT at 10)).

Moreover, the investigational hearing did not offend due process because Complaint Counsel fully complied with the D.C. Rule of Professional Conduct 4.2, which permits a lawyer to communicate with a nonparty employee of an organization without obtaining the consent of that organization's lawyer as long as the lawyer discloses to the employee "both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer." As a threshold matter, neither the text nor the underlying policies of Rule 4.2 provide a basis for extending its prohibition to former employees, such as Mr. Kaloustian. *See* D.C. Bar Legal Ethics Comm. Op. 287 (1998). Neither Commission Rules nor the D.C. Rules of Professional Conduct require Complaint Counsel to seek LabMD's consent before deposing its former employees. *See* Comm'n Rules of Practice 2.7(f)(3) and 2.9, 16 C.F.R. §§ 2.7, 2.9; *see also* D.C. Rule of Prof'l Conduct 4.2, Comment 6; D.C. Bar Legal Ethics Comm. Op. 287 (1998); ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 91–359 (1991); *Domestic*

Air Transp. Antitrust Litig., 141 F.R.D. 556, 561-62 (N.D. Ga. 1992); *United States v. W. Elec. Co.*, No. 82-0192, 1990 WL 39129, at *2 (D.D.C. Feb. 28, 1990).[11] As Mr. Kaloustian is a former employee with no continuing relationship with LabMD, it was proper for Complaint Counsel to contact him without LabMD's consent.

Complaint Counsel fully observed the safeguards contemplated by the rules of professional responsibility and scrupulously avoided intruding on LabMD's attorney-client privilege, attorney work product or trade secret protections, or confidentiality order during the investigational hearing. *See* D.C. Rule of Prof'l Conduct 4.2, Comment 6 (requiring Complaint Counsel not "seek to obtain information that is otherwise protected"); D.C. Rule of Prof'l Conduct 4.4(a) and Comment 1 (advising counsel not to engage in "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship"). Consistent with their professional obligations, Complaint Counsel specifically instructed Mr. Kaloustian not to reveal any information protected by LabMD's attorney-client privilege, work product or trade secret protections, or confidentiality agreement. (CX0735 (Kaloustian, IHT at 8-10)). During the deposition, Complaint Counsel instructed Mr. Kaloustian not to testify about the Tiversa LimeWire investigation and reminded Mr. Kaloustian, when appropriate, not to reveal privileged information. (CX0735 (Kaloustian, IHT at 74, 76, 88, 220, 259, 264, 269-271)). The D.C. Rules of Professional Conduct permit *ex parte* contact between Complaint Counsel and a former

[11] Respondent's reliance on case law interpreting Florida and Maryland State Bar Rules is unfounded, as neither Complaint Counsel who participated in the investigational hearing is a member of the Florida or Maryland bars. Moreover, the Maryland district court's interpretation of Rule 4.2, *Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996), is a minority position. The majority of courts that have considered the issue have concluded former employees are not included in the rule prohibiting *ex parte* communications, and counsel may contact former employees so long as they do not discuss privileged information. *See* D.C. Bar Legal Ethics Comm. Op. 287 (1998) (collecting cases).

employee of LabMD, subject to observance of certain safeguards. Complaint Counsel observed those safeguards; therefore, the ex parte contact was not improper.

Significantly, when LabMD counsel was present at the deposition of another former employee who had previously been examined in an *ex parte* investigational hearing, counsel did not take any opportunity to assert privilege over the former employee's current or previous testimony. Complaint Counsel conducted an investigational hearing and a deposition of Alison Simmons, a former IT employee and a contemporary of Mr. Kaloustian's at LabMD, and covered the same topics as were covered in the investigational hearing of Mr. Kaloustian. (*See* (CX0734 (Simmons, IHT, May 2, 2013); CX0730 (Simmons, Dep., Feb. 5, 2014); CCFF ¶¶ 371 (Simmons worked at LabMD from October 2006 through August 2009), ¶ 349 (Kaloustian worked at LabMD from October 2006 through April or May 2009)). At the investigational hearing, Complaint Counsel provided special instructions to Ms. Simmons regarding LabMD's attorney client privilege, work product and trade secret protections, and confidentiality agreement. (CX0734 (Simmons, IHT at 9-13)). Complaint Counsel followed a clear procedure throughout the investigational hearing to ensure that there was no inadvertent disclosure of privileged information. (CX0734 (Simmons, IHT at 42, 43, 67, 148, 157, 160, 161-62)). At Ms. Simmons' subsequent deposition, LabMD was present and represented by Ms. Lorinda Harris of Cause of Action. (CX0730 (Simmons, Dep. at 4)). Although Ms. Harris made a number of objections on the record, she did not take any opportunity to assert privilege over Ms. Simmons' current or previous testimony. (*See generally* CX0730 (Simmons, Dep. at 1-166)).

The blanket no-contact rule advocated by LabMD is inconsistent with interpretations of D.C. Rules of Professional Conduct and would impose burdens on the Commission's ability to obtain evidence. *See* D.C. Bar Legal Ethics Comm. Op. 287 (1998). First, it contradicts the

broad policy that litigants should have access to all relevant, non-privileged information regarding a matter and, derivatively, lawyers should be allowed to find facts as quickly and inexpensively as possible. *Id*. Second, it would act as a deterrent to the disclosure of information. Former employees would be reluctant to come forward with potentially damaging information if they could only do so in the presence of the company's attorney. Third, because former employees cannot bind the company by decision making, by conduct, or by admission with respect to a pending or prospective matter, Rule 4.2 does not prohibit ex parte contacts with these individuals. *Id*. The fact that former employees may possess information prejudicial to their former employer does not, without more, place those former employees in a position to bind the organization in the manner contemplated by Rule 4.2. *Id*. Given that Commission Counsel put in place safeguards to prevent the inadvertent disclosure of privileged material, this Court should not exclude the uncontroverted facts obtained during the investigational hearing of Mr. Kaloustian.

Finally, even if Mr. Kaloustian's investigational hearing somehow infringed on LabMD's privileges, the factual evidence adduced in that deposition should not be excluded. LabMD has not identified *any* alleged privileged information Mr. Kaloustian revealed. Indeed, it cites only to discrete factual matter it contends should be excluded. (*See* Resp't's Post-Trial Brief at 57 n.12). Putting aside the issue of LabMD's failure to prove the elements of attorney-client privilege, it is black letter law that facts are never protected by privilege:

> "A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."

Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981) (quoting *Phila. v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

Because Complaint Counsel's conduct during the investigational hearing was proper, the exclusionary rule should not prevent Complaint Counsel or its experts from using as evidence facts obtained from Mr. Kaloustian during the investigational hearing.

134. Due process is also offended as a matter of law by FTC's reliance on Boback's testimony in this case. *See Morris v. Ylist*, 447 F.3d 735, 744 (9th Cir. 2006) (suspected perjury requires an investigation and this "duty to act is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it"). FTC knew Boback lied no later than [redacted] and likely when it received CX 0019 in advance of Boback's November, 2013 deposition, and possibly before. It was obligated to take appropriate steps to protect the integrity of this proceeding. *See United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974) (holding that a prosecutor was obligated to inform the court and the grand jury when he became aware of perjured testimony).

Response to Conclusion No. 134:

The Court should disregard the proposed conclusion because it is predicated on a factual contention – that [redacted] – for which there is no evidentiary support[13] and because Complaint Counsel does not "rel[y] on

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[12] To the extent that Respondent's assertion refers to the transcript of the May 30, 2014 Evidentiary Hearing, the information to which Respondent refers was received *in camera*. Revealing it in Respondent's Public Post-Trial Conclusions of Law violates Rule 3.45(d), 16 C.F.R. § 3.45(d).

[13] Because Respondent provides no citation in support of its specious allegation, Complaint Counsel need not respond to the merits of Respondent's factual contention. For the Court's benefit, however, we note that this Court did not sit on [redacted] The evidentiary hearing proceeded on May 30, 2014, however, and during an *in camera* session initiated at the request of Respondent's counsel, [redacted]

Boback's testimony" in its post-trial brief or proposed findings of fact. *See* Compl. Counsel's Post-Trial Brief at 61 n.3 (August 10, 2014). This is not the first time Respondent has made such a spurious allegation, to which Complaint Counsel responded at length in its Opposition to Respondent's Motion to Dismiss. *See* Opp. to Resp't's Mot. to Dismiss at 3 n.4 (May 6, 2015). Moreover, Respondent opposed Complaint Counsel's immediate effort to do what Respondent now criticizes Complaint Counsel for having failed to accomplish: Determining how, when, and where Tiversa found the 1718 File on the P2P networks. *Compare* Compl. Counsel's Mot. for Leave to Issue Subpoenas for Rebuttal Evidence (July 8, 2014), *with* Resp't's Opp. to Mot. for Leave to Issue Subpoenas for Rebuttal Evidence (July 18, 2014)).

135. As matter of law, FTC's reliance on Tiversa to commence its inquisition, and its defense of Tiversa notwithstanding Boback's evident perjury, is precisely the kind of prosecutorial misconduct that violates LabMD's constitutional rights. *See Mesarosh v. United States*, 352 U.S. 1, 9 (1956) (holding that "it was not within the realm of reason" to require a district court judge to find truthful portions of perjured testimony); *United States v. Basurto*, 497 F.2d 781, 784 (9th Cir. 1974) (prosecutors failure to alert grand jury to perjured testimony violated the defendants constitutional rights); *see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutors use of false testimony to secure conviction violated the defendant's constitutional rights).

[redacted]

Response to Conclusion No. 135:

The Court should disregard the proposed conclusion because it is predicated on a factual contention – that Mr. Boback's deposition testimony constituted perjury – that has not been established.[14] Whether or not the finder of fact credits testimony from Tiversa's Rule 3.33 designee – testimony on which Complaint Counsel does not rely its post-trial brief or proposed findings of fact – the undisputed facts adduced through Complaint Counsel's investigation and the impartially-administered proceedings before this Court establish that LabMD lacked reasonable data security. (*See, e.g.*, CCFF ¶¶ 382-1110).

The Court should also disregard the proposed conclusion because the conclusion is a misstatement of the law. The cases to which Respondent cites in its Proposed Conclusion fail to support its position. *Napue* and *Basurto* stand for the unremarkable proposition that the knowing use of false testimony to secure a conviction violates due process. *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959); *United States v. Basurto*, 497 F.2d 781, 785-86 (9th Cir. 1974). Here, LabMD has offered no evidence – nor could any evidence be adduced – that Complaint Counsel has actual knowledge that any witness committed perjury. *See Ford v Hall*, 546 F.3d 1326, 1331-1332 (11th Cir. 2009) (defendant must establish that "the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false" (citation and internal quotation omitted)). Moreover, because Complaint Counsel has expressly *declined to rely* on the very testimony Respondent claims was "evident perjury," (*see* Compl. Counsel's Post-Trial Brief at 61 n.3 (August 10, 2014)), LabMD cannot show materiality. *See Ford*, 546

[14] Respondent's unsupported factual contention that Complaint Counsel "defen[ded] Tiversa" is belied by Complaint Counsel's Response – which did not oppose Respondent's sought relief – to Respondent's Motion to Refer Tiversa, Inc., Tiversa Holding Corp., and Robert Boback. *See* Compl. Counsel's Resp. to Resp't's Mot. to Refer Tiversa (July 1, 2015).

F.3d at 1332 (defendant must establish that the "use was material i.e., that there is any reasonable likelihood that the false testimony could have affected the judgment" (citations and internal quotations omitted)). Accordingly, neither opinion supports Respondent's spurious contention that Complaint Counsel engaged in prosecutorial misconduct or otherwise violated Respondent's constitutional rights.

Respondent's reliance on *Mesarosh* is also misplaced. There, the Court observed that in an administrative proceeding, where an administrative agency is the finder of fact, the agency is the proper entity to assess the record "shorn of . . . tainted testimony." *See Mesarosh v. United States*, 352 U.S. 1, 11-12 (1956) (distinguishing administrative actions from criminal jury trials) (citing *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956)).[15] By extension, in this administrative proceeding, if Complaint Counsel were to *rely* on the testimony Respondent identifies, and that testimony were to be discredited, this Court would be the proper entity to assess the remaining record. (*See also* CCRRCL ¶¶ 129-130 (Complaint Counsel's conduct with respect to information supplied by Tiversa does not implicate Respondent's due process rights)).

136. As a matter of law, FTC has, at a minimum, the duty to strip Boback's tainted testimony and all derivative evidence (including expert opinions) from the administrative record. *Subversive Activities Control Bd.*, 351 U.S. at 125 (agency must base findings on untainted evidence and must expunge perjured testimony from the record).

Response to Conclusion No. 136:

The Court should disregard the proposed conclusion because the proposed conclusion is a misstatement of law. *Subversive Activities Control Board* stands for the proposition that where a

[15] The "not within the realm of reason" language from *Mesarosh*, cited by LabMD, refers to the impropriety of expecting a judge to sort out facts *where the original trier of fact was a jury*. Understood in its proper context, *Mesarosh* stands for precisely the opposite result than that for which LabMD cites it.

liability determination is made based on later-questioned testimony, the matter should be remanded to the administrative agency to determine what witness testimony to credit in reaching its findings. *Communist Party of the U.S. v. Subversive Activities Control Board*, 351 U.S. 115, 125 (1956) (holding that the Court could not review the legal merits of a decision made on "a record containing such challenged testimony" and that "[t]he basis for challenging the testimony was not in existence when the proceedings were concluded before the [factfinder]"); *see also* CCRRCL ¶¶ 134-135. To the extent any testimony is questioned in this proceeding, this Court has all the evidence relating to the credibility of testimony before it. Furthermore, as set forth in Complaint Counsel's Post-Trial filings, Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Mr. Boback's testimony, CX0019, or expert conclusions that were predicated on Mr. Boback's testimony, and do not ask this Court to rely upon it. (*See* Compl. Counsel's Post-Trial Brief at 61 n.3 (August 10, 2014); *Subversive Activities Control Board*, 351 U.S. at 123 (noting that the factfinder's decision contained a total of 85 references to the testimony of the witnesses whose testimony was challenged, and the references "were made in support of every finding" under the eight statutory criteria at issue in the case).

To the extent the proposed conclusion argues that evidence should be excluded under the exclusionary rule of the Fourth Amendment, the Court should disregard the proposed conclusion because it is not supported by the cited authority. (*See* CCRRCL ¶¶ 112-115, 127, 132, (LabMD's due process rights have not been injured in this proceeding, and no evidence should be excluded)).

137. Courts expect that federal lawyers with prosecutorial powers will treat targets of government investigations fairly by providing a "more candid picture of the facts and the legal principles governing the case." *See, e.g.*, James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 Temp. Pol. & Civ. Rts. L. Rev. 633, 639 (2006).

Response to Conclusion No. 137:

To the extent that the proposed conclusion quotes Professor Moliterno's conclusion that "Courts expect that when dealing with a government lawyer, they get a more candid picture of the facts and the legal principles governing the case," Complaint Counsel has no specific response. The Court should otherwise disregard the proposed conclusion because it fails to cite any binding legal authority.

138. As a matter of law, first FTC and later Complaint Counsel were obligated to conduct a detailed and diligent investigation of Tiversa and the 1718 File before proceeding against LabMD. *See* 16 C.F.R. § 2.4 (stating that FTC's investigational policy mandates the "just . . . resolution of investigations").

Response to Conclusion No. 138:

To the extent that the proposed conclusion quotes Commission Rule 2.4, Complaint Counsel has no specific response. The Court should otherwise disregard the proposed conclusion because the cited legal authority does not impose an obligation on the Commission or Complaint Counsel to have conducted a "detailed" or "diligent" investigation of a third-party witness or the evidence it supplied. (CCRRCL ¶¶ 42, 129-130). Furthermore, Complaint Counsel's pre-complaint investigation is irrelevant to this proceeding (CCRRFF ¶ 1), and in any event the evidence shows that the 1718 File was available on a P2P network and downloaded from that network by a third party. (CCFF ¶¶ 1393-1396).

139. "A government lawyer 'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.'" *Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47-48 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Accordingly, "a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." *Id.* at 48.

Response to Conclusion No. 139:

To the extent that this conclusion of law appears to be a quotation from *Freeport-McMoran Oil & Gas Co.*, Complaint Counsel has no specific response.

C. Due Process: Notice[16]

140. FTC owed LabMD adequate *ex ante* notice of the medical data security practices that it purports to forbid or require. *See Satellite Broad. Co.*, 824 F.2d at 3 (traditional concepts of due process incorporated into administrative law preclude agencies from penalizing private parties for violating rules without first providing adequate notice of their substance); *see also City of Chicago v. Morales*, 527 U.S. 41, 63-64 (1999) (boundless enforcement discretion violates due process); *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926) (statute that either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates due process); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002). *Util. Solid Waste Activities Grp.*, 236 F.3d at 754; *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000);

Response to Conclusion No. 140:

The proposed conclusion is not supported by the authorities cited. Respondent received adequate notice of its duty to provide reasonable data security. The unfairness test in the FTC Act, 15 U.S.C. § 45(n), "is sufficient to give fair notice of what conduct is prohibited." Comm'n Order Denying Resp't's Mot. to Dismiss at 16 (Jan. 16, 2014); *see also* CCRRCL ¶¶ 89-93.

As the Commission explained in its Order Denying Respondent's Motion to Dismiss, "[e]very day, courts and juries subject companies to tort liability for violating uncodified standards of care, and the contexts in which they make those fact-specific judgments are as varied and fast-changing as the world of commerce and technology itself." Comm'n Order Denying Resp't's Mot. to Dismiss at 17 (Jan. 16, 2014). For example, doctors are often held liable in medical malpractice cases for violating uncodified standards of care that are established only in after-the-fact expert testimony. Moreover, when factfinders in tort cases find that

[16] For clarity, Complaint Counsel has preserved Respondent's section numbering. Section VII.B is not missing—it does not appear in Respondent's Proposed Conclusions of Law.

corporate defendants have violated an unwritten rule of conduct, they "can normally impose compensatory and even punitive damages," whereas the FTC is generally confined to equitable remedies. Comm'n Order Denying Resp't's Mot. to Dismiss at 17 (Jan. 16, 2014). Despite the broad relief available to private plaintiffs, no one would contend that a trial court violates fair notice principles when, by applying ordinary duty-of-care principles, it finds that a commercial defendant has acted negligently by inadequately safeguarding consumers. The application is no different with respect to Section 5. *See FTC v. Accusearch, Inc.*, No. 06–CV–105–D., 2007 WL 4356786, at *7 (D. Wyo. Sept. 28, 2007) (defendants "can reasonably be expected to know" the legal environment in which their industries operate); *accord Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (industry participants charged with knowledge of such agency guidance because "it is a vital part of [their] business to be knowledgeable in [their] field." (internal citation omitted)).

The proposed conclusion is misleading to the extent it suggests that the Complaint alleges violations of anything other than Section 5 of the FTC Act. (*See* CCRRCL ¶¶ 85 (discussing the test of reasonableness the FTC applies); ¶ 86 (stating that reasonableness applies across industries, and there is no distinct "medical data security 'reasonableness'"); ¶ 87, (setting forth the standard of proof the Commission must meet to declare an act or practice "unfair")).

141. Due process is offended if FTC regulates without providing "a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012).

Response to Conclusion No. 141:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. In *Fox Television*, the Court determined that the FCC's decision to bring action against a broadcaster for violation of a new indecency standard—that had been issued *after* the

broadcasts at issue had aired—violated fair notice standards. *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2318 (2012) ("In the 2004 *Golden Globes* Order, issued after the broadcasts, the [FCC] changed course and held that fleeting expletives could be a statutory violation. . . . In the challenged orders now under review the [FCC] applied the new principle . . . and determined fleeting expletives and a brief moment of indecency were actionably indecent." (citations omitted)). *Fox Television* is not in any way analogous to this proceeding. Respondent has not presented any evidence that the Commission has altered its application of Section 5 in the data security context such that LabMD could not have known the Commission's new position. Nor can it. The Commission has applied Section 5 in the data security context since at least 2000, (*see* FTC Business Center, Legal Resources, at https://www.ftc.gov/tips-advice/business-center/legal-resources?type=case&field_consumer_protection_topics_tid=249), has applied Section 5(n)'s unfairness standard in the data security context since at least 2005, (*see* Vision I Properties, LLC, Docket No. C-4135, *available at* https://www.ftc.gov/enforcement/cases-proceedings/042-3068/vision-i-properties-llc-et-al-matter), has issued dozens of consent decrees in data security matters under Section 5, (*see* FTC Business Center, Legal Resources; *see also* CCCL ¶ 19), and makes consistent allegations regarding data security failings and Section 5's application to such unreasonable acts or practices in each of those actions. As set forth in CCRRCL ¶ 140, Section 5 provides fair notice of what conduct is prohibited.

142. As a matter of law, the testimony of Daniel Kaufman, taken after the MTD Order was issued, demonstrates that FTC lacked constitutionally sufficient standards for LabMD to determine during the relevant time whether its PHI data security practices, which complied with HIPAA, also complied with Section 5(n).

Response to Conclusion No. 142:

The Court should disregard the proposed conclusion because it is unsupported by any legal authority or reference record as required by the Court's Order on Post-Trial Briefs. The Court should also disregard the proposed conclusion because it is vague and ambiguous with respect to the testimony of Daniel Kaufman. To the extent that this conclusion relates to the Commission's provision of adequate notice or due process, see CCRRCL ¶ 140.

The proposed conclusion is also misleading to the extent that it suggests that anything other than the reasonableness test discussed in CCRRCL ¶ 85 applies in this matter. (*See also* CCRRCL ¶ 86, (reasonableness applies across industries, and there is no distinct "medical data security 'reasonableness'")).

143. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD had actual notice of the Commission's position that Section 5 required something more or different than HIPAA, or, based on the practices of the medical industry during the relevant time, any reason to look for them. *See Diebold*, 585 F.2d at 1333.

Response to Conclusion No. 143:

The proposed conclusion is unsupported by any legal authority or record as required by the Court's Order on Post-Trial Briefs to the extent that it suggests that actual notice is required. As set forth in CCRRCL ¶ 140, Respondent had adequate notice of its responsibility under Section 5 to provide reasonable data security. As set forth in CCRRCL ¶ 96, OSHA cases are inapposite. Furthermore, Respondent's reliance on *Diebold* is misplaced. The *Diebold* court rejected the argument that ignorance of a requirement negates the conclusion that such a requirement existed. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332-33 (6th Cir. 1978). The court noted that business enterprises "should be alert to the probability that their conduct is of interest to one or more administrative agencies." *Id.* at 1337. In making its decision on the very

narrow requirement at issue, the Court limited its holding to the "particular 'facts of the case at hand.'" *Id.* at 1337-38 (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1974)).

As set forth in CCRRCL ¶ 98, the Commission already rejected Respondent's HIPAA argument. As the Commission points out in its Order Denying Respondent's Motion to Dismiss, "HIPAA evinces no congressional intent to preserve anyone's ability to engage in inadequate data security practices that unreasonably injure consumers in violation of the FTC Act, and enforcement of that Act thus fully comports with congressional intent under HIPAA." Comm'n Order Denying Resp't's Mot. to Dismiss at 12 (Jan. 16, 2014). The Commission's Order Denying Respondent's Motion to Dismiss also points out that the Commission has obtained favorable results by jointly investigating with HHS the data security practices of companies that may have violated Section 5 and/or HIPAA, and those efforts have been publicized. *Id.* at 11 n.18 (Jan. 16, 2014) (citing FTC press releases regarding CVS Caremark and Rite Aid Corp. settlements).

Finally, Respondent's argument that it was unaware of Section 5 is unavailing. *See FTC v. Accusearch, Inc.*, No. 06–CV–105–D., 2007 WL 4356786, at *7 (D. Wyo. Sept. 28, 2007) (defendants "can reasonably be expected to know" the legal environment in which their industries operate).

144. *S&H Riggers* ruled that "the difficulty with the Commission's approach lies more in its application than its formulation. Without articulating in this or any other case the circumstances in which industry practice is not controlling or the reasons it is not controlling in any particular case, the Commission would decide ad hoc what would be reasonable conduct for persons of particular expertise and experience without reference to the actual conduct which that experience has engendered. In other words, the Commission would assert the authority to decide what a reasonable prudent employer would do under particular circumstances, even though in an industry of multiple employers, not one of them would have followed that course of action." *See* 659 F.2d at 1280-81(internal citations omitted). Therefore, as a matter of law Complaint Counsel bears the burden of proving that LabMD did not adhere to data security practices customary in the medical industry at the time of the alleged violations. *See id.*

Response to Conclusion No. 144:

The proposed conclusion is misleading to the extent it suggests to the Court that the "Commission" referenced is the FTC. It is not. The "Commission" in the case cited by Respondent is not the FTC, but rather the Occupational Health and Safety Review Commission, an agency with a different authorizing statute enforcing different laws.

Further, the proposed conclusion is misleading to the extent that it suggests that the Commission must meet a burden other than that imposed by Section 5. As set forth in CCRRCL¶ 96, OSHA law and precedent are inapposite, and Respondent may not use them to impose additional burdens upon the Commission in establishing a violation of Section 5. (*See* CCRRCL ¶¶ 85-87 (setting forth the reasonableness test, making clear that there is no distinct "medical data security 'reasonableness,'" and stating the applicable law (Section 5)), ¶ 192 (agency has discretion to proceed by adjudication)).

145. The Commission acknowledged in its May 19, 2014 Order Denying Respondent LabMD, Inc.'s Motion for Summary Decision that in that order, as in the MTD Order, it ruled only on LabMD's facial fair-notice Due Process challenge and did not address "the extent LabMD is contending that Complaint Counsel, in the course of this adjudication, has yet to identify with specificity what data security standards it alleges LabMD violated" because at that time "the adjudication [was] still underway," nor did it address "other ways to interpret LabMD's statement that might implicate unresolved legal questions or material issues of fact." *See* Order Denying Respondent LabMD, Inc.'s Motion for Summary Decision at 7 n.12, *In the Matter of LabMD*, Dkt. No. 9357 (May 19, 2014).

Response to Conclusion No. 145:

As the Commission noted in its Order Denying Respondent's Motion for Summary Decision, to the extent LabMD was arguing in its motion "an alternative formulation of its legal argument that the Commission infringed its Constitutional due process rights by providing inadequate advance notice, the statement is unavailing because we have already rejected that legal argument." Comm'n Order Denying Resp't's Mot. for Summ. Decision at 7 n.12 (May 19, 2014).

The Commission and Complaint Counsel have consistently articulated that the test of whether a company's data security practices are unfair is reasonableness, Comm'n Statement Marking 50th Data Sec. Settlement (Jan 31, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf, and Complaint Counsel has developed ample evidence in the course of this proceeding that LabMD's data security practices fell short of reasonableness, and thus it violated Section 5.

As with the application of the reasonableness standard of care in any other circumstance, what constitutes reasonable data security practices for a company that maintains consumers' sensitive Personal Information will vary depending on the circumstances. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965) ("[T]he proscriptions in [Section] 5 are flexible, 'to be defined with particularity by the myriad of cases from the field of business.'") (internal citations omitted); *Brock v. Teamsters Local Union No. 863*, 113 F.R.D. 32, 34 (D.N.J. 1986) (reasonableness under prudent man standard "tried on the individual facts of [the] case" in light of standards developed in case law); *In re Zappos.com, Inc.*, 2013 WL 4830497, at *3-4 (D. Nev. Sept. 9, 2013) (applying "reasonable and prudent person" standard in negligence case for failure to safeguard electronically held data). Reasonableness turns on the amount and sensitivity of the information the company handles (going to the magnitude of injury from unauthorized access to information) and the nature and scope of the firm's activities (going to the structure of the firm's network, how the network operates, the types of security vulnerabilities and risks it faces, and feasible protections). *Cf. FTC v Accusearch, Inc.*, No. 06–CV–105–D., 2007 WL 4356786, at *7 (D. Wyo. Sept. 28, 2007) (defendants "can reasonably be expected to know" the legal environment in which their industries operate).

The complaint sets forth in paragraph 10 the ways in which LabMD's data security practices violated the unfairness provision of Section 5 by being unreasonable, and Complaint Counsel proved by a preponderance of the evidence that LabMD's security was not reasonable. (*See generally* CCFF ¶¶ 382-1110). For example, although guidelines for securing electronic health data in the healthcare context have been available since 1997 (CCFF ¶ 405), and national experts have developed and made available best practices for security data available at no cost online since 1997 (CCFF ¶ 1122-1123), LabMD failed to have a comprehensive written information security program. (CCFF ¶¶ 415-480). Likewise, although the relationship between risk assessments and reasonable security is very well known among IT practitioners and IT practitioners consider risk assessment the foundation for choosing security measures that are reasonable under their circumstances (CCFF ¶ 485), and frameworks for conducting risk assessments were widely available from a variety of courses including NIST, SANS, and GIAC (CCFF ¶¶ 489-496), LabMD failed to adequately assess risks on its network. (CCFF ¶¶ 524-808).

Although companies that maintain sensitive information should restrict access to that data by defining roles for their employees and specifying the types of data that are needed by employees in those roles (CCFF ¶ 812), LabMD did not limit employees' access to sensitive information that was not needed to do their jobs, even though such functionality was available to it in its operating system. (CCFF ¶¶ 811-827, 1151). LabMD did not act to purge unneeded data from its system, such as for the 100,000 consumers for whom it never performed testing (CCFF ¶¶ 832-849), although IT practitioners regularly purged unneeded data throughout the Relevant Time Period. (CCFF ¶ 831). Although training from nationally-recognized organizations was available at low or no cost (CCFF ¶¶ 1159-1162), LabMD did not provide data security training

to its employees. (CCFF ¶¶ 852-900). LabMD's own employee, Mr. Hyer, recognized based on his experience in IT that LabMD's password practices were less than adequate, not being enforced, and that the resulting passwords were not as complex as they should have been (CCFF ¶¶ 911, 913), but LabMD nevertheless failed to have or enforce written policies for strong passwords. (CCFF ¶¶ 919-993). While maintaining and updating operating systems of computers and other devices to protect against known vulnerabilities is integral to a company's data security strategy (CCFF ¶ 997), LabMD failed to patch vulnerabilities in its system. (CCFF ¶¶ 1003-1043). Finally, although LabMD's Windows operating system allowed it to restrict employee administrative access to their computers (CCFF ¶ 1181), and many other low cost measures were available to it (CCFF ¶¶ 1182-1185), LabMD failed to prevent or detect unauthorized access to Personal Information. (CCFF ¶¶ 1045-1110). In all these ways, and many more not detailed here, LabMD's data security was not reasonable under Section 5.

146. FTC lacks jurisdiction under Section 5 to bring a data security case against LabMD, and violated the Constitution's guarantee of due process by bringing this case. *See generally* LabMD, Inc.'s Motion to Dismiss, *In the Matter of LabMD*, Dkt. No. 9357 (May 27, 2014); LabMD, Inc.'s Motion to Dismiss, *In the Matter of LabMD*, Dkt. No. 9357 (Nov. 12, 2013); LabMD. Inc.'s Motion for Summary Decision, *In the Matter of LabMD*, Dkt. No. 9357 (Apr. 21, 2014); LabMD, Inc.'s Motion to Dismiss, *In the Matter of LabMD*, Dkt. No. 9357 (Apr. 24, 2015). To the extent applicable, the Commission's January 15, 2014 Order Denying Respondent LabMD, Inc.'s Motion to Dismiss and its May 19, 2014 Order Denying LabMD, Inc.'s Motion for Summary Decision are erroneous, but law of the case. LabMD believes that a federal court will find as much, for the reasons briefed and on the basis of additional authority including: *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-55 (D.C. Cir. 1998), *In re Bogese*, 303 F.3d 1362, 1368 (Fed. Cir. 2002), and *PMD Produce Brokerage v. USDA*, 234 F.3d 48, 51-52 (D.C. Cir. 2000).

Response to Conclusion No. 146:

The proposed conclusion is not supported by the authorities cited and is a misstatement of law. Respondent's Motions are not authority for any legal proposition, and the additional legal authority Respondent cites, which existed long before it filed its multiple motions, does not provide any grounds for the proposed conclusion.

The Commission has considered and rejected LabMD's arguments regarding jurisdiction and due process, ruling that the Commission has jurisdiction over data security practices and that LabMD has received adequate due process. Comm'n Order Denying Resp't's Mot. to Dismiss at 3-10, 14-17 (Jan. 16, 2014); Comm'n Order Denying Resp't's Mot. for Summ. Decision at 9-10 (May 19, 2014). And this Court has ruled on and denied Respondent's other Motions to Dismiss. Order Denying Resp't's Mot. to Dismiss at Close of Evid. Offered in Support of the Compl. at 2-3(July 21, 2015); Order Denying Resp't's Mot. to Dismiss at 2-3 (May 26, 2015). To the extent Respondent is asserting proposed conclusions based on arguments within its denied Motions, it has waived any that it failed to raise individually in its Post-Trial Briefing. *See* Order Denying Resp't's Mot. to Dismiss at 2 (May 26, 2015) (noting any issues raised in Motion "are properly briefed by the parties in their post-hearing briefs"); *see also* Order on Post-Trial Briefs (July 16, 2015).

147. The Commission acknowledged in its May 19, 2014 Order Denying Respondent LabMD, Inc.'s Motion for Summary Decision that, as in the MTD Order, it ruled only on LabMD's facial fair-notice Due Process challenge and did not address "the extent LabMD is contending that Complaint Counsel, in the course of this adjudication, has yet to identify with specificity what data security standards it alleges LabMD violated" because at that time "the adjudication [was] still underway," nor did it address "other ways to interpret LabMD's statement that might implicate unresolved legal questions or material issues of fact." *See* Order Denying Respondent LabMD, Inc.'s Motion for Summary Decision at 7 n.12, *In the Matter of LabMD*, Dkt. No. 9357 (May 19, 2014).

Response to Conclusion No. 147:

To the extent Respondent is quoting the Commission's Order, Complaint Counsel has no specific response.

To the extent Respondent implies that it did not have fair notice of the reasonableness test of Section 5, this assertion is incorrect. (CCRRCL ¶¶ 85-86, 145).

148. Due Process, as applied to LabMD, requires Complaint Counsel to prove that LabMD's PHI data security practices in any given year fell below those that were customary in that same year for a healthcare provider in the medical industry, not an IT company, of LabMD's size and

nature. *See S&H Riggers*, 659 F.2d at 1285; *see also Fla. Mach. & Foundry, Inc. v. OSHRC*, 693 F.2d 119, 120 (11th Cir. 1982) ("[A] standard of this generality requires only those protective measures which the employers' industry would deem appropriate. . . .") (emphasis added); *B&B Insulation v. OSHRC*, 583 F.2d 1364, 1370 (5th Cir. 1978) (industry-specific standard, *e.g.*, what is customary for sausage industry or roofing industry).

Response to Conclusion No. 148:

The proposed conclusion is misleading to the extent that it suggests that Complaint Counsel must prove anything other than a violation of Section 5. (*See* CCRRCL ¶¶ 144 (stating that the Commission need only meet the burden imposed by Section 5), ¶¶ 85-87 (setting forth the reasonableness test and applicable law (Section 5) and demonstrating that there is no distinct medical data security standard), ¶ 96 (noting that OSHA law and precedent are inapposite, and Respondent may not apply them to impose additional burdens upon the Commission in establishing a violation of Section 5), ¶ 192, (stating that case-by-case adjudication is appropriate)). Furthermore, LabMD holds Personal Information of the type held by organizations operating in many industries, such as names, dates of birth, Social Security numbers, and financial accounts numbers. (JX0001-A (Joint Stips. of Fact, Law, and Authenticity) at 1-2. LabMD also holds additional sensitive information relating to consumers' health. *Id.* This fact is relevant to the level of protection that LabMD must reasonably provide to data under its control, but does not dictate any particularized standard.

149. A party proffering expert opinion evidence bears the burden of proving its admissibility. *See Pride v. BIC Corp.*, 218 F.3d 566, 578 (6th Cir. 2000).

Response to Conclusion No. 149:

Complaint Counsel does not dispute that the proponent of expert testimony has the burden of establishing the pertinent admissibility requirements are met under Federal Rule of Evidence 702. *See* Fed. R. Evid. 702 advisory committee's note (2000 Amendment) ("Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

(1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). . . . Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).").

150. The Court must act as a gatekeeper, admitting only that expert testimony which is relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

Response to Conclusion No. 150:

Complaint Counsel does not dispute the court's role in the admission of expert testimony, but clarifies that Federal Rule of Evidence 702 governs the admission of expert testimony:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. *See also* Fed. R. Evid. 702 advisory committee's note (2000 Amendment) ("Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S. Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date

of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.").

151. For an expert opinion to be relevant "there must be a 'fit' between the inquiry in the case and the testimony." *United States v. Bonds*, 12 F.3d 540, 555 (6th Cir. 1993).

Response to Conclusion No. 151:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702. Federal Rule of Evidence 702 requires that the evidence or testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). "This condition goes primarily to relevance," and fit is an aspect of relevance, not a separate consideration. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993). "An additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Id.* (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). "The consideration has been aptly described by Judge Becker as one of 'fit.'" *Id.* (referring to *United States v. Downing*, 753 F.2d at 1242). *See also Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) ("Rule 702 requires that the expert testimony must fit the issues in the case. In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact.").

152. For an expert opinion to be reliable, *Daubert* requires the trier of fact to evaluate: (1) whether the analytic technique or opinion has been subjected to peer review or publication, (2) the "known or potential rate of error," (3) a "reliability assessment," in which the "degree of acceptance" within a scientific community may be determined and reviewed, and (4) the "testability" of the opinion. *Daubert*, 509 U.S. at 592-94.

Response to Conclusion No. 152:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Supreme Court identified a number of factors that courts *may* consider to determine whether expert testimony is relevant and reliable. The specific *Daubert* factors are: (1) whether "a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) the "degree of acceptance" or "general acceptance" of the theory within the relevant scientific community. *Daubert*, 509 U.S. at 593-94. These factors are not "a definitive checklist or test," and the inquiry envisioned by Rule 702 is "a flexible one." *Id*. Courts may consider other factors relevant to the expert's field. *See id.* at 593-95 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one"); *Kumho Tire Co., Ltd.*, 526 U.S. at 150-51 (*Daubert* factors are "meant to be helpful, not definitive"); *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 406 (3d Cir. 2003) ("[W]e note that expert testimony does not have to obtain general acceptance or be subject to peer review to be admitted under Rule 702.").

Indeed, the Court in *Kumho* emphasized that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd.*, 526 U.S. at 152. The reliability analysis of the basis of the expert's opinion may be informed by the expert's experience. *See also* Fed. R. Evid. 702 advisory committee's note (2000 Amendment) (noting that when an expert relies "primarily on experience, then the witness must explain how that experience leads to the conclusion

reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts"); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 691 F. Supp. 2d 448, 473 (S.D.N.Y. 2010) (applying advisory committee note's standard for experience qualifying an expert).

153. An expert must utilize in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Response to Conclusion No. 153:

Complaint Counsel does not dispute that the Court stated in *Kumho* that the objective of the gatekeeping requirement of *Daubert* is to "ensure the reliability and relevancy of expert testimony" and "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

154. An expert witness may testify to industry standards and the breach thereof but not to ultimate legal conclusions. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (excluding expert testimony labeling conduct as "wrongful" or "intentional," but allowing testimony on "industry standards" and "factual corporate norms").

Response to Conclusion No. 154:

The proposed conclusion is a misstatement of law. Federal Rule of Evidence 704 provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704. *See also Shahid v. City of Detroit*, 889 F.2d 1543, 1548 (6th Cir. 1989) ("Federal Rule of Evidence 704 permits a witness to testify in the form of an opinion or inference to an ultimate issue to be decided by the trier of fact.") (citations and internal quotations omitted).

155. Dr. Hill did not consider FTC standards and guidelines in rendering her opinion. This fact that was not before the Commission when it issued the MTD Order. Dr. Hill's inability to discern applicable FTC standards is sufficient to find the Commission has denied LabMD fair notice as a matter of law. *Fabi Constr. Co.*, 508 F.3d at 1084. If Complaint Counsel's standards

expert cannot find competent standards at FTC, then it would be unfair as a matter of law to presume LabMD, which relied on IT professionals experienced in the medical business in developing and operating its data security, to have been able to do so prior to this action. *See L.R. Willson & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n*, 698 F.2d 507, 513 (D.C. Cir. 1983).

Response to Conclusion No. 155:

The Court should disregard the proposed conclusion because it does not expound on any legal standard or proposition and instead offers statements of fact and attorney argument.

The proposed conclusion cites as support *Fabi Construction Co., Inc. v. Sec'y of Labor*, 508 F.3d 1077 (D.C. Cir. 2007) and *L.R. Willson & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n*, 698 F.2d 507, 513 (D.C. Cir. 1983) but neither of those cases concerns fair notice of FTC standards or guidelines and instead concern violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and regulations promulgated under it.

To the extent LabMD's proposed conclusion of law is simply an alternative formulation of its legal argument that the Commission infringed LabMD's Constitutional due process rights by providing inadequate advance notice, that legal argument has already been rejected. *See* Comm'n Order Denying Resp't's Motion for Summ. Decision at 7 n.12 (May 19, 2014). Complaint Counsel addressed Respondent's fair notice claims above. (CCRRCL ¶¶ 85, 89-90).

Finally, the only relevant test under the FTC Act is the reasonableness test. (CCRRCL ¶ 145; CCRRFF ¶ 88). Dr. Hill evaluated LabMD's data security practices under that standard, and opined that it failed to provide reasonable security for Personal Information within its computer network. (CX0740 (Hill Report) ¶ 49). In addition, although Dr. Hill did not consider FTC business guidance on data security, FTC guidance is consistent with Dr. Hill's approach and other data security standards and guidance that Dr. Hill considered, and that are available to companies. (CCRRFF ¶ 340).

D. Due Process: Fair Commission Treatment

156. FTC owes LabMD a constitutional duty of impartiality free from the taint of bias, prejudice, or pre-decision. FTC's misconduct and indiscretions, from case inception through the OGR investigation of Tiversa, and the statistical certainty that it will find a Section 5 violation *regardless of this Court's factual and legal findings,* breach this duty as a matter of law. *Withrow,* 421 U.S. at 47.

Response to Conclusion No. 156:

The proposed conclusion is without merit to the extent that it claims that LabMD was denied due process, as explained below. (*See* CCRRCL ¶¶ 157-163).

157. The Commission violated LabMD's due process rights as a matter of law because FTC's Rules of Practice render pre-trial motion practice futile. *See* Rules of Practice, 74 Fed. Reg. 20,205 (May 1, 2009); *see also Withrow,* 421 U.S. at 47.

Response to Conclusion No. 157:

The Court should disregard the proposed conclusion because it is not supported by the authorities cited and is a misstatement of the law. Respondent has not explained or set forth any authority for its claim that the FTC's revised Rules of Practice "render pre-trial motion practice futile." To the extent that its citation to the 2009 changes to the Rules of Practice is meant to argue that those changes rendered pre-trial motion practice futile, the argument is without merit. The 2009 revisions to the Rules of Practice were designed to "expedite resolution of a matter and save litigants resources." FTC, Proposed rule amendments; request for public comment, 73 Fed. Reg. 58832-01 (Oct. 7, 2008). Respondent has not set forth an argument that supports its claim the Commission's rules deny it due process.

158. Also, the Commission has violated LabMD's due process rights as a matter of law because it is a statistical certainty that the Commission will find LabMD's data security practices are unfair under Section 5(n) no matter what this Court does. Nichole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950–2011 and Integration of Decision Functions*, 81 Geo. Wash. L. Rev. 1684 (2013); *see also* Commissioner Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI Antitrust Chronicle (Nov. 2013) (in "100 percent of cases where the ALJ ruled in favor of the FTC, the Commission affirmed; and in 100 percent of the cases in which the ALJ ruled against the FTC, the Commission reversed"). The government

may not lawfully require a party to undergo the burdens of futile litigation. *Cont'l Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *accord Withrow*, 421 U.S. at 47.

Response to Conclusion No. 158:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities and is a misstatement of the law. Respondent has presented no evidence to support its claim that the Commission "will find LabMD's data security practices are unfair under Section 5(n) no matter what this Court does."

To the extent that this conclusion sets forth the proposed fact that Respondent is certain to be found to have violated Section 5 before the Commission, it is a finding of fact not a conclusion of law. Moreover, Respondent has not presented any witness with the expertise to demonstrate this proposed fact nor is there is anything in the record to support this proposed factual finding, and its reference to two articles cannot be used to establish this fact.

Even if Respondent had presented any evidence that the Commission has consistently decided against respondents in other cases, which Respondent has not, Respondent has offered no authority to support its claim that this would constitute a due process violation. Respondent has not shown that the Commission has in this case, already decided the "specific factual questions and is impervious to contrary evidence." *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995) (holding that recusal of FCC Commissioner not required absent such a showing) (citation and internal quotation omitted). A claim about the Commission's decisions in prior cases does nothing to show that it has already made its determination in this one. In order to show a denial of due process a party must show that the factfinder "has indicated his belief that named individuals or firms are violating the statute," not that the factfinder has found that other respondents in other unrelated cases have violated the law. *Dean Foods Co.*, Docket No. 8674, 70 F.T.C. 1146, 1966 WL 88197, at *107 (1966); *see*

also FTC v. Cement Institute, 333 U.S. 683, 701-02 (1948) (rejecting a claim that Commission's prior conclusions about underlying legal issues denied respondent due process in the present case). Respondent has not and cannot point to any authority or evidence on the record to support such a finding.

In any event, the articles cited by Respondent do not support their claim that the Commission certainly will find that LabMD violated Section 5. *See* Nicole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950–2011 and Integration of Decision Functions*, 81 Geo. Wash. L. Rev. 1684 (2013) (addressing only competition cases); Joshua Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI Antitrust Chronicle, November 2013 (addressing only FTC's competition cases). Even related to Competition cases, a recent competition case shows that Complaint Counsel does not win on every claim brought against a respondent. *McWane, Inc. & StarPipe Products, Ltd.*, Docket No. 9351, 2014 WL 556261, at *1 (2014) (dismissing all but one of seven counts brought against respondent). Looking to the more relevant universe of consumer protection cases, given how few consumer protection cases have been brought administratively, any statistical conclusions about patterns in past cases are without merit. At the very least, Respondent's claim that Complaint Counsel is assured a total victory before the Commission oversimplifies prior Commission cases. *See, e.g.*, *POM Wonderful, LLC*, Docket No. 9344, 155 F.T.C. 1, 2013 WL 8364895, at *55 (2013) (upholding ALJ's rejection of relief sought by Complaint Counsel).

159. Also, the Commission has violated due process as a matter of law by the appearance of prejudgment. *See In re Dean Foods Co.*, No. 8674, 1966 FTC LEXIS 32, *332-*335 (F.T.C. 1966) (fair hearing denied where a disinterested observer would have reason to believe that the Commission had in some measure adjudged the facts of a particular case in advance of hearing it); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement

helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.") (citations omitted); *Gibson*, 411 U.S. at 578-79; *In re Murchison*, 349 U.S. 133 136 (1953).

Response to Conclusion No. 159:

The Court should disregard the proposed conclusion to the extent that it claims that LabMD was denied due process due to appearance of prejudgment, as explained above. (*See* CCRRCL ¶ 158).

160. There are two ways in which a plaintiff may establish that he has been denied his constitutional right to a fair hearing before an impartial tribunal. First, the proceedings and surrounding circumstances may demonstrate actual bias on the part of the adjudicator. *See Taylor v. Hayes*, 418 U.S. 488, 501-04 (1974); *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). Second, the adjudicator's personal interest in the outcome of the proceedings may create an appearance of partiality that violates due process, even without any showing of actual bias. *Gibson*, 411 U.S. at 578; *see also Exxon Corp. v. Heinze*, 32 F.3d 1399, 1403 (9th Cir. 1994) ("[T]he Constitution is concerned not only with actual bias but also with 'the appearance of justice.'") (citation omitted).

Response to Conclusion No. 160:

To the extent Respondent is arguing that it has demonstrated that the Commission will base its decision on actual bias or has an appearance of impartiality, Complaint Counsel has demonstrated that Respondent has presented no record evidence or legal authority to support its contention. (CCRRCL ¶¶ 161-163).

161. The surrounding circumstances establish the Commission's bias as a matter of law because the Commission wrongfully used its enforcement authorities to retaliate against LabMD for speaking out against government overreach. *See Trudeau v. FTC*, 456 F.3d 178, 190-91, 190 n.22 (D.C. Cir. 2006) (official reprisal for constitutionally-protected speech violates the First Amendment); *see also White v. Baker*, 696 F. Supp. 2d 1289, 1312-13 (N.D. Ga. 2010).

Response to Conclusion No. 161:

The proposed conclusion is misleading, unsupported and a misstatement of law. Respondent has not introduced any evidence of any animus by any individual at the

Commission, nor of any causal nexus between any animus and any alleged retaliation. Rather, Respondent relies solely on the timing of the FTC enforcement action and Mr. Daugherty's public criticism of the FTC in his published book and in other public statements. This evidence is insufficient to overcome the presumption that agency officials "have properly discharged their official duties." *United States v. Armstrong*, 517 US 456, 463 (1996) (quoting *United States v. Chemical Foundation*, 272 US 1, 14-15 (1926)).

Courts have 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). Retaliation cannot be inferred from the timing of this enforcement action because the alleged protected speech occurred in the *middle* of an ongoing action – Mr. Daugherty's book was published three years *after* the FTC began investigating LabMD. *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.").

162. The circumstances suggest an appearance of partiality by the Commission against LabMD as a matter of law. The OGR investigation creates powerful institutional incentives for the Commission to prejudge this matter, because only a judgment against LabMD will rescue the Commission's reputation – any other result confirms government misconduct and creates potential civil liability. *Pillsbury Co.*, 354 F.2d at 964 (litigant's right to a fair trial is breached where agency officials in judicial function are subjected to powerful external influences).

Response to Conclusion No. 162:

The impartiality of an adjudicative tribunal is called into question "only if the congressional communications posed a serious likelihood of affecting the agency decision maker's ability to act fairly and impartially in the matter before it." Comm'n Op. and Order Denying Resp't's Mot. to Disqualify Chairwoman Edith Ramirez ("Comm'n Order on Mot. to

Disqualify") at 2 (June 15, 2015). Courts examine "not the mere fact of the inquiry, but whether there is a direct connection between the congressional involvement and the adjudicator's decision-making process." *Id.* at 2 (citing *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) and *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011)). Only where a Congressional inquiry focuses "directly and substantially upon the mental decisional processes of a Commission" may an agency's interaction with Congress intrude on "the right of private litigants to a fair trial and . . . appearance of impartiality." *Pillsbury*, 354 F.2d at 952; *see also State of Cal. ex rel. State Water Res. Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1552 (9th Cir. 1992) (no violation of *ex parte* communications provision of APA where agency engaged in correspondence with Congress on issues related to a proceeding where there was no showing that "any such communication unduly influenced the merits of the FERC decision").

The mere existence of a congressional investigation is not enough to demonstrate prejudgment. Comm'n Order on Mot. to Disqualify at 2-3. Such an absurd result would upend the adjudicative process. *See id.* at 2-3 ("[N]o agency adjudication could ever proceed if there were any congressional involvement . . . .").

163. Furthermore, the Commission has refused to comply with APA provisions governing *ex parte* contacts between it and Congress regarding matters relating to the facts and circumstances of this case. *See* 5 U.S.C. § 557(d)(1)(A); *Aera Energy LLC*, 642 F.3d at 220-22; *see also United Steelworkers of Am.*, 647 F.2d at 1213 (D.C. Cir. 1980) (APA prohibits off-the-record communication between agency decision maker and any other person about a fact in issue); *Pillsbury Co.*, 354 F.2d at 964. The only cure for such *ex parte* contact is full disclosure by Complaint Counsel of all *ex parte* communications and documents exchanged with Congress, which the Commission has refused to do. 5 U.S.C. § 557(d)(1)(A); *Aera Energy LLC*, 642 F.3d at 220-22. The Commission's refusal to disclose, when viewed in context of all the other facts and circumstances of this case, taints the proceeding with the appearance of bias as a matter of law.

Response to Conclusion No. 163:

If a communication relevant to the merits of the proceeding were to occur, the remedy that the APA and the Commission's Rules would require is disclosure of the communication.

See 5 U.S.C. § 557(d)(1)(C); 16 C.F.R. 4.7(c). Respondent has not styled its post-trial brief as a motion seeking any remedy, including disclosure of any communications, and its apparent request for relief is irrelevant to the disposition of this proceeding.

Furthermore, Respondent has made no showing that any Commissioner engaged in any communication *relevant to the merits* of the LabMD proceeding with Members of Congress or any other third party that would indicate bias. The Commission has held that "[t]he circumstances provide no basis to believe that the Oversight Committee's inquiry has impaired Chairwoman Ramirez's (or the Commission's) ability to render a fair and impartial decision in this case." Comm'n Order on Mot. to Disqualify at 3 (citing *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994)); *see also California ex rel. State Water Res. Control Bd. v. Fed. Energy Regulatory Comm'n*, 966 F.2d 1541, 1552 (9th Cir. 1992) (no violation of *ex parte* communications provision of APA where agency engaged in correspondence with Congress on issues related to a proceeding where there was no showing that "any such communication unduly influenced the merits of the FERC decision"). The inquiries from a member of Congress in this matter related to an evidentiary source. Comm'n Order on Mot. to Disqualify at 2. They did not focus "directly and substantially upon the mental decisional processes of a Commission." *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). Only in that circumstance may an agency's interaction with Congress intrude on "the right of private litigants to a fair trial and . . . appearance of impartiality." *Id.*

VIII. COMPLAINT COUNSEL'S EXPERT DEFICIENCIES

164. Complaint Counsel introduced testimony from three expert witnesses and one rebuttal expert to prove its case. When ruling on expert opinions, "courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue." *In re McWane, Inc.*, 2012 FTC LEXIS 142, at *8 (F.T.C. Aug. 16, 2012) (citations omitted).

Response to Conclusion No. 164:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

Federal Rule of Evidence 702 governs the admission of expert testimony:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In *Daubert*, the Supreme Court identified a number of factors that courts may consider to determine whether expert testimony is relevant and reliable. The specific *Daubert* factors are: (1) whether "a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) the "degree of acceptance" or "general acceptance" of the theory within the relevant scientific community. *Daubert*, 509 U.S. at 593-94. These factors are not "a definitive checklist or test," and the inquiry envisioned by Rule 702 is "a flexible one." *Id.* at 593-94. In *Kumho*, the Court emphasized that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd.*, 526 U.S. at 152. Courts may consider other factors relevant to the expert's field. *See Daubert*, 509 U.S. at 593-95 ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150-151 (1999) (*Daubert* factors are "meant to be helpful, not definitive"); *Schneider ex rel. Estate of Schneider*

v. Fried, 320 F.3d 396, 406 (3d Cir. 2003) ("[W]e note that expert testimony does not have to obtain general acceptance or be subject to peer review to be admitted under Rule 702"). The proponent of expert testimony has the burden of establishing the pertinent admissibility requirements are met under Federal Rule of Evidence 702. *See* Fed. R. Evid. 702 advisory committee's note (2000 Amendments) (". . . the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

165. *Daubert* mandates a "rigorous three-part inquiry" assessing: (1) the expert's qualifications; (2) the reliability of the expert's methodology; and (3) whether the expert's testimony assists the factfinder, "through the application of scientific, technical, or specialized expertise. . . ." *Daubert*, 509 U.S. 579; *see Hendrix v. Evenflo*, 609 F.3d 1183, 1194 (11th Cir. 2010); *AG of Okla. v. Tyson Foods, Inc*., 565 F.3d 769, 780 (10th Cir. 2009). Complaint Counsel bears the burden of showing by preponderant evidence that an expert's proposed testimony independently satisfies all three prongs. *See id*.; *see generally Amorgianos v. Amtrak*, 303 F.3d 256, 267 (2d Cir. 2002) ("expert's analysis [must] be reliable at every step").

Response to Conclusion No. 165:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). (*See* CCRRCL ¶ 164).

166. A witness who invokes 'my expertise' rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term." *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005).

Response to Conclusion No. 166:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See* CCRRCL ¶ 164; Fed. R. Evid. 702 advisory committee's note (2000 amendments) (noting that when an expert relies "primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts"); *Pension Comm. of the Univ. of Montreal Pension*

Plan v. Banc of Am. Sec., 691 F. Supp. 2d 448, 473 (S.D.N.Y. 2010) (applying advisory committee note's standard for experience qualifying an expert).

The proposed conclusion relies on *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005), where the proposed expert "all but conceded that he had not applied 'reliable principles and methods'" to generate projections of lost business and lost profits caused by defects in merchandise, and instead pointed only to "my expertise" or some variant when asked to explain what methods he had used. *Zenith Elecs. Corp.*, 395 F.3d at 418-19. There is no such testimony in this proceeding.

167. Nothing requires a court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. *See Gen. Electric v. Joiner*, 522 U.S. 136, 146 (1997).

Response to Conclusion No. 167:

The proposed conclusion is misleading to the extent that it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See* CCRRCL ¶ 164; *see also* Fed. R. Evid. 702 advisory committee's note (2000 Amendments) ("Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S. Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony.

168. An expert's bald assurance of validity is not enough to show reliability. Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this

will require some objective, independent validation of the expert's methodology. *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1316 (9th Cir. 1995). Testimony based on insufficient or incorrect facts is not reliable. *See Allen v. LTV Steel Co.*, 68 Fed. Appx. 718, 721-22 (7th Cir. 2003); *Guillory v. Domtar Indus*., 95 F.3d 1320, 1330-1331 (5th Cir. 1996).

Response to Conclusion No. 168:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). (*See* CCRRCL ¶¶ 166-167). Federal Rule of Evidence 702 governs the admission of expert testimony:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

(Fed. R. Evid. 702). In *Daubert*, the Supreme Court identified a number of factors that courts may consider to determine whether expert testimony is relevant and reliable. The specific *Daubert* factors are: (1) whether "a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) the "degree of acceptance" or "general acceptance" of the theory within the relevant scientific community. *Daubert*, 509 U.S. at 593-94. These factors are not "a definitive checklist or test," and the inquiry envisioned by Rule 702 is "a flexible one." *Id.* at 593-94. In *Kumho*, the Court emphasized that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co., Ltd.*, 526 U.S. at 152. Courts may consider other factors relevant to the expert's field. *See Daubert*, 509 U.S. at 593-95 ("The inquiry envisioned by Rule 702 is, we

emphasize, a flexible one"); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150-151 (1999) (*Daubert* factors are "meant to be helpful, not definitive"); *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 406 (3d Cir. 2003) ("[W]e note that expert testimony does not have to obtain general acceptance or be subject to peer review to be admitted under Rule 702"). The proponent of expert testimony has the burden of establishing the pertinent admissibility requirements are met under Federal Rule of Evidence 702. *See* Fed. R. Evid. 702 advisory committee's note (2000 Amendments) (". . . the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.").

169. For example, in a case where the expert witness formed an opinion that coal dust caused the plaintiffs' symptoms based on the experts' knowledge about coal dust exposure generally plus the plaintiffs' subjective beliefs that they had been exposed to coal dust, not a scientific determination that they had been exposed, his "opinion was not based upon 'sufficient facts or data," and therefore was properly excluded. *Korte v. ExxonMobil Coal USA, Inc.*, 164 Fed. Appx. 553, 557 (7th Cir. 2006); *cf. Nunez v. BNSF Ry. Co.*, 730 F.3d 681, 684 (7th Cir. 2013).

Response to Conclusion No. 169:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶¶ 164, 166).

170. An expert's testimony must "fit" the case at hand. For example, the testimony of a chemistry expert that a ladder had a manufacturing defect because of a lack of adhesion between its chemical components did not fit the facts of the case because the legal standard for a manufacturing defect was whether the product deviated in a material way from the industry's manufacturing specifications, and the expert did not assess whether the ladder met those standards. *See Leverette v. Louisville Ladder Co*., 183 F.3d 339, 341 (5th Cir. 1999).

Response to Conclusion No. 170:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702. Rule 702 requires that the evidence or testimony "will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). "This condition goes primarily to relevance." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-92

(1993) (citing *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985) ("An additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"); "The consideration has been aptly described by Judge Becker as one of 'fit.' *Ibid.*"). *See also Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) ("Rule 702 requires that the expert testimony must fit the issues in the case. In other words, the expert's testimony must be relevant for the purposes of the case and must assist the trier of fact.") (exclusion of expert testimony held abuse of discretion where expert had ample experience and his academic background and teaching position demonstrated he was highly knowledgeable about the relevant subject matter). (*See* CCRRCL ¶ 164; *see also* CCRRCL ¶¶ 172 (Dr. Hill's testimony fits the case), ¶ 182 (Mr. Kam's testimony fits the case)).

171. An expert's opinion is presumed unreliable when driven by a financial incentive. *Lust by & Through Lust v. Merrell Dow Pharms.*, 89 F.3d 594, 597-98 (9th Cir. 1996); *see also Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351, 1359 (N.D. Ga. 1999).

Response to Conclusion No. 171:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities. It is also misleading. In *Lust By and Through Lust v. Merrell Down Pharmaceuticals, Inc.*, the court considered the narrow, fact-driven question of whether an expert's scientific opinion regarding the effects of a pharmaceutical drug was reliable. 89 F.3d 594 (9th Cir. 1996). As part of this inquiry, the court noted "[i]t is not unreasonable to presume that [the expert's] opinion on [the pharmaceutical drug] was influenced by a litigation-driven financial incentive" where plaintiff's scientific research was not peer-reviewed and he was "already a professional plaintiff's witness" when one of his scientific articles was published. *Id.* at 597-98. However, the *Lust By and Through Lust* court also held that despite the presumption, the expert still "could have convinced the district court that his methodology was nonetheless

scientific…." *Id.* *Lust By and Through Lust* does not, as LabMD contends, stand for the proposition that there is any general "presumption" of unreliability. While the court in *Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351, 1359 (N.D. Ga. 1999), cites to *Lust By and Through Lust*, it does not discuss, let alone support, any "presumption" of unreliability tied to "a financial incentive."

A. Dr. Hill

172. Dr. Hill's opinion does not "fit" this case as a matter of law for she evaluated LabMD's data security using broad, general IT principles from 2014 and without reference to or apparent knowledge of medical industry standards and practices during the relevant time.

Response to Conclusion No. 172:

The proposed conclusion is unsupported, misleading, and irrelevant. The Court should disregard the proposed conclusion because there is no citation to authorities, in violation of the Court's Order on Post-Trial Briefing. The proposed conclusion is misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Dr. Hill that do not "fit" the facts of this case.[17] (*See* CCRRCL ¶ 170). Dr. Hill assessed the adequacy of LabMD's information security practices using principles and concepts that were widely used by information security professionals, including in the medical industry, between 2005 and 2010, and even earlier. (Hill Tr. 234-235). These principles, guidelines, and standards are common across all industries and data using computer networks. (Hill Tr. 234-235; CX0740 (Hill Report) ¶¶ 64-66; RX0524 (Hill, Dep. at 61-62)). Dr. Hill opined that LabMD's security practices were unreasonable from the perspective of the information security industry, taking into account the "amount and nature of the data maintained within LabMD's network, LabMD's network and security practices, risks

[17] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony.

and vulnerabilities on LabMD's network, and the cost of remediating those risks and vulnerabilities." (CX0740 (Hill Report) ¶ 49). Moreover, Respondent admits that its compliance with HIPAA is irrelevant in this matter. (CX0765 (LabMD's Resps. to Second Set of Discovery) at 12-13). The Commission has held that under the FTC Act the test used to judge whether security practices are reasonable is the same in medical and other industries. Comm'n Order Denying Resp't's Mot. to Dismiss at 11-12 (Jan. 16, 2014). Dr. Hill's opinions are relevant and will assist the Court.

173. She considered only the HIPAA security rule but did not consider the rest of the statutory or regulatory HIPAA/HITECH data security regime or perform the "scalability" analysis HIPAA requires to differentiate between large and small medical providers. However, "scalability" is a key tenet of HIPAA's security standard, providing that data security compliance must be judged according to the size and nature of the medical provider in question. *See* Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334, 8338-49, 8351, 8359-64, 8367-69, 8372-73 (Feb. 20, 2003); *see also* 45 C.F.R. Parts 160, 162, 164.

Response to Conclusion No. 173:

The proposed finding is unsupported, misleading, and irrelevant. (*See* CCRRCL ¶¶ 14, 16-18, 94 (HIPAA is irrelevant to this proceeding), ¶ 172 (Dr. Hill's testimony fits this case)).

To the extent the proposed conclusion contains a factual allegation, it is not supported by any reference to the record in violation of the Court's Order on Post-Trial Briefs. Furthermore, as a factual proposition, Respondent's proposed finding that Dr. Hill did not evaluate LabMD's data security practices in light of the size and complexity of its business and the Personal Information it collected and maintains, is contradicted by the record. (*See* CCRRFF ¶ 318).

174. Also, Dr. Hill testified that LabMD should have designed its IT system differently. In cases where experts have testified that a product should have employed an alternative design, even where the alternative designs "involve only simple components and widely-accepted engineering principle[s]," the alternative design must have been tested and found appropriate. *Cummins v. Lyle Indus.*, 93 F.3d 362, 368 (7th Cir. 1996). Otherwise, the expert is offering only "unverified statements," "unsupported by any scientific method," constituting a "type of unsubstantiated testimony." *See id.* at 368-69. Dr. Hill, in rendering her opinion, proposed an ideal hypothetical data security system, an untested alternative design LabMD should have implemented.

Response to Conclusion No. 174:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. In *Cummins v. Lyle Industries* the Court considered the narrow, fact-driven question of whether an expert's scientific opinion regarding the feasibility of an alternative design of an industrial trim press was reliable. 93 F.3d 362 (7th Cir. 1996). As part of this inquiry, the Court focused specifically on scientific knowledge and in that context emphasized, "[w]e do not mean to suggest, of course, that hands-on testing is an absolute prerequisite to the admission of expert testimony." *Id.* at 369.

The proposed conclusion is misleading to the extent it mischaracterizes Dr. Hill's opinions. Dr. Hill has offered reliable opinions assessing whether Respondent provided reasonable security for Personal Information within its computer network and whether its security failures could have been corrected using readily available security measures (CCFF ¶ 19), including implementing low-cost changes in security practices Respondent was already using such as changing its password policies to require employees to use strong passwords instead of easy-to-guess passwords (such as "labmd"). (CCFF ¶¶ 945-971, 1165-1167). Dr. Hill's opinions relate to LabMD's network as it existed during the Relevant Time Period; she does not opine on any alternative designs for LabMD's network, nor provide any prescriptive opinions regarding its design. (CX0740 (Hill Report) ¶¶ 32-40)). Dr. Hill's opinions are relevant and reliable and will assist the Court.

175. Dr. Hill opined LabMD's data security was "unreasonable" and made "recommendations." However, Dr. Hill could not opine whether LabMD's data security is "unreasonable" because this is the ultimately legal issue. *Nationwide Transp. Fin.*, 523 F.3d at 1058.

Response to Conclusion No. 175:

The proposed conclusion is misleading and misstates the law. Federal Rule of Evidence 704 provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704. *See also Shahid v. City of Detroit*, 889 F.2d 1543, 1548 (6th Cir. 1989) ("Federal Rule of Evidence 704 permits a witness to testify in the form of an opinion or inference to an ultimate issue to be decided by the trier of fact." (quotations omitted)).

Dr. Hill did not offer a legal conclusion about whether LabMD's information security practices were unreasonable as a matter of law. Dr. Hill instead opined that LabMD's security practices were unreasonable from the perspective of the information security industry, taking into account the "amount and nature of the data maintained within LabMD's network, LabMD's network and security practices, risks and vulnerabilities on LabMD's network, and the cost of remediating those risks and vulnerabilities." (CX0740 (Hill Report) ¶ 49). Dr. Hill's opinions are relevant and reliable and will assist the Court.

B. Clay Shields

176. As a rebuttal expert, Shields' opinion is necessarily limited to rebuttal of Fisk's testimony. *See* FTC Rule § 3.31A(a).

Response to Conclusion No. 176:

The proposed conclusion is an inaccurate representation of the law. As a rebuttal expert, Dr. Shields' report is "limited to rebuttal of matters set forth in a respondent's expert reports." Rule § 3.31A(a), 16 C.F.R. § 3.31A(a).

C. Jim Van Dyke

177. Complaint Counsel asked Van Dyke to serve as an expert witness in this case in early 2013. The Javelin survey that Van Dyke conducts, and which he relied on in this case, contains new questions in each year. In October of 2013, Van Dyke conducted the survey that he would use as the basis for his opinion in this case. (Van Dyke, Tr. 636-637). Van Dyke had been retained by Complaint Counsel for the better part of a year before conducting the survey on which he testified. Here, as in *Lust*, it is reasonable to presume Van Dyke's testimony is colored

by a litigation-driven financial incentive. As a result, its weight is substantially diminished as a matter of law.

Response to Conclusion No. 177:

The proposed conclusion is misleading to the extent it argues that opinions offered by Complaint Counsel's expert Mr. Van Dyke can be presumed to reflect a litigation-driven financial incentive and thus accorded less weight, and Respondent's claim to the contrary is not supported by *Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594 (1996). (CCRRCL ¶ 171).

The proposed conclusion is also factually misleading. Mr. Van Dyke's methodology was very well-established years before 2013. Mr. Van Dyke, assisted by statistical experts, developed and used the methodology to conduct surveys for at least 10 years. (Van Dyke, Tr. 730-731). Mr. Van Dyke's opinions are relevant and reliable and will assist the Court.[18]

178. Van Dyke's statistical analysis fails *Daubert* as a matter of law. First, the Javelin survey was conducted via the internet without any reliable means of confirming that identities of those who receive the survey match those of the subjects the survey intends to target, giving rise to the likelihood of serious sampling error. Second, he projected an anticipated fraud impact to consumers due to unauthorized disclosure of the 1718 File and the Day Sheets of between 7.1% and 13.1%. However, Van Dyke's claims were belied by empirical data: The actual fraud impact to consumers in this case proven by Complaint Counsel is 0%. This suggests the Javelin survey is methodologically flawed and that its results are inherently unreliable. *EEOC v. Freeman*, 778 F.3d 463, 466, 469 (4th Cir. 2015) (citations omitted).

Response to Conclusion No. 178:

The proposed conclusion is unsupported and misleading. The Court should disregard the proposed conclusion because it is not supported by the cited authority. Nothing in the Court's narrow, fact-driven analysis of certain expert reports in *EEOC v. Freeman*, 778 F.3d 463 (4th

[18] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony.

Cir. 2015) supports LabMD's claim that Mr. Van Dyke's analysis "fails *Daubert* as a matter of law."

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 164). There is no legal or practical basis for excluding a survey based solely on the fact that it was conducted over the internet. *See, e.g., Pom Wonderful LLC v. Organic Juice USA, Inc.*, 769 F. Supp. 188, 193-200 (S.D.N.Y. 2011) (admitting three internet surveys for consideration for the fact-finder). Conducting surveys online, like any other survey methodology, has its own benefits and challenges. *See* Shari Seidman Diamond, *Reference Guide on Survey Research*, in Reference Manual on Scientific Evidence, 3d edition (Federal Judicial Center, 2011) at 406-411 (discussing benefits and challenges of internet surveys). An internet survey, when properly conducted, can be as reliable and useful as any other survey methodology. *See id.* at 407-409 (discussing methods to mitigate the challenges of internet surveys).

The proposed conclusion is also factually misleading. (*See* CCRRCL ¶ 177). Further, because Complaint Counsel is not required to prove actual injury to show a violation of Section 5 of the FTC Act, the proposed conclusion's assertion that actual injury has not occurred is simply false and its use is misguided.

The proposed conclusion is further misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Mr. Van Dyke that are not reliable.[19] The opinions of Mr. Van Dyke that were presented to the Court are relevant and reliable and will assist the Court.

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[19] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony.

D. Rick Kam

179. As a matter of law, Kam's testimony is not reliable because his methods have neither been verified by testing nor peer reviewed nor evaluated for potential rate of error. *Kumho Tire Co.*, 526 U.S. at 157; *Freeman*, 778 F.3d at 469 (citing cases); *Allen v. LTV Steel Co.*, 68 Fed. Appx. at 721-22.

Response to Conclusion No. 179:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166). Mr. Kam's methodology is based on extensive experience in the identity theft field and relevant literature. (CX0742 (Kam Report) at 3-5, 10-11, 13-15, 33-36; RX522 (Kam, Dep. at 36-37, 44-46, 72-73). In reaching his opinions, Mr. Kam used his experience in considering the nature and extent of the personal information disclosed without authorization, the unauthorized persons to whom the disclosure was made, whether the information was viewed or acquired, and efforts made to mitigate the risk. (CX0742 (Kam Report) at 10, 13-15, 17-18, 33-36; CCFF ¶ 43; RX0522 (Kam, Dep. at 36-37, 44-46, 72-73)). The proposed conclusion is further misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Mr. Kam that are not reliable.[20] The opinions of Mr. Kam that are presented to the Court are relevant and reliable and will assist the Court.

180. Kam is not qualified to give the expert opinion he provided. As a matter of law, his testimony should not be relied upon. *Elcock v. Kmart Corp.*, 233 F.3d 734 (3rd Cir. 2000) (trial court erred in not holding a Daubert hearing, where damages expert relied on dubious methodology, and expert's qualifications were minimal: where qualifications are a "close call," this factor weighs in favor of excluding the testimony as unreliable).

[20] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony.

Response to Conclusion No. 180:

The proposed conclusion is not supported by the authority cited and is misleading. Nothing in the court's narrow, fact-driven analysis of certain expert testimony regarding lost future earnings in *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000), supports LabMD's claim that Mr. Kam's testimony should not be relied on "as a matter of law."

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (CCRRCL ¶ 166). Mr. Kam holds a CIPP/US certificate and participates in professional associations dealing with data breaches and identity, and has published in the identity theft field. (CCFF ¶ 38). Mr. Kam has remediated security breaches, instances of identity theft and medical identity theft. (CCFF ¶ 38). Mr. Kam is the President and co-founder of ID Experts, which specializes in breach response and restoring identities that have been stolen. (CCFF ¶ 38). Mr. Kam is qualified to provide the expert opinions Complaint Counsel relies on. Mr. Kam's opinions are relevant and reliable and will assist the Court.

181. Kam's opinion is undermined by his financial entanglements. *See Lust by & Through Lust*, 89 F.3d at 597-98.

Response to Conclusion No. 181:

The Court should disregard the proposed conclusion because it is not supported by the cited authority and misstates the law; Respondent's claim to the contrary is not supported by *Lust By and Through Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594 (1996). (CCRRCL ¶ 171). Moreover, the proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166).

The proposed conclusion is further misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Mr. Kam that are not reliable. The opinions of Mr. Kam that are presented to the Court are relevant and reliable and will assist the Court.

182. Kam's analysis does not "fit" the facts of the case as a matter of law because an expert witness's opinion that one thing caused another must identify and rule out other likely causes. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997); *Sorensen by & Through Dunbar v. Shaklee Corp*, 31 F.3d 638, 649 (8th Cir. 1994).

Response to Conclusion No. 182:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities. Nothing in the Court's narrow, fact-driven analysis of certain expert testimony regarding causes of educational deficiencies in *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997) supports LabMD's claim that Mr. Kam's testimony should not be relied on "as a matter of law."

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166). An analysis is not "inadmissible merely because it is unable to exclude all possible causal factors other than the one of interest." *Southwire Co. v. J.P. Morgan Chase & Co.*, 528 F. Supp. 2d. 908, 930 (W.D. Wisc. 2007) (*citing People Who Care v. Rockford Bd. Of Educ.*, 111 F.3d 528, 537-38 (7th Cir. 1997)). Mr. Kam's opinion fully explains the basis for his conclusion that the exposure of sensitive personal information subjects consumers to the risk of injury. (*See* CX0742 (Kam Report) at 17-23). Respondent has pointed to no other possible causes of injury that Mr. Kam's analysis failed to address.

It is also misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Mr. Kam that do not "fit" the facts of this case. (*See* CCRRCL ¶ 170). Mr. Kam applied his expertise to the facts of the case. (CX0742 (Kam Report) at 21-23; RX0522 (Kam,

Dep. at 154-155). The Kam opinions on which Complaint Counsel relies are reliable under Federal Rule of Evidence 702 and *Daubert* and will assist the Court.

183. Surveys in particular are unreliable where, as here, they contain systematic errors such as nonresponse or sampling bias. *See Freeman*, 778 F.3d at 466, 469; *In re Countrywide Fin. Corp. Mortgage-Backed Secs. Litig. v. Countrywide Fin. Corp.*, 984 F. Supp. 2d 1021, 1038 (C.D. Cal. 2013).

Response to Conclusion No. 183:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities. Nothing in the Court's narrow, fact-driven analysis of certain expert reports in *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015) or the Court's narrow, fact-driven analysis of "application of multi-stage cluster sampling" techniques in *In re Countrywide Fin. Corp. Mortgage-Backed Securities Litigation*, 984 F. Supp. 2d 1021, 1038 (C.D. Cal. 2013), supports LabMD's suggestion that Complaint Counsel is relying on any survey that is unreliable. Respondent has not pointed to any nonresponse or sampling biases that affected the reliability or outcome of any survey. (*See* CCRRFF ¶¶ 403-407).

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166).

184. When an expert relies on uncorroborated assumptions for a factual premise for his opinion, the opinion is unreliable as a matter of law. *See Korte*, 164 Fed. Appx. at 557; *Casey v. Geek Squad*, 823 F. Supp. 2d 334, 340-41 (D. Md. 2011); *cf. Nunez v. BNSF Ry. Co.*, 730 F.3d 681, 684 (7th Cir. 2013); *Guillory v. Domtar Indus.*, 95 F.3d 1320, 1330-31 (5th Cir. 1996) ("Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all. Both analyses result in pure speculation."). Kam uncritically relied on Boback and Tiversa, so his opinion is unreliable as a matter of law. *Guillory*, 95 F.3d at 1330-31.

Response to Conclusion No. 184:

The proposed conclusion is misleading and irrelevant. It is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166).

The proposed conclusion is misleading and irrelevant to the extent it suggests that Mr. Kam's expert opinions on which Complaint Counsel relies do not satisfy Federal Rule of Evidence 702 and *Daubert*. Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony. Mr. Kam's opinions on which Complaint Counsel relies are reliable under Federal Rule of Evidence 702 and *Daubert*. Mr. Kam's opinions are relevant and reliable and will assist the Court.

185. Because Kam's entire analysis of the likelihood of harm from the Day Sheets was premised on the CLEAR database, which was excluded from this case, his opinion lacks a reliable factual basis as a matter of law and must be excluded. *Geek Squad*, 823 F. Supp. 2d at 340-44.

Response to Conclusion No. 185:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166).

The proposed conclusion is also factually misleading. Mr. Kam's analysis of consumer harm makes use of the information contained in the Day Sheets, the police investigation, and his extensive experience in remediating breaches and identity theft. (CCFF ¶ 43, 1714-1735, 1763-1776; (Kam Tr. at 404-405; CX0742 (Kam Report) at 18, 23). The proposed conclusion is further misleading to the extent it suggests that Complaint Counsel is relying on any opinions of

Mr. Kam that are not reliable.[21] The opinions of Mr. Kam that are presented to the Court are relevant and reliable and will assist the Court.

186. Kam's opinion falsely assumed that the suspects in whose Sacramento house LabMD's Day Sheets were found had "identity theft charges and convictions prior to the events in Sacramento on October 5, 2012," when in fact they did not. Therefore, Kam's opinion regarding consumer harm from the Day Sheets is unreliable and irrelevant as a matter of law. *See Korte*, 164 Fed. Appx. at 557.

Response to Conclusion No. 186:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166). The proposed conclusion is also factually inaccurate. (*See* CCRRCL ¶ 185). The proposed conclusion is further misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Mr. Kam that are not reliable.[22] The opinions of Mr. Kam that are presented to the Court are relevant and reliable and will assist the Court.

187. Kam conducted essentially no analysis of the risk of harm to consumers from LabMD's general security measures. As a matter of law, an expert may not simply accept another expert's opinion: "[e]xperts may not . . . simply repeat or adopt the findings of [others] without investigating them." *See Hendrix v. Evenflo Co., Inc.*, 255 F.R.D. 568, 607 (N.D. Fla. 2009), *aff'd* at 609 F. 3d 1183 (11th Cir. 2010).

Response to Conclusion No. 187:

The proposed conclusion is misleading and misstates the law. Federal Rule of Evidence 703 provides as follows:

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[21] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony. In addition, Complaint Counsel's post-trial brief and proposed findings of fact do not cite to CX0451.

[22] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony. In addition, Complaint Counsel's post-trial brief and proposed findings of fact do not cite to CX0451.

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

(Fed. R. Evid. 703). *See also Hendrix v. Evenflo Co., Inc*., 255 F.R.D. 568, 607 n.75 (N.D. Fla. 2009), *aff'd* 609 F. 3d 1183 (11th Cir. 2010) ("An expert may properly rely on the opinion of another expert.").

The proposed conclusion is also factually inaccurate. Mr. Kam is not offered as an expert on information security practices and was not asked to identify Respondent's security failures. (CCFF ¶¶ 38-41). Instead, Mr. Kam was asked to, and did, determine the consequences of unauthorized disclosure of Personal Information held by Respondent. (CCFF ¶¶ 38-41; CCRRCL ¶ 185). The proposed conclusion is further misleading to the extent it suggests that Complaint Counsel is relying on any opinions of Mr. Kam that are not reliable.[23] The opinions of Mr. Kam that are presented to the Court are relevant and reliable and will assist the Court.

188. Testimony cannot be conclusory. *See Roberts v. Menard, Inc*, No.4:09-cv-59-PRC, 2011 U.S. Dist. LEXIS 44628, at *11-*17. (N.D. Ind. Apr. 25, 2011). Experts cannot simply mention that something is possible; they must quantify its likelihood for their opinion to be relevant and reliable. When "experts testify to a possibility rather than a probability" and do not quantify this possibility, or otherwise indicate how their conclusions about causation should be weighted, even though the substantive legal standard has always required proof of causation by a preponderance of the evidence, this renders their testimony inadmissible. *See Daubert*, 43 F.3d at 1322.

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[23] Complaint Counsel's post-trial brief and proposed findings of fact do not cite to Robert Boback's testimony, CX0703, or to CX0019, nor do they cite to expert conclusions that were predicated on Mr. Boback's testimony. In addition, Complaint Counsel's post-trial brief and proposed findings of fact do not cite to CX0451.

Response to Conclusion No. 188:

The proposed conclusion is misleading to the extent it departs from Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). (*See* CCRRCL ¶ 166). Furthermore, Mr. Kam's opinions are expressed with adequate specificity regarding the likelihood of injury caused to consumers by LabMD's unfair practices. (*See, e.g.*, CX0742 (Kam Report) at 21).

189. Emotional harm such as embarrassment or reputational impact does not constitute "substantial injury" under Section 5. *See* Fed. Trade Comm'n, *FTC Policy Statement on Unfairness*, https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (last visited August 9, 2015).

Response to Conclusion No. 189:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. Emotional harm such as embarrassment and reputational impact can be substantial injury. (CCCL ¶¶ 39-40). The harms that result from public disclosure of health data are distinguishable in type and severity from the example of emotional impact that would not constitute substantial injury noted in the Unfairness Statement. *See Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *97 (1984) (Unfairness Statement) (states "Emotional impact and other subjective types of harm" not substantial injury, example given of advertisement that "offends the tastes or social beliefs of some viewers").

IX. COMPLAINT COUNSEL HAS FAILED TO PROVE UNREASONABLENESS

190. As a matter of law, Complaint Counsel has not proven by a preponderance of the evidence that LabMD's data security acts or practices between 2005 and 2010 cause, or are likely to reoccur and then to cause substantial consumer injury, which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. *See* 15 U.S.C. § 45(n).

Response to Conclusion No. 190:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. Section 5 does not require Complaint Counsel to show by a preponderance of the evidence that LabMD's inadequate security practices are likely to recur and then cause injury. (CCRRCL ¶ 58 (addressing substantively identical Proposed Conclusion 58)).

191. Complaint Counsel must affirmatively prove by preponderant evidence that LabMD's data security practices were "unreasonable." MTD Order at 18-19. This standard cannot be construed in a way that violates LabMD's due process rights.

Response to Conclusion No. 191:

To the extent that the proposed conclusion argues that preponderance of the evidence is the applicable standard of proof and lack of reasonableness is the test for unfairness, Complaint Counsel has no specific response.

The Court should disregard the proposed conclusion to the extent it claims that LabMD's due process rights were injured by a failure to receive fair notice of what practices were unreasonable to satisfy due process. (*See, e.g.*, CCRRCL ¶¶ 35, 38, 85, 89, 141).

192. As a matter of law, the Commission has not previously promulgated by rulemaking or adjudication a "reasonableness" standard applicable to Respondent or the medical industry.

Response to Conclusion No. 192:

The Court should disregard the proposed conclusion because it is not supported by any authority, as required by the Court's Order on Post-Trial Briefs. The proposed conclusion is misleading to the extent that suggests it that Section 5's reasonableness test differs in its application to Respondent or the medical industry. (CCRRCL ¶ 86 (there is no distinct medical data security reasonableness)). "Reasonableness" is the applicable test, and Respondent had adequate and fair notice of the law. (CCRRCL ¶¶ 35, 38, 85, 89, 140-141).

As the Commission stated in its Order Denying Respondent's Motion to Dismiss, complex questions relating to data security practices in an online environment—such as those at issue in this case—are particularly well-suited to case-by-case development in administrative adjudications; agencies must retain power to deal with problems on a case-to-case basis if the administrative process is to be effective; and "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency" [quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)]; "agency discretion is at its peak in deciding such matters as whether to address an issue by rulemaking or adjudication[,] [and] [t]he Commission seems on especially solid ground in choosing an individualized process where important factors may vary radically from case to case" [quoting *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990)]. Comm'n Order Denying Resp't's Mot. to Dismiss at 14-15 (Jan. 16, 2014).

193. As a matter of law due process requires the Commission to articulate and apply an *objective* and *industry-specific* "reasonableness" standard of care to Respondent before commencing action against it. 5 U.S.C. § 552(a)(1)(D); *see Fla. Mach. & Foundry*, 693 F.2d at 120 ("[A] standard of this generality requires only those protective measures which the employers' industry would deem appropriate....") (emphasis added); *S&H Riggers*, 659 F.2d at 1285; *B&B Insulation*, 583 F.2d at 1370 (industry-specific standard, *e.g.*, what is customary for sausage industry or roofing industry).

Response to Conclusion No. 193:

The proposed conclusion is misleading to the extent that suggests it that Section 5's reasonableness test differs in its application to Respondent or the medical industry. (CCRRCL ¶ 86 (there is no distinct medical data security reasonableness)). "Reasonableness" is the applicable test, and Respondent had adequate and fair notice of the law. CCRRCL ¶¶ 35, 38, 85, 89, 140-141); Comm'n Order Denying Resp't's Mot. to Dismiss at 14-15 (Jan. 16, 2014).

Furthermore, OSHA's legal framework and requirements are inapposite to the unfairness analysis set forth in Section 5(n), and OSHA cases cited by Respondent (including *Fla. Mach. &*

Foundry, *S&H Riggers*, and *B&B Insulation*) have no bearing on the FTC's application of Section 5. (CCRRCL ¶¶ 96, 97).

194. As a matter of law, Complaint Counsel must prove Respondent failed to comply with the medical industry standards in effect during the time 2005 – 2010.

Response to Conclusion No. 194:

The Court should disregard the proposed conclusion because it is not supported by any authority as required by the Court's Order on Post-Trial Briefs. The proposed conclusion is misleading to the extent that suggests it that Section 5's reasonableness test differs in its application to Respondent or the medical industry. (CCRRCL ¶ 86 (there is no distinct medical data security reasonableness); *see also* CCRRCL ¶ 192).

195. As a matter of law, Complaint Counsel has not proven the objective, medical-industry "reasonableness" standard of care in effect between 2005 – 2010 that LabMD should have followed for PHI data security, nor proven by preponderant evidence that LabMD violated it.

Response to Conclusion No. 195:

The Court should disregard the proposed conclusion because it is not supported by any authority as required by the Court's Order on Post-Trial Briefs. The proposed conclusion is misleading to the extent that suggests it that Section 5's reasonableness test differs in its application to Respondent or the medical industry. (CCRRCL ¶ 86 (there is no distinct medical data security reasonableness); *see also* CCRRCL ¶ 192).

196. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's data security acts or practices were "unfair" as that word is commonly defined, *e.g.*, dishonest, contrary to law, or unethical.

Response to Conclusion No. 196:

The Court should disregard the proposed conclusion because it is not supported by any authority as required by the Court's Order on Post-Trial Briefs. The proposed conclusion is also misleading and irrelevant. Under Section 5, an act or practice is unfair if it "causes or is likely to

cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (CCCL ¶¶ 12, 24-27). Complaint Counsel has proven by a preponderance of the evidence that LabMD's unfair acts or practices caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. (CCFF ¶¶ 382-1798).

197. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's current data security acts or practices cause or are likely to cause consumers substantial injury in the future.

Response to Conclusion No. 197:

The Court should disregard the proposed conclusion because it is not supported by any authority as required by the Court's Order on Post-Trial Briefs. The proposed conclusion is misleading and irrelevant to the extent that it argues that to prove that Respondent violated Section 5 of the FTC Act, Complaint Counsel must prove that LabMD's current information security practices will cause or are likely to cause injury in the future (*see* CCRRCL ¶ 56), and it has done so (CCFF ¶¶ 1472-1770). For the purpose of liability, the conduct at issue in this case includes LabMD's past information security practices during the relevant time period, which began in 2005.

198. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's 2005-2010 data security acts or practices are "likely" (probable) either to reoccur or, if they were somehow to do so, to cause consumers substantial injury.

Response to Conclusion No. 198:

The Court should disregard the proposed conclusion because it is not supported by any authority in violation of the Court's Order on Post-Trial Briefs. The proposed conclusion is also misleading and irrelevant. (CCRRCL ¶ 58 (addressing substantively identical Proposed Conclusion 58)).

199. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence current or likely substantial consumer injury in the future.

Response to Conclusion No. 199:

The Court should disregard the proposed conclusion because it is not supported by any authority in violation of the Court's Order on Post-Trial Briefs. Contrary to Respondent's contention that Section 5 requires that Complaint Counsel must prove that LabMD's acts or practices are currently causing harm or are likely to cause injury in the future, the Commission has interpreted Section 5 to apply in this case where LabMD's actions "caused or were likely to cause" consumer injury. (CCRRCL ¶ 56 (addressing substantively identical Proposed Conclusion 56)).

200. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD unreasonably relied on its data security specialists.

Response to Conclusion No. 200:

The Court should disregard the proposed conclusion because it is not supported by any authority in violation of the Court's Order on Post-Trial Briefs. It is not a proposed conclusion of law because it does not expound on any legal standard or proposition.

As a statement of fact, the factual premise of Respondent's finding is incorrect and contradicted by the weight of the evidence. The weight of the evidence establishes that to extent that LabMD is referring to its reliance on *external* IT experts, LabMD managed its network using in-house IT employees and did not rely on outside service providers for its network security from at least 2006. (CCFF ¶¶ 173, 175, 178, 182-183, 185-186, 188, 190; *see also* CCRRFF ¶¶ 134-148 (responding to Respondent's claims regarding services provided by APT)). To the extent that LabMD is referring to its use of internal IT staff, it defies logic that LabMD should be shielded from liability based on conduct of its own employees. *See Meyer v. Holley*, 537 U.S. 280, 285-286 (2003) ("It is well established that traditional vicarious liability rules ordinarily

make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." (citations omitted)); CCRRCL ¶ 107 (addressing substantively identical Proposed Conclusion 107).

201. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that the data security program described by Dr. Hill was actually used by any medical provider during the relevant time or today.

Response to Conclusion No. 201:

The Court should disregard the proposed conclusion because it is not supported by any authority in violation of the Court's Order on Post-Trial Briefs. The proposed conclusion is also not supported by any reference to the record, in violation of the Court's Order on Post-Trial Briefs.

The proposed conclusion is also misleading. Dr. Hill's report identified principles "that help to specify the policies and identify the mechanisms" a company should implement to protect information on its network. (CX0740 (Hill Report) ¶ 31). A company must take into account the amount and nature of data maintained within its network in determining reasonable and appropriate security measures. (CX0740 (Hill Report) ¶ 49; Comm'n Statement Marking 50th Data Sec. Settlement (Jan 31, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf). A reasonable data security strategy must take into account not only the size and components of a company's network, but also the volume and sensitivity of the information maintained with the network: the greater the sensitivity and volume of the information, the greater the need for enhanced security measures to provide reasonable security. (CX0740 (Hill Report) ¶¶ 27-30, 75; CX0737 (Hill Rebuttal Report) ¶¶ 7-9; Hill, Tr. 102-03; Comm'n Statement Marking 50th Data Sec. Settlement (Jan 31, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf). As the Commission expressed it, "reasonable and appropriate security is a continuous process of assessing and

addressing risks; there is no one-size-fits-all data security program. Comm'n Statement Marking 50th Data Sec. Settlement (Jan 31, 2014), *available at* http://www.ftc.gov/system/files/documents/cases/140131gmrstatement.pdf. Therefore, a reasonable data security program will vary depending on the factors identified above.

Furthermore, Dr. Hill's opinion that using multiple, layered security measures satisfies the reasonableness test for securing a network is entirely consistent with security standards during the Relevant Time Period. NIST Special Publication 800-30, dated July 2002, identifies the risk management process for data security as encompassing risk assessment, risk mitigation, and evaluation and assessment. (CX0400 (NIST Special Publication 800-30) at 11). NIST identified many types of threats to computer systems, such as a firewall allowing guest access to a server without username and password login, failure to apply patches to a system, and failure to remove terminated employees' identifiers from a system. (CX0400 (NIST Special Publication 800-30) at 22-23; *see* CCFF ¶¶ 759-771 (LabMD's Mapper server allowed write access to the root directory by users without credentials); CCFF ¶¶ 996-1040 (LabMD did not patch and update operating systems and other programs); CCFF ¶¶ 986-987 (LabMD did not deactivate the login access of former clients, and Ms. Simmons's credentials remained valid a year after she left LabMD)). NIST also recommended that companies develop security requirements for technical security based on many criteria, including security of communications, cryptography (encryption), discretionary access control, identification and authentication, and intrusion detection. (CX0400 (NIST Special Publication 800-30) at 26; *see* CCFF ¶¶ 452-454 (LabMD's Policy Manuals did not have policies describing how information would be protected in transit and whether sensitive information would be stored in an encrypted format), 474-480 (LabMD did not provide tools to allow employees to encrypt emails containing sensitive data); CCFF

¶¶ 811-827 (LabMD did not implement mechanisms to restrict employee access to information not needed to do their jobs); CCFF ¶¶ 909-983 (LabMD did not have or enforce policies requiring strong passwords); CCFF ¶¶ 699-702 (LabMD did not implement an intrusion detection or protection system)).

202. As a matter of law, Tiversa and FTC colluded in the transfer of the 1718 File from Tiversa to the Privacy Institute in violation of HIPAA, 42 U.S.C. § 1320d-5.

Response to Conclusion No. 202:

The Court should disregard the proposed conclusion because it is not supported by the authority cited and is a misstatement of the law. As a preliminary matter, the statutory citation directs the Court to a provision, 42 U.S.C. § 1320d-5, that relates to penalties, not proscribed conduct. To the extent that Respondent intended to cite to 42 U.S.C. § 1320d-6, rather than § 1320d-5, Respondent's contention nonetheless remains unsupported. The provisions of 42 U.S.C. § 1320d-6 apply only to "covered entities," which include health plans, health care clearinghouses, certain health care providers and Medicare prescription drug card sponsors. *See* Scope of Criminal Enforcement Under 42 U.S.C. § 1320d-6, 29 Op. OLC 76, 81 (2005), *available at* http://www.justice.gov/olc/file/478996/download at 76 (stating that non-covered entities cannot directly violate 42 U.S.C. § 1320d-6 because it "simply does not apply to them"). Respondent has cited no evidence indicating any of the entities identified in the proposed conclusion is a covered entity, as defined by the statute and implementing regulations. *See* 42 U.S.C. § 1320d-1; 45 C.F.R. pt. 160; *see also* CCRRCL ¶¶ 122-125 (addressing related HIPAA arguments).

To the extent that the proposed conclusion states a proposed finding of fact that "Tiversa and FTC colluded," the proposed finding is not supported by any reference to the record, in violation of the Court's Order on Post-Trial Briefs. (*See also* CCRRCL ¶ 203).

203. As a matter of law, Tiversa functioned as FTC's agent because enforcement action against LabMD and other companies similarly-situated was viewed as mutually beneficial. *See Johnson,* 196 F. Supp. 2d at 863.

Response to Conclusion No. 203:

The Court should disregard the proposed conclusion because it is not supported by the cited authority and is a misstatement of law. Tiversa was not functioning as the Commission's agent. (*See* CCRRCL ¶ 127 (addressing substantively identical Proposed Conclusion 127)).

To the extent that the proposed conclusion states a proposed finding of fact, the proposed finding is not supported by any reference to the record, in violation of the Court's Order on Post-Trial Briefs.

204. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's data security practices between 2005 and 2010 caused substantial injury to a single consumer.

Response to Conclusion No. 204:

The Court should disregard the proposed conclusion because it is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

To the extent the proposed conclusion argues that it is Complaint Counsel's burden to prove substantial injury to a particular consumer, it misstates the law. The Commission is "empowered and directed to prevent . . . unfair or deceptive acts or practices in or affecting commerce," among others, without naming a complainant or alleging harm to a specific person, including practices that are "likely to cause substantial injury to consumers." 15 U.S.C. § 45(a)(2), (n). Complaint Counsel is required "to prove by a preponderance of evidence that LabMD's practices are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (CCCL ¶ 3 (quoting JX0001-A at 3)). Complaint Counsel has met this

burden. (*See* CCFF ¶¶ 1472-1798; *see also* CCRRFF ¶ 505 (Complaint Counsel is not required to name a complainant or allege identity harm to a specific person).

205. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's data security practices between 2005 and 2010 are likely to reoccur and cause substantial injury to consumers. *See Borg-Warner Corp.*, 746 F.2d at 110. "Merely speculative harms" do *not* constitute "substantial injury" sufficient to support a finding of unfairness under Section 5(n). Fed. Trade Comm'n, *FTC Policy Statement on Unfairness*, https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness (last visited August 9, 2015).

Response to Conclusion No. 205:

The Court should disregard the proposed conclusion because it is not supported by the cited authorities and is a misstatement of law. Section 5(n) on its face does not require that Complaint Counsel prove by a preponderance of the evidence that a challenged act or practice is likely to recur. 15 U.S.C. § 45(n); CCRRCL ¶ 58 (addressing substantively identical Proposed Conclusion 58).

Complaint Counsel has presented overwhelming evidence that Respondent's practices were likely to cause substantial consumer injury. (*See* CCFF ¶¶ 1472-1798; *see also* CCRRCL ¶¶ 80, 206 (addressing contentions regarding speculative harm)).

206. As a matter of law, mere speculation that LabMD's data security could have put consumers at a potentially increased risk of injury is not "substantial injury" under Section 5(n).

Response to Conclusion No. 206:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

The proposed conclusion is misleading to the extent it suggests that the substantial injury caused or likely to be caused by Respondent's practices is "mere speculation" as a matter of law. Complaint Counsel agrees that "trivial or merely speculative harms" do not satisfy Section 5(n) substantial injury. *Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *97 (1984)

(Unfairness Statement). However, a practice is unfair if it causes or is likely to cause "a small amount of harm to a large number of people, or if it raises a significant risk of concrete harm." (CCCL ¶ 29 (quoting Unfairness Statement); *see also* Comm'n Order Denying Resp't's Mot. to Dismiss at 18-19 (Jan. 16, 2014)). The substantial injury to consumers that LabMD's practices caused or are likely to cause is not "mere speculation." (*See* CCFF ¶¶ 1472-1798; *see also* CCRRCL ¶ 80 (addressing claims regarding "speculation about possible identity theft and fraud")).

207. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that any benefit in terms of reduced risk from changing LabMD's data security practices would have outweighed not only the costs to LabMD, but also the additional burdens to the doctors and their patients who benefitted from the potentially life-saving speed and accuracy of LabMD's system.

Response to Conclusion No. 207:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

As explained above, countervailing benefits are determined based on the practice at issue in the complaint, not the overall operation of the business. (CCRRCL ¶ 41 (addressing substantively identical Proposed Conclusion 41)). The cost to LabMD to correct many of its security failures would have been low (*see generally* CCFF ¶¶ 1113-1185), indicating that the cost of correcting these unreasonable practices would not have outweighed the likely harm caused to consumers. (*See* CCRRCL ¶ 41).

208. Complaint Counsel has failed to prove by a preponderance of the evidence the allegation in ¶ 18(b) of the Complaint that in May 2008 "the P2P insurance aging file was one of hundreds of files that were designated for sharing from [LabMD's] billing computer using Limewire." There is no evidence LabMD designated the 1718 File for sharing because Woodson was not authorized to bind the corporation and her conduct was contrary to LabMD policy.

Response to Conclusion No. 208:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs. Even if it were, the proposed conclusion is not relevant to LabMD's violation of Section 5. The Complaint asserts, among other things, that LabMD "did not use readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities on its networks" (Compl. ¶ 10(b)), and "did not adequately train employees to safeguard information" (Compl. ¶ 10(d)). The sharing of the 1718 File was the result of LabMD's failure to, among other things, implement and enforce reasonable information security policies (*e.g.*, CCFF ¶¶ 415-443, 465-471) – such as the Software Monitoring Policy it claims was in practice (CCFF ¶¶ 465-471) – and use reasonable tools to identify risks on its network, such as file integrity monitoring (CCFF ¶¶ 705-712). The sharing of the 1718 File was a symptom of LabMD's unreasonable data security, not the core of it.

Moreover, Respondent's assertion that its billing manager was not authorized to bind the corporation is unavailing. As the Supreme Court held in *Meyer v. Holley*: "It is well established that traditional vicarious liability rules ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment." 537 U.S. 280, 285-286 (2003) (citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) ("An employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment"); *New Orleans, M. & C.R. Co. v. Hanning*, 82 U.S. 649, 657 (1873) ("The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of"); *see Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 967 (7th Cir. 1986)

("'respondeat superior' . . . is a doctrine about employers . . . and other principals"); Restatement (Second) of Agency § 219(1) (1957) (Restatement).

Finally, as a statement of fact, it is likewise not supported by any reference to the record, in violation of the Court's Order on Post-Trial Briefs.

209. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence the allegation in ¶ 21 of the Complaint that "[i]n October 2012, the Sacramento, California Police Department found more than 35 Day Sheets and a small number of copied checks in the possession of individuals who pleaded no contest to state charges of identity theft."

Response to Conclusion No. 209:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

In addition, the proposed conclusion does not expound on any legal standard or proposition. As a statement of fact, the proffered statement is contradicted by the weight of the evidence. The record establishes that in October 2012 the Sacramento Police Department found more than 35 LabMD Day Sheets and 9 copied checks and one money order made payable to LabMD in the possession of individuals unrelated to LabMD's business who later pleaded no contest to state charges of identity theft. (CCFF ¶¶ 1413-1414).

210. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence the allegation in ¶ 21 of the Complaint that "[m]any of these consumers were not included in the P2P insurance aging file, and some of the information post-dates the P2P insurance aging file."

Response to Conclusion No. 210:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

The proposed conclusion does not expound on any legal standard or proposition. As a statement of fact, it is incorrect and contradicted by the weight of the evidence. The weight of the evidence establishes many of the consumers in the Day Sheets were not included in the 1718

file and that some of the Day Sheets post-date the 1718 File. (CX0008-CX0011 (*in camera*)[24]; CX0697 (*in camera*) (1718 File, dated "6/5/2007" on first page); CX0087 (*in camera*) (LabMD Day Sheets); CCFF ¶¶ 1354 (1718 File dated "6.05.07"), ¶ 1435 (some Day Sheets dated after June 5, 2007)).

211. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence the allegation in ¶ 21 of the Complaint that "[a] number of the SSNs in the Day Sheets are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves."

Response to Conclusion No. 211:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs. In addition, the proposed conclusion does not expound on any legal standard or proposition.[25]

212. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence the allegations in ¶ 22 of the Complaint that any action or practice by LabMD in this case for the period January 1, 2005 to and including July 31, 2010 was "an unfair act or practice" within the meaning of Section 5(n). *See* Hon. Julie Brill, Comm'r, Fed. Trade Comm'n, Responses to Sen. Kelly Ayotte (QFR), U.S. S. Comm. on Commerce, Sci. & Transp.: Privacy and Data Security: Protecting Consumers in the Modem World at 223 (June 19, 2011), *available at* http://www.governmentattic.org/13docs/FTC-QFR_2009-2014.pdf ("***The Commission will not bring a case where the evidence shows no actual or likely harm to competition or consumers***. As the Chairman explained in his testimony before the Senate Judiciary Committee last summer, 'Of (*sic*) course, ***in using our Section 5 authority the Commission will focus on bringing cases where there is clear harm to the competitive process and to consumers.' That is, any case the Commission brings under the broader authority of Section 5 will be based on demonstrable harm to consumers or competition.***") (emphasis added).

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[24] Complaint Counsel has not marked as nonpublic its responses to Respondent's proposed conclusions of law that cite to *in camera* exhibits where (1) the exhibit has been granted *in camera* status due to the inclusion of Sensitive Personal Information as defined in Rule 3.45(b) and (2) the citation is to the existence or nature of the exhibit, or to general information about the exhibit as a whole, rather than to specific Sensitive Personal Information contained therein.

[25] Complaint Counsel made an offer of proof of CX0451 to the Court on May 21, 2014. (Tr. 371-73). Complaint Counsel preserved its exception to the Court's ruling denying admission of the document, and reserved its right to appeal the exclusion of the document. (CCFF ¶ 1724, 1724 n.2).

Response to Conclusion No. 212:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. The cited source is inapplicable to this case because (1) the testimony relates to "unfair methods of competition" under Section 5, rather than "unfair . . . acts or practices," the allegation in this case, Hon. Julie Brill, Comm'r, Fed. Trade Comm'n, Responses to Sen. Kelly Ayotte (QFR), U.S. S. Comm. on Commerce, Sci. & Transp.: Privacy and Data Security: Protecting Consumers in the Modem World at 223 (June 19, 2011) at 222-23, *available at* http://www.governmentattic.org/13docs/FTC-QFR_2009-2014.pdf , and (2) the testimony is inapposite to the burden of proof here, which is defined by Section 5(n). In addition, the proposed conclusion is not a conclusion of law because it does not expound on any legal standard or proposition. As a statement of fact, it is incorrect because Complaint Counsel has met its burden of proof in this case. (*See* CCFF ¶¶ 1472-1798).

213. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that the acts and/or practices of LabMD as alleged in the Complaint constitute "clear harm to the competitive process and to consumers" or "demonstrable harm to consumers or competition" in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a). *See* Hon. Julie Brill, Comm'r, Fed. Trade Comm'n, Responses to Sen. Kelly Ayotte (QFR), U.S. S. Comm. on Commerce, Sci. & Transp.: Privacy and Data Security: Protecting Consumers in the Modem World at 223 (June 19, 2011), *available at* http://www.governmentattic.org/13docs/FTC-QFR_2009-2014.pdf.

Response to Conclusion No. 213:

To the extent the proposed conclusion asserts Complaint Counsel's burden of proof, the proposed conclusion is unsupported and a misstatement of law. The quoted source is inapplicable to this case because (1) the testimony relates to "unfair methods of competition" under Section 5, rather than "unfair . . . acts or practices," the allegation in this case, Hon. Julie Brill, Comm'r, Fed. Trade Comm'n, Responses to Sen. Kelly Ayotte (QFR), U.S. S. Comm. on Commerce, Sci. & Transp.: Privacy and Data Security: Protecting Consumers in the Modem

World at 223 (June 19, 2011) at 222-23, *available at* http://www.governmentattic.org/13docs/FTC-QFR_2009-2014.pdf , and (2) the testimony is inapposite to the burden of proof here, which is defined by Section 5(n). Complaint Counsel is required "to prove by a preponderance of evidence that LabMD's practices are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (CCCL ¶ 3 (quoting JX0001-A at 2-3)). In addition, the proposed conclusion is not a conclusion of law because it does not expound on any legal standard or proposition. As a statement of fact, it is incorrect because Complaint Counsel has met its burden of proof in this case. (*See* CCFF ¶¶ 1472-1798).

To the extent the proposed conclusion appears to be a quotation from Commissioner Brill's responses to Senator Ayotte's Questions for the Record, Complaint Counsel has no specific response.

214. As a matter of law, Complaint Counsel bears the burden of proving LabMD's data security was unreasonable. MTD Order at 18-19. However, the evidence is LabMD's data security was reasonable at all relevant times as a matter of law.

Response to Conclusion No. 214:

The proposed conclusion that LabMD's data security was reasonable at all relevant times as a matter of law is not supported by any references to the record or applicable legal authority, in violation of the Court's Order on Post-Trial Briefs. Furthermore, the Court should disregard the proposed conclusion because it is a conclusory statement on an ultimate issue of fact and law in this matter.

Complaint Counsel does not dispute that it has the burden of proving that LabMD violated Section 5 by a preponderance of the evidence. (CCCL ¶ 1-3).

X. INJURY WAS "AVOIDABLE"

215. To prove a Section 5(n) case, Complaint Counsel must show that LabMD's data security practices were likely to cause substantial injury "which is not reasonably avoidable by consumers themselves." *See* 15 U.S.C. § 45(n). "Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end." *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988).

Response to Conclusion No. 215:

To the extent the proposed conclusion is quotations from Section 5(n) and *Orkin*, Complaint Counsel has no specific response. However, to the extent the proposed conclusion implies that consumers in this case could reasonably avoid the substantial injury LabMD's practices caused or are likely to cause, it is a proposition of fact that is contradicted by the weight of the evidence. On the contrary, consumers could not reasonably avoid the injury caused or likely to be caused by LabMD's unreasonable data security. As in *Orkin*, "[a]nticipatory avoidance through consumer choice was impossible" in this case because consumers had no way of knowing that LabMD would receive their specimen and Personal Information, and had no way of knowing LabMD's unreasonable security practices. *See Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1365 (11th Cir. 1988); CCFF ¶¶ 1777-1787. In addition, where consumers do not knowingly purchase a product or service, there are unlikely to be countervailing benefits to a company's unfair practices. *FTC v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1078 (C.D. Cal. 2012) (finding no countervailing benefits where consumers "did not give their consent to enrollment in OnlineSupplier, and thus, the harm resulted from a practice for which they did not bargain."); *see also* CCCL ¶¶ 42-44.

216. As a matter of law, Complaint Counsel has failed to prove any consumers suffered substantial injury as defined under Section 5(n) due to either of the Security Incidents in the Complaint.

Response to Conclusion No. 216:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs. Moreover, the proposed conclusion misstates the law. Complaint Counsel is required "to prove by a preponderance of evidence that LabMD's practices are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (CCCL ¶ 3 (quoting JX0001-A at 2-3)). Complaint Counsel has met this burden. (CCFF ¶¶ 1472-1798).

217. Established judicial principles suggest "substantial injury" under Section 5(n) must at least be more than an "injury in fact," that is, the invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan*, 504 U.S. at 560. While the test for constitutional standing is low, *see, e.g.*, *Blunt*, 767 F.3d at 278 (requiring only "some specific, identifiable trifle of injury"), Section 5(n) contains two additional requirements: the injury must be (1) "substantial," which, to have any meaning, must be something more than the injury required by Article III; and, (2) not "reasonably avoidable by consumers themselves." 15 U.S.C. § 45(n).

Response to Conclusion No. 217:

To the extent the proposed conclusion argues that Section 5(n) substantial injury must be "something more" than "injury in fact" under Article III, it is unsupported and a misstatement of law. (CCRRCL ¶ 81 (addressing identical Proposed Conclusion 81)).

To the extent the proposed conclusion quotes from *Lujan v. Defenders of Wildlife*, *Blunt v. Lower Marion Sch. Dist.*, and Section 5(n), Complaint Counsel has no specific response.

218. In data breach cases where no misuse is proven there has been no injury as a matter of law. *Reilly*, 664 F.3d at 44.

Response to Conclusion No. 218:

The proposed conclusion is not supported by the authority cited and is a misstatement of law. (CCRRCL ¶ 82 (addressing identical Proposed Conclusion 82)).

219. An "injury" is not actionable under Section 5(n) "if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." *HSBC Bank Nevada*, 691 F.3d at 1168-69. The issue "not whether subsequent mitigation was convenient or costless, but whether it was reasonably possible." *Id.* at 1169. As a matter of law, speculation about the potential time and money consumers could spend resolving fraudulent charges cannot satisfy Section 5(n), or even confer standing under Article III. *See id.*; *Reilly*, 664 F.3d at 46 (alleged time and money expenditures to monitor financial information do not establish standing, "because costs incurred to watch for a speculative chain of future events based on hypothetical future criminal acts are no more 'actual' injuries than alleged 'increased risk of injury' claims"); *Randolph*, 486 F. Supp. 2d at 8 ("[L]ost data" cases "clearly reject the theory that a plaintiff is entitled to reimbursement for credit monitoring services or for time and money spent monitoring his or her credit."). That a plaintiff has willingly incurred costs to protect against an alleged increased risk of identity theft is not enough to demonstrate a "concrete and particularized" or "actual or imminent" injury. *In re Sci. Applications Int'l Corp.*, 45 F. Supp. 3d at 28-33 (listing cases).

Response to Conclusion No. 219:

The proposed conclusion is not supported by the authorities cited supported and is a misstatement of law. (CCRRCL ¶ 83 (addressing identical Proposed Conclusion 83)).

220. Even if such injury had occurred, Complaint Counsel has failed as a matter of law to prove by a preponderance of the evidence that such injury was not "reasonably avoidable." As the Ninth Circuit explained in *Davis v. HSBC Bank* that an "injury" is not actionable under Section 5(n) "if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact." 691 F.3d at 1168-69. *Davis* rejected the notion that avoiding injury is itself sufficient, framing the issue as "not whether subsequent mitigation was convenient or costless, but whether it was reasonably possible." *Id.*

Response to Conclusion No. 220:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

To the extent the proposed conclusion argues that consumers could reasonably avoid substantial injury or the likelihood of substantial injury in this case, that is not a proposed conclusion of law because it does not expound on any legal standard or proposition. As a statement of fact, it is incorrect because Consumers in this case could not reasonably avoid the injury caused or likely to be caused by LabMD's unreasonable data security. (CCRRCL ¶ 215).

The cited authority is inapplicable here because in *Davis* the consumer could avoid paying an annual fee by viewing terms and conditions. (CCRRCL ¶ 83). Unlike *Davis*, here, "[a]nticipatory avoidance through consumer choice was impossible" in this case because consumers had no way of knowing that LabMD would receive their specimen and Personal Information, and had no way of knowing LabMD's unreasonable security practices. *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1365 (11th Cir. 1988); CCFF ¶¶ 1777-1787. Moreover, the proposed conclusion is erroneous in that it states that costs that consumers incur in remediating problems caused by a party's conduct do not constitute "injury" under Section 5. (CCRRCL ¶ 83).

Respondent's reliance on *Davis v. HSBC Bank Nevada* for the proposition that an "injury" is not actionable under Section 5(n) "if consumers are aware of, and are reasonably capable of pursuing, potential avenues toward mitigating the injury after the fact" is misplaced. Unlike *Davis*, consumers in this case would have no way of avoiding harm prior to the injury, no reliable way of learning of the injury, and therefore would lack awareness about potential avenues to mitigate harms that they had no reliable way of learning about in the first place. (CCRRCL ¶ 83). Furthermore, notice to consumers does not allow them to avoid all harms from identity theft. (CCFF ¶¶ 1502-1503). The Personal Information LabMD maintains includes Social Security numbers and health insurance numbers, which can be used to commit identity crimes over an extended period of time. (CCFF ¶ 1770). Victims of identity theft may have difficulty mitigating loss, such as difficulty closing fraudulent accounts (CCFF ¶¶ 1546-1551), being subject to false arrest on criminal charges (CCFF ¶¶ 1554-1556), experiencing tax identity theft (CCFF ¶¶ 1559-1562), and suffering medical identity theft or fraud (CCFF ¶¶ 1593-1639).

To the extent that the proposed conclusion is a quotation from *Davis v. HSBC Bank*, Complaint Counsel has no specific response.

XI. COMPLAINT COUNSEL HAS FAILED TO PROVE COUNTERVAILING BENEFIT WAS OUTWEIGHED BY RISK IN THIS CASE

221. As a matter of law, Complaint Counsel has failed to prove by a preponderance of the evidence that LabMD's data security practices were likely to cause substantial injury "not outweighed by countervailing benefits to consumers." *See* 15 U.S.C. § 45(n).

Response to Conclusion No. 221:

The proposed conclusion is not supported by the cited authority. Complaint Counsel has proven that LabMD's unreasonable data security practices were not offset by countervailing benefits to consumers or competition. (CCRRCL ¶ 41 (addressing substantively identical Proposed Conclusion 41)).

222. LabMD's business model offered groundbreaking benefits to doctors and patients, delivering pathology results to doctors electronically at unprecedented speed, allowing them to more quickly tell anxiously waiting patients whether they had cancer and to begin treatment immediately if needed. However, FTC did not offer a reasoned countervailing benefit analysis as required by law. *Fox Television Stations, Inc.*, 556 U.S. at 515 (noting "the requirement that an agency provide reasoned explanation for its action").

Response to Conclusion No. 222:

The proposed conclusion is not supported by the cited authority. As a statement of fact, the proposed conclusion is incorrect. Complaint Counsel has proven that LabMD's unreasonable data security practices were not offset by countervailing benefits to consumers or competition. (CCRRCL ¶ 41 (addressing identical Proposed Conclusion 41)).

XII. FTC IS NOT ENTITLED TO THE REQUESTED RELIEF

223. Section 5 does not specifically authorize FTC to issue a notice order with the Complaint. Consequently, the "notice order" is either a judicially reviewable final order and violates due process because it demonstrates this case has been prejudged or it is an *ultra vires* act in violation of the APA.

Response to Conclusion No. 223:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

Complaint Counsel's complaint is in compliance with Rule § 3.11(b)(3), which requires that "The Commission's complaint shall contain the following: . . . (3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint." 16 C.F.R. § 3.11(b)(3).

224. As a matter of law, Complaint Counsel's proposed order is not equitable but punitive in nature and the Commission is not authorized to issue punitive orders. *Heater v. FTC*, 503 F.2d 321, 322-327 (9th Cir. 1974) (overturning an FTC order for restitution as inconsistent with the purpose of the FTC Act, which does not authorize punitive or retroactive punishment); MTD Order at 18 ("[F]act-finders in the tort context find that corporate defendants have violated an unwritten rule of conduct, they – unlike the FTC – can normally impose compensatory and even punitive damages."). The Commission then argued incorrectly that not pursuing criminal or civil penalties for past conduct somehow divests it of the constitutional requirement to provide fair notice. However, even if this argument were not incorrect, *see, e.g.*, *United States v. Chrysler Corp.*, 158 F.3d at 1354-55, *In re Bogese*, 303 F.3d at 1368, and *PMD Produce Brokerage*, 234 F.3d at 51-52, the evidence does not support the claimed relief.

Response to Conclusion No. 224:

The Court should disregard the proposed conclusion because it is not supported by the cited authority, and is a misstatement of law. As an initial matter, fair notice principles have not been violated in this proceeding. (CCRRCL ¶ 85). *Chrysler Corp.* involved a recall of Chrysler products for failure to comply with a NHTSA standard. The court determined, based on NHTSA's statutory mandate, that "where there is no safety defect at issue . . . a manufacturer cannot be found to be out of compliance with a standard if NHTSA has failed to give fair notice of what is required by the standard." *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998). To the extent *Chrysler* has any bearing on this proceeding, here, unlike in *Chrysler*, the equivalent of a safety defect—unfair acts or practices likely to cause substantial harm to consumers—is present. The court in *Bogese* examined a sanction imposed by the Office of

Patents and Trademark on a patent applicant for his failure to diligently prosecute his patent; in that context, the court observed that "an administrative agency cannot impose a penalty or forfeiture without providing notice." *In re Bogese*, 303 F.3d 1362, 1368 (Fed. Cir. 2002). Even if this were applicable to the litigation context, which it is not, the Notice Order does not contain any penalty or forfeiture. (*See* CCRRCL ¶ 227). Finally, *PMD Produce Brokerage* concerned fair notice of imposition of a procedural sanction that could deprive the plaintiff of a license under the Perishable Agricultural Commodities Act. *PMD Produce Brokerage Corp. v. U.S. Dep't of Agric.*, 234 F.3d 48, 52 (D.C. Cir. 2000). As with *Bogese*, even if *PMD Produce Brokerage* applies, the Notice Order does not contain any sanctions. The relief sought in this proceeding is not punitive; as the Commission observed, "the complaint does not even seek to impose damages, let alone retrospective penalties." Comm'n Order Denying Resp't's Mot. to Dismiss at 17 (Jan. 16, 2014).

Furthermore, the relief sought is supported by the record. (CCCL ¶¶ 57-71). The Commission has wide latitude and considerable discretion in crafting its orders. (CCCL ¶¶ 58-59). LabMD has no intention of dissolving as a Georgia corporation, retains the personal information of over 750,000 consumers, continues to operate a computer network, and intends to employ the same unreasonable policies and procedures to Personal Information in its possession as it employed in the past. (CCCL ¶¶ 60-64). An injunction is an appropriate remedy, (CCCL ¶¶ 73-78), as is fencing-in relief. (CCCL ¶¶ 80-120). The provisions of the notice order are consistent with the Commission's Safeguards Rule of the Gramm-Leach-Bliley Act, 16 C.F.R. § 314.1 *et seq.*, with relief approved by the Commission in prior cases relating to unfair data security and other practices, and with the Commission's guidance to businesses. (CCCL ¶¶ 125-

131, 146-155). The fencing-in relief sought is appropriate and consistent with prior Commission orders in data security cases. (CCCL ¶¶ 133-144).

To the extent the proposed conclusion is a restatement of Respondent's fair notice claims, Complaint Counsel has responded to these claims above. (CCRRCL ¶¶ 89-90, 93).

225. There is no basis in law to require LabMD to comply with requirements such as establishing a "comprehensive information security program," hiring outside professionals to conduct biannual audits, and hiring additional personnel to monitor the security of data that is not being actively used and is being kept on computers that are stored with the power off. *Borg-Warner Corp.*, 746 F.2d at 110-11.

Response to Conclusion No. 225:

The proposed conclusion is not supported by the authorities cited, and is a misstatement of law. *Borg-Warner* is not a bar to entry of the notice order. In *Borg-Warner*, the company had sold its relevant business unit and the respondent directors had left their positions years before the Commission's order issued. *Borg-Warner Corp. v. FTC*, 746 F.2d 108, 110-111 (2d Cir. 1984). LabMD has no intention of dissolving as a Georgia corporation, retains the personal information of over 750,000 consumers, continues to operate a computer network, continues to provide past test results to healthcare providers and collect on monies owed to it, and intends to employ the same unreasonable policies and procedures to Personal Information in its possession as it employed in the past. (CCCL ¶¶ 60-64; CCFF ¶ 63).

226. As a matter of law, Complaint Counsel has failed to allege or prove by a preponderance of the evidence that LabMD's past course of conduct provides a legally sufficient basis for believing that it will violate Section 5(n) in the future.

Response to Conclusion No. 226:

The proposed conclusion is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs. To the extent Respondent is arguing that Complaint Counsel must prove its unfair acts will recur, it is a misstatement of law. (*See* CCRRCL ¶ 58). To the extent Respondent is arguing that Complaint Counsel has not proven that entry of the

Notice Order is necessary and proper, it is not supported by the evidence. (*See* CCRRCL ¶ 225 (describing factors showing an entry of the notice order is necessary to protect consumers); CCCL ¶¶ 60-71 (establishing that "there exists some cognizable danger of recurrent violation," *U.S. v. W.T. Grant. Co.*, 345 U.S. 629, 633 (1953)).

227. As a matter of law, "fencing-in" relief, which extends to future conduct by LabMD, is inappropriate in this case. *See Riordan*, 627 F.3d at 1234.

Response to Conclusion No. 227:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. *Riordan* is inapposite. It holds that a cease-and-desist order does not need to comply with a statute of limitations that applies to "any civil fine, penalty, or forfeiture." *Riordan v. SEC*, 627 F.3d 1230, 1234 (D.C. Cir. 2010). The D.C. Circuit held that the order was not covered by the statute because a cease-and-desist order preventing future misconduct is "purely remedial and preventative" and not a "penalty" or "forfeiture." *Id*. at1234-35 (quoting *Drath v. FTC*, 239 F.2d 452, 454 (D.C. Cir.1956)). Complaint Counsel has demonstrated that fencing-in relief is appropriate in this case. (CCCL ¶¶ 80-120).

228. Such relief "must be sufficiently clear that it is comprehensible to the violator, and must be 'reasonably related' to a violation of the [FTC] Act." *See In re Daniel Chapter One*, 2009 FTC LEXIS 157, at *280-*281 (citations omitted). Whether fencing-in relief bears a "reasonable relationship" to the conduct found to be unlawful depends on: "(1) the deliberateness and seriousness of the violation; (2) the degree of transferability of the violation to other products; and, (3) any history of prior violations." *See id.* It must be "reasonably calculated to prevent future violations of the sort found to have been committed." *See ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 221-22 (2d Cir. 1976).

Response to Conclusion No. 228:

To the extent the proposed conclusion quotes the cited sources, Complaint Counsel has no specific response. Complaint Counsel has demonstrated that fencing-in relief is appropriate in this case. (CCCL ¶¶ 80-120).

229. The first factor for fencing-in relief is "the deliberateness and seriousness of the violation." *See In re Daniel Chapter One*, 2009 FTC LEXIS 157, at *280-281. As a matter of law, Complaint Counsel has failed to allege or prove by a preponderance of the evidence that LabMD knowingly violated Section 5 or that such violations were "serious." *Compare In the Matter of Daniel Chapter One*, 2009 FTC LEXIS 157, at *281-282, *with In the Matter of POM Wonderful LLC*, 2012 FTC LEXIS 18, at *97-*98 (F.T.C. Jan. 11, 2012). Complaint Counsel does not dispute that LabMD's data security complied with HIPAA and has not alleged or proven that a HIPAA-compliant data security program could be a "serious" violation of Section 5.

Response to Conclusion No. 229:

The proposed conclusion is a misstatement of the law. Insofar as Respondent's proposed conclusion injects a "knowingly" requirement into the standard articulated by *Daniel Chapter One* and *POM Wonderful LLC*, it is not supported by any applicable legal authority, in violation of the Court's Order on Post-Trial Briefs.

Complaint Counsel has proven that LabMD's violations of section 5 were serious. (CCCL ¶¶ 105-110).

Respondent's HIPAA compliance or lack thereof is irrelevant to this proceeding, as Respondent has conceded. Comm'n Order Denying Resp't Mot. for Summ. Decision at 5-6 (May 19, 2014); CX0765 (LabMD's Resps. to Second Set of Discovery) at 12-13, Resp. to Interrog. 22 (stating that information regarding whether LabMD complied with HIPAA regulations is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence").

Respondent's representation of Complaint Counsel's evaluation of LabMD's HIPAA compliance is false and unsupported by any citation to the record, in violation of the Court's Order on Post-Trial Briefs. Respondent presented no evidence on its compliance with HIPAA, and in fact affirmatively declined to provide evidence on its HIPAA compliance. (CX0765 (LabMD's Resps. to Second Set of Discovery) at 12-13, Resp. to Interrog. 22 (stating that

information regarding whether LabMD complied with HIPAA regulations is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence")).

To the extent the proposed finding quotes *Daniel Chapter One*, Complaint Counsel has no specific response.

230. The second factor is "the degree of transferability of the violation to other products." *See In re Daniel Chapter One*, 2009 FTC LEXIS 157, at *280-*281. As a matter of law, Complaint Counsel has failed to allege or prove transferability in this case.

Response to Conclusion No. 230:

Complaint Counsel has proven that LabMD's data security failures are transferrable. (CCCL ¶¶ 112-114). To the extent the proposed finding quotes *Daniel Chapter One*, Complaint Counsel has no specific response.

231. The third factor is "history of prior violations." *See id.* Complaint Counsel has not alleged or proven any.

Response to Conclusion No. 231:

Complaint Counsel does not dispute that there is no evidence of prior violations of the FTC Act by LabMD. Where the first two factors sufficiently establish a relationship between the remedy and the violation, this factor is not necessary to the appropriateness of fencing-in relief in an order. *Telebrands Corp. v. FTC*, 457 F.3d 354, 362 (4th Cir. 2006); *Pom Wonderful LLC*, Docket No. 9344, Initial Decision at 314 (May 17, 2012). Furthermore, LabMD's data security failures occurred over a long period of time, were diverse, and covered a wide spectrum of data security practices, and the lack of prior adjudicated violations is not a bar to entry of fencing-in relief. (CCCL ¶¶ 117-120).

232. Fencing-in relief is therefore both unnecessary and unlawfully punitive in this case. *See Riordan*, 627 F.3d at 1234 ("[W]e have stated that a cease-and-desist order is 'purely remedial and preventative' and not a 'penalty' or 'forfeiture.'") (citing *Drath v. FTC*, 239 F.2d 452, 454 (D.C. Cir. 1956)). Complaint Counsel seeks an Order requiring LabMD to hire outside contractors to conduct biannual assessments, send letters to all persons on the 1718 File (notwithstanding there is no evidence of breach or injury) and establish a hotline and website,

implement onerous document retention requirements, and meet agency reporting requirements for twenty years. *See* Compl. at 12, *In the Matter of LabMD*, Dkt. No. 9357 (Aug. 28, 2013). However, as a matter of law it has not proven that such relief is appropriate.

Response to Conclusion No. 232:

The Court should disregard the proposed conclusion because it is not supported by the cited authority. (CCRRCL ¶¶ 224, 227 (addressing substantively identical Proposed Conclusions 224 & 227). Complaint Counsel has proven that the relief it seeks is appropriate. (CCCL ¶¶ 55-155; *see also* CCRRCL ¶¶ 223-231).

233. Also, Complaint Counsel's demanded relief includes a prohibited "obey-the-law" provision. The Complaint demands an Order requiring LabMD to:

> [N]o later than the date of service of this order, establish and implement, and thereafter maintain, a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers by respondent or by any corporation, subsidiary, division, website, or other device or affiliate owned or controlled by respondent. Such program, the content and implementation of which must be fully documented in writing, shall contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers, including:
>
> A. The designation of an employee or employees to coordinate and be accountable for the information security program;
>
> B. The identification of material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assessment of the sufficiency of any safeguards in place to control these risks. At a minimum, this risk assessment should include consideration of risks in each area of relevant operation, including, but not limited to: (1) employee training and management; (2) information systems, including network and software design, information processing, storage, transmission, and disposal; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;
>
> C. The design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;

> D. The development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and
>
> E. The evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by Subpart C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

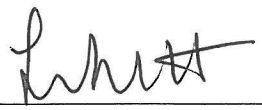
Compl. at ¶ 7-8. If FTC gave LabMD notice during the relevant time (2005-2010) that Section 5 required these things, as Complaint Counsel has argued, then the proposed order is an invalid "obey-the-law" provision. *SEC v. Goble*, 682 F.3d 934, 949 (11th Cir. 2012). If FTC did not give LabMD notice during the relevant time that Section 5 required these things, then, by definition, LabMD lacked constitutional fair notice. *Fabi Construction Co.*, 508 F.3d at 1088.

Response to Conclusion No. 233:

Respondent fails to cite any applicable legal authority for the "law" supporting its "obey-the-law" claim, in violation of the Court's Order on Post-Trial Briefs. The Commission's action and the notice order are not in violation of fair notice as guaranteed by the Due Process clause. (CCRRCL ¶¶ 35, 38, 89, 93). *SEC v. Goble* stands only for the proposition that an order cannot cross-reference provisions to statutes and rules that would require a defendant to have "compendious knowledge of the codes." *SEC v. Goble*, 682 F.3d 934, 952 (11th Cir. 2012). The *Goble* court vacated portions of an injunction only to remand the case so the district court could "specifically describe the proscribed conduct within the four corners of the injunction." *Id.* Here, the four corners of the comprehensive security program provision specifically describe the conduct required, and there is no basis to invalidate it. Part I of the notice order is consistent with the Commission's Safeguards Rule of the Gramm-Leach-Bliley Act, 16 C.F.R. § 314.1 *et seq.*, with relief approved by the Commission in prior cases relating to unfair data security and other practices, and with the Commission's guidance to businesses. (CCCL ¶¶ 125-131).

Dated: September 4, 2015

Respectfully submitted,



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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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

I also certify that I caused a copy of the foregoing document to be served *via* secure file transfer to:

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

I further certify that I caused a copy of the foregoing document to be served *via* secure file transfer to:

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CERTIFICATE FOR ELECTRONIC FILING

I 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 4, 2015

By: _____

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection