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 OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

At issue in this case is whether Respondent unfairly caused or likely caused harm to consumers that they could not reasonably avoid and that provided no countervailing benefits to consumers or competition by failing to implement and maintain reasonable data security measures to protect the sensitive consumer data it maintained, including Social Security numbers, laboratory test results and diagnosis or medical test codes, and health insurance company names and policy numbers. Respondent's Motion is the latest in a series of attempts to avoid the Court's determination on that question and distract from Respondent's data security failures with unfounded, unsupported, and untrue suggestions of Complaint Counsel misconduct and conspiracy. Because Complaint Counsel has far exceeded the *prima facie* threshold for establishing a Section 5 violation, Respondent's latest attempt to short circuit this proceeding must fail.

Rule 3.22(a) contemplates the filing of a motion to dismiss at the close of Complaint Counsel's evidence based upon an alleged failure to establish a *prima facie* case. 16 C.F.R. § 3.22(a). Respondent filed such a motion on May 27, 2014, to which Complaint Counsel responded on June 6, 2014. On April 24, 2015, Respondent filed the instant supplemental

Motion to Dismiss[1] ostensibly "in order to apprise the Court of a number of new facts that have developed" since it filed its May 2014 Motion to Dismiss. Mot. to Dismiss at 1 n.1. The alleged facts presented by Respondent, the majority of which are not based on record evidence in this proceeding, do not relate to Complaint Counsel's presentation of its evidence and whether it has established a *prima facie* case in support of the complaint. The issues Respondent raises are not appropriate for resolution on a motion to dismiss, and the remedies Respondent seems to seek, such as exclusion of Complaint Counsel's evidence, are likewise inappropriate on a motion to dismiss. Therefore, the Court should deny Respondent's Motion.

I. STANDARD FOR MOTION TO DISMISS

A motion to dismiss made at the close of Complaint Counsel's evidence is analogous to a motion for judgment as a matter of law, as described in Federal Rule of Civil Procedure 50(a), which permits a court, after a party "has been fully heard on an issue" and finds there is no "legally sufficient evidentiary basis to find for the party on that issue," to "resolve the issue against the party" and enter judgment as a matter of law. As the Supreme Court explained, "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The Court observed that the standard is "very close" to the summary judgment standard, describing the inquiry under both standards as "whether the evidence presents a sufficient disagreement to require submission to a jury[2] or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. Put another way, "a district court grants [judgment as a matter of law]

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[1] This is Respondent's third motion to dismiss. It filed a pre-trial motion to dismiss with the Commission, which the Commission treated as a motion to dismiss for failure to state a claim analogous to a motion under Federal Rule of Civil Procedure 12(b)(6) and denied. Order Denying Resp't LabMD's Mot. to Dismiss (Jan. 16, 2014) at 3.

[2] Although the Court refers to jury trials, the Commission has ruled on motions for summary decision under the *Anderson* standard, indicating that it applies to trials before the Administrative Law Judge as well. *See, e.g.*, Order Denying Resp't LabMD, Inc's Mot. for Summ. Decision (May 19, 2014) at 3.

only 'if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion."' *Lucent Techs., Inc. v. Gateway, Inc*., 580 F.3d 1301, 1309 (Fed. Cir. 2009) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)).

This Court has applied the foregoing standard, denying a motion to dismiss where "Respondent failed to demonstrate that the Complaint should be dismissed for failure to establish a prima facie case." *In re McWane, Inc.*, 2012 FTC LEXIS 174 (Nov. 7, 2012); *see also In re Chicago Bridge & Iron Co. N.V.*, 2003 FTC LEXIS 28 (Jan 28, 2003); *In re Porter & Deitsch, Inc.*, 1977 FTC LEXIS 11, at *20-21, 157 (Dec. 20, 1977). Complaint Counsel amply demonstrated in its June 6, 2014 Opposition to Motion to Dismiss that it has presented an adequate – indeed overwhelming – *prima facie* case, and will not repeat its recitation of the facts in evidence here.

As to purported facts that are not in evidence introduced by Respondent in its Motion, "[f]acts are 'material' for present purposes only if they tend to prove or disprove that LabMD's data security practices satisfy" the criteria of Section 5(n) of the FTC Act. Order Denying Resp't's Mot. for Summ. Decision (May 19, 2014) at 3. "Facts that have no bearing on these dispositive questions 'are irrelevant and unnecessary [and] will not be counted.'"[3] *Id.* (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 248). Respondent's Motion contains numerous spurious and inflammatory assertions that are unsupported by the record in this proceeding.[4] Complaint

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[3] For example, in yet another attempt to divert attention from the relevant facts, Respondent's Motion makes assertions related to HIPAA regulations, Resp't Motion at 2, despite the fact that the Commission has already ruled, and Respondent has acknowledged, that HIPAA is irrelevant to this proceeding. Comm'n Order Denying Resp't Motion for Summary Decision at 5-6; Resp't Responses to Complaint Counsel's Second Set of Interrogatories at 12-13 (stating that information regarding whether LabMD complied with HIPAA regulations is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence"), attached as Exhibit A.

[4] Respondent also repeatedly provides a skewed recounting of [redacted]

Counsel disputes Respondent's specious characterizations and categorically denies any allegations of misconduct by Complaint Counsel. To promote judicial economy, Complaint Counsel has not responded to each of Respondent's mischaracterizations and instead addresses Respondent's failure to meet the legal standard to prevail on its Motion.

II. RESPONDENT HAS PRESENTED NO BASIS FOR DISMISSAL OF THIS PROCEEDING

A. Complaint Counsel Presented a *Prima Facie* Case Establishing that Respondent's Conduct Was Unfair

To the extent that Respondent is arguing that Complaint Counsel has failed to present a *prima facie* case that Respondent engaged in unfair acts or practices by failing to protect consumer Personal Information, Respondent is plainly incorrect. The argument ignores the overwhelming evidence establishing that Respondent's practices cause or are likely to cause substantial injury to consumers that the consumers cannot reasonably avoid, including evidence of Respondent's systemic failure to provide reasonable and appropriate security for sensitive personal information on its computer networks,[5] and its admission that the 1718 File was

[redacted]

[5] *See, e.g.*, JX0001., Fact 6 (admitting that LabMD did not memorialize security policies in writing until 2010); *id.*, Fact 8 (admitting that LabMD did not conduct penetration tests until 2010); *id.*, Fact 5 (admitting that LabMD maintained personal information about approximately 100,000 consumers for whom it never performed laboratory tests), CX 0734 at 60-63 (LabMD provided no formal employee training regarding IT); CX0167 (identifying weak passwords); CX0067 at 22-23, 65 (identifying a critical vulnerability from failing to update an operating system).

available for sharing through LimeWire installed on a LabMD computer.[6] When a company fails to uphold data security measures that are "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, it acts in violation of Section 5. As the Commission put it in deciding Respondent's first Motion to Dismiss, "occurences of actual data security breaches or 'actual, completed economic harms' 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 on Resp't's Mot. to Dismiss at 19.

The evidentiary record contains voluminous evidence of Respondent's failure to reasonably and appropriately protect consumers' personal information on its computer networks. Specifically, the evidentiary record establishes that Respondent failed to: (1) develop, implement, or maintain a comprehensive data security program;[7] (2) use readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities;[8] (3) use adequate measures to prevent employees from accessing consumers' personal information not needed to perform their jobs;[9] (4) adequately train employees on basic security practices;[10] (5) require employees and others to use common authentication-related

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[6] *See, e.g.*, JX0001, Facts 10-11.

[7] *See, e.g.*, Hill, Tr. at 125-36; JX0001, Fact 6-7

[8] *See, e.g.*, Hill, Tr. at 137-63; JX0001, Fact 8; CX0035; CX0070.

[9] *See, e.g.*, Hill, Tr. at 163-67; JX0001, Fact 5, CX0754.

[10] *See, e.g.*, Hill, Tr. at 167-76.

security measures;[11] (6) maintain and update operating systems on computers and other devices;[12] and (7) use readily available measures to prevent and detect unauthorized access to consumers' personal information.[13] Compl. ¶ 10. Complaint Counsel also established that many of these issues could have been remediated at low or no cost, and that LabMD's failure to implement such remediation therefore provided no offsetting benefits to consumers or competition.[14] As such, any claim that Complaint Counsel has failed to establish its *prima facie* case is a gross mischaracterization of the record.

In addition to this systemic failure to reasonably protect consumers' personal information, Complaint Counsel has proven that Respondent allowed the 1718 File to be made available on a peer-to-peer network. By Respondent's own admission, the 1718 File and hundreds of other files were available for sharing on a P2P network from a LabMD computer.[15] Mr. Wallace's testimony of May 5, 2015 corroborates this disclosure. Mr. Wallace confirmed that he found the 1718 File on the Gnutella P2P network using a program such as LimeWire on a stand-alone desktop computer without the aid of any proprietary technology. Wallace, Rough Tr. 30, 58 (May 5, 2015). Accordingly, the availability of the 1718 File and the sensitive

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[11] *See, e.g.*, Hill, Tr. at 176-88; CX0167.

[12] *See, e.g.*, Hill, Tr. at 188-94; CX0067; CX0051.

[13] *See, e.g.*, Hill, Tr. at 194-202.

[14] *See, e.g.*, Hill, Tr. 132-36 (LabMD could have developed, implemented, or maintained a comprehensive information security program to protect consumers' Personal Information at relatively low cost); Hill, Tr. 137-40, 161-62 (LabMD could have used readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities on its network at relatively low cost); Hill, Tr. 164, 166 (LabMD could have regularly purged unneeded Personal Information from its databases and limited employees' access to Personal Information to only the types of Personal Information that the employees needed to perform their jobs at relatively low cost); Hill, Tr. 173-74 (LabMD could have adequately trained employees to safeguard Personal Information at relatively low cost); Hill, Tr. 188 (LabMD could have implemented strong authentication-related security measures at low or no cost); Hill, Tr. 194 (LabMD could have maintained and updated operating systems of computers and other devices on its network at relatively low cost); Hill, Tr. 201-02 (LabMD could have employed readily available measures to prevent or detect unauthorized access to Personal Information on its computer network at relatively low cost).

[15] *See, e.g.*, JX0001, Facts 10-11.

personal information for more than 9,300 consumers that it contains were likely to cause substantial consumer injury. Comm'n Order on Resp't's Mot. to Dismiss at 19 ("[O]ccurences of actual data security breaches or 'actual, completed economic harms' 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.'"); *accord In re Int'l Harvester Co.*, 104 FTC 949, 1984 WL 565290 at *89 n.52 (1984) (examining likelihood of harm standard and stating "[t]he ultimate question at issue is, indeed, risk. What is the risk of consumer harm?").

B. Respondent Has Not Been Denied a Fair Trial

Respondent raises a number of due process and constitutional arguments in its request for dismissal of this case. These issues are not appropriate for resolution in a motion for judgment on the law, which, as described above, relates solely to Complaint Counsel's *prima facie* case in support of the Commission's complaint.

First, Respondent argues that it has a First Amendment retaliation claim against the Commission. Mot. to Dismiss at 32-33. While LabMD has engaged in extensive litigation relating to this claim,[16] it did not assert it as an affirmative defense in this proceeding. *See* Ans. at 6-7. These allegations are, then, irrelevant to the Complaint or Respondent's defenses. The Eleventh Circuit has held that this claim will be justiciable upon appellate review after final agency action. *LabMD, Inc. v. FTC*, No. 14-12144 (11th Cir. Jan. 20, 2015), *pet. for reh'g en banc denied* April 21, 2015 (order affirming district court's dismissal of case at 10-11), attached as Ex. B.

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[16] Relating to its First Amendment claim, among others, LabMD filed suit in the District of the District of Columbia on November 14, 2013, No. 13-1787, which it voluntarily dismissed on February 19, 2014; in the Eleventh Circuit on December 23, 2013, No. 13-15267, which was dismissed *sua sponte* for lack of jurisdiction; on March 20, 2014 in the Northern District of Georgia, No. 14-810, which was dismissed based on the lack of a final agency action to review; and appealed to the Eleventh Circuit, No. 14-12144, on May 15, 2014, which was denied on January 20, 2015.

Second, Respondent claims Chairwoman Ramirez's alleged participation in the Commission's response to the House Committee on Oversight and Government Reform's ("OGR") investigation "taints this proceeding." Mot. to Dismiss at 33. Respondent has filed a separate motion seeking to disqualify the Chairwoman, *see* Mot. to Disqualify Commissioner[sic] Edith Ramirez (Apr. 27, 2015), which is the proper vehicle for resolving this claim. Respondent also claims that the outcome of this proceeding is pre-determined and is tantamount to a denial of due process. This argument has been repeatedly rejected by federal courts in which LabMD has brought ancillary litigation, most recently by the Eleventh Circuit, which emphasized that "'no rights or obligations have been determined,' because the agency proceeding is ongoing." Ex. B at 6 (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

Finally, Respondent's arguments relating to the Administrative Procedure Act merely repackage its allegations relating to the Chairwoman's alleged bias. Mot. to Dismiss at 34. Were the Court to accept this argument, it would find itself in the extraordinary position of holding that any Congressional inquiry to any agency regarding any matter, no matter how tangential, related to an ongoing agency proceeding requires immediate dismissal of that proceeding. The *ex parte* communication and disclosure provisions of 5 U.S.C. § 557 are designed to ensure "fair decisionmaking; only if a party knows the arguments presented to a decisionmaker can the party respond effectively and ensure that its position is fairly considered." *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 563 (D.C. Cir. 1982). The Commission's response to requests from OGR for factual material related to that body's investigation does not fall within the ambit of "arguments presented to a decisionmaker" to which Respondent has no opportunity to respond. Indeed, the statute specifically states that it "does not constitute authority to withhold information from Congress." 5 U.S.C. § 557(d)(2).

C. Respondent Seeks Remedies Unavailable Under a Motion to Dismiss

The remedies Respondent seeks in its Motion are the types of remedies imposed as sanctions. Such relief is not available, either under a motion styled as one to dismiss or a motion for sanctions.[17] As this Court observed in 2010 in ruling on a motion for sanctions, "the Commission's Rules of Practice do not contain a rule analogous to Rule 11 of the Federal Rules of Civil Procedure." *In re Gemtronics, Inc.*, No. 9330, 2010 FTC LEXIS 40, at *8 (Apr. 27, 2010). Furthermore, Respondent's previous motion seeking dismissal as a sanction for many of the same "facts" not in evidence was denied because it "would require fact finding on disputed evidentiary issues." Order on Resp't's Mot. for Sanctions at 2 (Sept. 5, 2014).

There is likewise no basis in the Rules, in the record, or in Respondent's Motion for the suggestions that a witness's testimony must be stricken from the record, Mot. to Dism. at 28, 32, or that certain evidence must not be considered and the case dismissed under the Exclusionary Rule, *id.* at 31. For example, the cases Respondent cites to support its arguments related to exclusion of the 1718 File deal with evidence gathered through unreasonable searches conducted by the government and are therefore inapplicable to the facts of this proceeding in which Respondent has no evidence of an unreasonable government search. *See O'Connor v. Ortega*, 480 U.S. 709 (1987); *U.S. v. Jacobsen*, 466 U.S. 109, 114 (1984); *Marshall v. Barlow's*, 436 U.S. 306 (1978); *Boudreau v. McDowell*, 256 U.S. 465, 475 (1921); *U.S. v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982); *United States v. Widow Brown's Inn of Plumsteadville, Inc.* 1992 OCAHO LEXIS 3 (Jan. 15, 1992).

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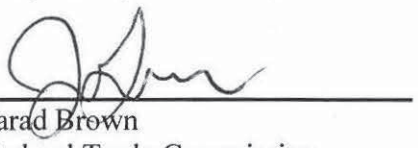
[17] Respondent has already sought dismissal of this case as a sanction and been denied. *See* Order on Resp't's Mot. for Sanctions (Sept. 5, 2014).

III. CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss should be denied. The grounds raised and remedies sought in Respondent's Motion are improper. Complaint Counsel has presented a *prima facie* case that supports the complaint, and Respondent has failed to establish that it is entitled to judgment as a matter of law.

Dated: May 6, 2015

Respectfully submitted,



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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 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 transmitted *via* electronic mail and delivered by hand 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* electronic mail 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.

May 6, 2015

By: _____

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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

RESPONDENT'S RESPONSES

Respondent, LabMD, Inc. ("LabMD"), for its response to Complaint Counsel's Interrogatories and Requests ("Discovery Requests") states as follows:

GENERAL OBJECTIONS

1. Respondent objects to the Discovery Requests to the extent that they seek information which is neither relevant to, nor reasonably likely to lead to the discovery of admissible evidence.

2. Respondent objects to the Discovery Requests to the extent that they are overly broad, unduly burdensome, vague, ambiguous, and/or unrestricted by any relevant date parameters.

3. Respondent objects to the Discovery Requests to the extent that they seek information which is protected from discovery by the attorney-client privilege or work product doctrine.

4. Respondent objects to the Discovery Requests to the extent they seek a legal conclusion.

5. Respondent objects to the Discovery Requests to the extent they seek information and/or documents that are contained in or are part of the public record and readily obtainable by Complaint Counsel.

6. Respondent reserves all rights to object to the competency, relevancy, materiality and/or admissibility of the information and/or documents disclosed in response to the Discovery Requests.

7. Respondent objects to the Discovery Requests to the extent they seek information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information.

8. Respondent hereby incorporates these General Objections into each of the Responses herein, and failure to include each such General Objection in response to each Discovery Requests shall not waive LabMD's objections in this regard.

REQUESTS

29. Documents Sufficient to Show the last known address of all Consumers whose Personal Information is included in the 1,718 File or the Sacramento Documents.

RESPONSE: Respondent objects to this request as irrelevant and unduly burdensome. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that the FTC, has already been provided the name, social security number, and/or prior address of any of the Consumers identified in the 1,718 File or the Sacramento Documents, and thus FTC

is able to find the most recent address based upon its access to federal records such as tax returns. Therefore, the information sought is just as available, if not more so, to the FTC than to LabMD.

30. All documents listed in the document labeled FTC-LABMD-003755.

RESPONSE: Respondent objects to this request as unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent will produce the documents, to the extent they exist, listed in FTC-LABMD-003755, but makes no representation that these documents contain the same information as the documents listed in FTC-LABMD-03755 on the date the screenshot was taken.

31. All documents relating to any steps taken or investigation conducted by or on behalf of LabMD in connection with the Security Incident described in Paragraphs 17-19 of the Complaint, including any risk assessments conducted by or on behalf of the company pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).

RESPONSE: Respondent objects to this request as irrelevant. Without waiving these objections and/or the foregoing General Objections, responsive documentation was provided to Complaint Counsel on February 24, 2010 by letter from Phillipa Ellis in responses to requests numbered 13, 14, 15, 16, and 17.

32. All documents relating to any steps taken or investigation conducted by or on behalf of LabMD in connection with the Security Incident described in Paragraph 21 of the Complaint, including any risk assessments conducted by or on behalf of the company pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).

RESPONSE: Respondent objects to this request as irrelevant. Without waiving these objections and/or the foregoing General Objections, responsive documents were provided pursuant to Requests No. 16 and 17 of Complaint Counsel's First Set of Requests for Production of Documents.

33. Documents Sufficient to Show the dates during which LabMD employed Karalyn Garrett.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent will produce responsive documents.

34. Documents Sufficient to Show the dates during which LabMD employed Rosalind Woodson.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent will produce responsive documents.

35. Documents Sufficient to Show each substantially different Communication from LabMD to referring physicians, employees, contractors, or referring physicians' patients related to LabMD's decision to stop accepting new specimens.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent will produce responsive documents.

36. For each substantially different Communication from LabMD to referring physicians, employees, contractors, or referring physicians' patients related to LabMD's decision to stop accepting new specimens, Documents Sufficient to Show the full name and address of every Person to whom or to which Lab MD directed the Communication.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states no such document exist.

37. All Documents relating to LabMD's intent to dissolve as a Georgia corporation.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence Without waiving these objections and/or the foregoing General Objections, Respondent states no such document exist.

38. Documents Sufficient to Show the means by which LabMD protects or will protect Personal Information in its possession, custody, or control from unauthorized disclosure or access during the time period subsequent to LabMD's decision to stop accepting new specimens.

RESPONSE: Respondent objects this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, overly broad, and unduly burdensome. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing

General Objections, Respondent further states that LabMD will employ the same policies and procedures to protect Protected Health Information as it did prior to its decision to stop accepting new specimens, and that this information has already been provided. LabMD states that the laboratory information system, medical software is no longer connected to the internet.

39. All Documents LabMD intends to use to refute the allegations of the Complaint.

RESPONSE: Respondent will comply with its discovery obligations as stated in the ALJ's Revised Scheduling Order, and will produce proposed exhibits on April 9, 2014.

40. All Documents LabMD intends to use to support any affirmative defenses in its Answer.

RESPONSE: Respondent will comply with its discovery obligations as stated in the ALJ's Revised Scheduling Order, and will produce proposed exhibits on April 9, 2014.

INTERROGATORIES

10. Describe LabMD's current operations, including LabMD's status as a Georgia corporation with its principal office or place of business at 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339, and state the date on which LabMD decided to stop accepting new specimens.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, vague, ambiguous, and overly broad. Specifically, Complaint Counsel's use of the phrase "LabMD's current operations" is ambiguous. Without waiving these objections and/or the foregoing General Objections, Respondent states that LabMD is a Georgia corporation with its principal office at 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339, and that it began winding down its operations and stopped accepting new specimens on December 20, 2013.

11. State whether LabMD intends to dissolve as a Georgia corporation, setting forth specifically the time period in which it intends to file a Notice of Intent to Dissolve, wind-up its assets and obligations, or file Articles of Dissolution.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states that LabMD does not intend to dissolve as a Georgia corporation.

12. For the period from August 1, 2013 through January 1, 2015, state whether and how LabMD intends to preserve the Personal Information currently in its possession, custody, or control. If LabMD intends to preserve the Personal Information currently in its possession, custody, or control, describe how LabMD intends to protect the Personal Information from unauthorized access or disclosure.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that it will employ the same policies, procedures, hardware, and software utilized to protect Protected Health Information post August 2013 as it used prior to August 2013. This information has already been provided. Further the information is now kept in an unmarked location not readily recognizable as a business.

13. State the types of Personal Information that LabMD has collected or maintained. For each type of Personal Information, identify the number of Consumers whose Personal Information LabMD has collected or maintained, and state whether the information is stored or maintained electronically or in hard copy.

ANSWER: Respondent objects to this request as overly broad, burdensome, and vague. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Furthermore, Respondent states that this interrogatory is impossible to answer as worded, as LabMD did not keep track of the number of Consumers by the classifications of Personal Information which Complaint Counsel designates in its definition section. Without waiving these objections and/or the foregoing General Objections, Respondent states that LabMD has received the categories of Protected Health Information as described in Complaint Counsel's definition section, and that this information is kept electronically. Only inbound requests for lab tests, checks and transaction records are kept in hard copy.

14. For Personal Information that LabMD stores or maintains electronically, identify the location(s) on LabMD's networks (e.g., servers, applications, databases, or personal computers) where each type of Personal Information is stored or maintained. If the location(s) have changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents

relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that Protected Health Information is stored only on the Lytec and LabNet servers, and is not stored on personal computers, databases, or applications.

15. For each location on LabMD's networks identified in response to Interrogatory 14, identify the format (e.g., encrypted or clear readable text) in which the Personal Information is stored or maintained. If the format has changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only collected Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that all Protected Health Information is stored in an encrypted form.

16. For each location on LabMD's networks identified in response to Interrogatory 14, identify the means by which LabMD protects the Personal Information contained therein from unauthorized access or disclosure. If the means by which Lab MD protects Personal Information has changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that regardless of location, Protected Health Information is protected by passwords, security cameras, locks, and encryption software. In addition, Respondent further states that the Lytec server is the only server currently connected to the internet.

17. For Personal Information LabMD stores or maintains in hard copy, identify the location(s) of the hard copy information, and describe the means by which LabMD protects the Personal Information contained therein from unauthorized access or disclosure. If the means by which Lab MD protects Personal Information has changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that Protected Health Information previously stored at 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339 was stored in locked file cabinets. Protected Health

Information currently located at 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339 is stored in a locked condominium in a locked room, in a gated community only accessible by code.

18. State whether LabMD has used any of the following IP addresses for a business purpose: 173.16.83.112; 68.107.85.250; 201.194.118.82; 90.215.200.56.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states that none of the above mentioned IP addresses have been used by LabMD, Inc. for a business purpose, to the best of its knowledge.

19. State the dates on which LabMD's employment relationship with each of the following individuals ended, describing for each the reasons that his or her employment ended: Lawrence Hudson; Rosalind Woodson; Curt Kaloustian; Alison Simmons; Karalyn Garrett; and Kim Gardner.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, states that Lawrence Hudson was terminated for his sales performance; Rosalind Woodson was terminated for poor job performance and for breaking company policy; Curt Kaloustian was terminated for job abandonment; Allison Simmons was terminated for poor job performance; and Karalyn Garrett was terminated for poor job performance and sleeping on the job. Respondent will produce additional documentation.

20. For each job title responsible for tasks related to LabMD's billing- including Billing Representative, Billing Specialist, Accounts Receivable Specialist, Payment Posting

Specialist, Billing Manager, Client Services Manager, or Finance Manager- identify and describe each technical measure used to limit access to Personal Information maintained by LabMD.

ANSWER: Respondent objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only collected Protected Health Information. Without waiving these objections or the foregoing General Objections, see Respondent response to Complaint Counsel's Interrogatory 1 and 2.

21. For each .pdf file listed in the document labeled FTC-LABMD-003755, identify the types of Personal Information contained therein, and identify the number of Consumers whose Personal Information is contained therein.

ANSWER: Respondent objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving the these objections or the foregoing General Objections, Respondent states that no documents, except the 1718 File, contained Protected Health Information.

22. State whether you contend that LabMD has complied with the Privacy Rule, 45 C.F.R. Part 160 and Subparts A and E of Part 164, or the Security Rule, 45 C.F.R. Part 160 and Subparts A and C of Part 164, promulgated by the Department of Health and Human Services. If you contend that LabMD has complied with the Privacy Rule or the Security Rule promulgated by the Department of Health and Human Services, identify all facts that support that contention.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

23. State whether you contend that peer-to-peer file sharing applications do not present a risk that users will inadvertently share files on peer-to-peer networks. If you contend that that peer-to-peer file sharing applications do not present a risk that users will inadvertently share files on peer-to-peer networks, identify all facts that support that contention.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects as it is premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Respondent will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

24. State whether you contend that Lime Wire was used to conduct an intrusion of LabMD's computer networks. If you contend that Lime Wire was used to conduct an intrusion of LabMD's computer networks, identify all facts that support that contention.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects as it is premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Respondent will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

25. Identify each denial of a material allegation and each affirmative defense in your Answer, and for each state all facts upon which you base the denial or affirmative defense.

ANSWER: Respondent objects to this Request as the Answer speaks for itself. Respondent further objects to this request to the extent it seeks attorney work-product. Moreover Respondent objects as it is premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Respondent will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

/s/ William A. Sherman, II
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Admitted only in Maryland.
Practice limited to cases in federal court and administrative proceedings before federal agencies.
Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that on March 3, 2014, I served via electronic mail delivery a copy of the foregoing document to:

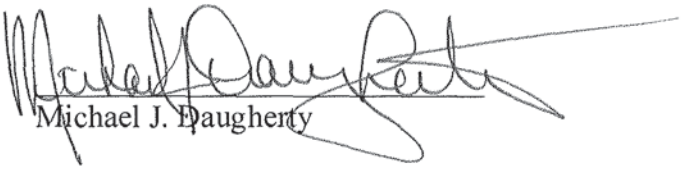
Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Melun
Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW Room NJ-8100
Washington, DC 20580
Tel: (202) 326-2999 (VanDruff) Facsimile: (202) 326-3062
Email: lvandruff@ftc.gov

By: /s/ William A. Sherman, II__

549815v2

VERIFICATION

I, Michael J. Daugherty, hereby verify that the foregoing answers to the above interrogatories are true and accurate to the best of my knowledge and information.



Michael J. Daugherty

Exhibit B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12144

D.C. Docket No. 1:14-cv-00810-WSD

LABMD, INC.,

Plaintiff - Appellant,

versus

FEDERAL TRADE COMMISSION,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 20, 2015)

Before MARTIN and ANDERSON, Circuit Judges, and COTE,* District Judge.

MARTIN, Circuit Judge:

LabMD, Inc. is an Atlanta-based laboratory that performed cancer-detection testing services for doctors. After the Federal Trade Commission (FTC) discovered that LabMD patient information files were available on a peer-to-peer file-sharing network, it launched an investigation into LabMD's data-security practices. The investigation persisted for three years, leading LabMD's CEO, Michael Daugherty, to publicly criticize the FTC's actions. Shortly after Mr. Daugherty posted an online trailer for his book, "The Devil Inside the Beltway," which he says exposes corruption in the federal government, the FTC filed an administrative complaint against the company. The administrative proceeding is ongoing.

This appeal addresses the District Court's dismissal of LabMD's challenges to the FTC's ability to regulate and conduct enforcement proceedings in the area of healthcare data privacy. LabMD argues that the FTC's enforcement action violates the Administrative Procedure Act (APA), is ultra vires, and is unconstitutional.

Before we can reach the merits of LabMD's claims, we must first face the central question of whether the District Court has subject-matter jurisdiction to consider LabMD's challenges while the administrative proceeding is ongoing.

* Honorable Denise Cote, United States District Judge for the Southern District of New York, sitting by designation.

Because we hold that the FTC's Order denying LabMD's motion to dismiss was not a "final agency action," as is required of claims made under the APA, those claims were properly dismissed. And because we conclude that LabMD's other claims—that the FTC's actions were ultra vires and unconstitutional—are intertwined with its APA claim for relief and may only be heard at the end of the administrative proceeding, we affirm the District Court's order dismissing the case for lack of subject-matter jurisdiction.

I.

In 2008, internet-security company Tiversa, Inc. notified LabMD that it had obtained sensitive patient information from LabMD. Under circumstances that remain hotly disputed by the parties, the FTC learned about the possible breach of security involving patient information and began an investigation into LabMD's data-security practices in 2010. On July 19, 2013, Mr. Daugherty posted an online trailer to his book highlighting corruption in the federal government, including specific claims about the FTC. Three days after Mr. Daugherty posted the trailer online, the FTC gave notice of its intent to file a complaint against LabMD.

In August 2013, the FTC filed its administrative complaint, alleging that LabMD violated Section 5 of the FTC Act by engaging in an "unfair . . . act[] or practice[]" by failing to prevent unauthorized access to its patient information. LabMD moved to dismiss the FTC Complaint, which the FTC denied in a January

2014 Order. LabMD next filed suit in the District Court for the District of Columbia, seeking an injunction to stay the administrative action from going forward on the grounds that it was an improper expansion of FTC jurisdiction, was retaliatory, and violated the Due Process Clause. LabMD v. FTC, No. 1:13-cv-1787 (D.D.C. Nov. 14, 2013). LabMD filed a similar action in this Court, making the same allegations. LabMD Inc. v. FTC, No. 13-15267-F (11th Cir. Feb. 18, 2014). We denied LabMD's claim, citing our lack of jurisdiction over a non-final agency action, but we declined to address whether the District Court could hear any of the claims. Id. LabMD voluntarily dismissed its District of Columbia suit.

On March 20, 2014, LabMD filed this suit in the Northern District of Georgia, alleging that: (1) the FTC's administrative action against LabMD is arbitrary and capricious in violation of the APA because the FTC has no authority to regulate protected health information (PHI); (2) the action is ultra vires and exceeds its statutory authority; (3) the FTC's application of Section 5 to LabMD's security protocols violates the Due Process Clause of the U.S. Constitution because it did not provide fair notice or access to a fair tribunal and a hearing; and (4) the FTC violated LabMD's First Amendment right to free speech. The FTC filed a motion to dismiss, which the District Court granted.

II.

We review de novo a district court's grant of a motion to dismiss for lack of subject-matter jurisdiction. Cash v. Barnhart, 327 F.3d 1252, 1255 n.4 (11th Cir. 2003) (per curiam). The District Court dismissed LabMD's APA claim for lack of subject-matter jurisdiction because the FTC's Order denying dismissal was not a final order. The District Court also dismissed the related constitutional and ultra vires claims as premature. We first turn to LabMD's challenge under the APA. LabMD argues that the Complaint and Order were sufficiently final to confer subject-matter jurisdiction over its APA claim. We cannot agree.

According to the APA, "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. Absent a final action, the courts are to exercise restraint so that the administrative agency may correct any errors by conducting its own internal appeals and by applying its own institutional expertise. The Supreme Court has held that an action must satisfy two requirements to be final: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177–78, 117 S. Ct. 1154, 1168 (1997) (internal citations and quotation marks omitted).

Under the Bennett standard, the Order and Complaint LabMD seeks to have us review are not final. First, neither document is a consummation of the agency's decisionmaking process. LabMD suggests that these documents "effectively determined there would be legal consequences imposed on LabMD," because the filing of an FTC complaint almost certainly leads to a cease-and-desist order. But, high odds of a cease-and-desist order coming from the FTC do not advance our ability to review the FTC actions. It is the nature of the action we must consider, and the Complaint and Order do not finally decide these issues. By definition, the denial of a motion to dismiss ensures that the proceeding will continue to a later, final order. In the same way, a complaint is just an initial document.

Next, no "direct and appreciable legal consequences" flowed from either FTC action, and "no rights or obligations have been determined," because the agency proceeding is ongoing. See Bennett, 520 U.S. at 178, 117 S. Ct. at 1168–69. LabMD argues that, on two occasions, the FTC characterized its Order as final, and therefore we must accept it as such. First, the FTC described its Order here as a "definitive interpretation of the application of Section 5." Second, the FTC sought Chevron[1] deference for this Order in another case. See FTC v. Wyndham Worldwide Corp., 10 F. Supp. 3d 602, 615 n.8 (D.N.J. 2014). True as

[1] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). Chevron deference is afforded only to final agency actions operating with the force and effect of law, Christenson v. Harris Cnty., 529 U.S. 576, 587, 120 S. Ct. 1655, 1662–63 (2000).

this may be, we are not required to agree with the FTC's characterization of its own Order in the course of litigation. See, e.g., Inv. Co. Inst. v. Camp, 401 U.S. 617, 628, 91 S. Ct. 1091, 1097–98 (1971); William Bros. v. Pate, 833 F.2d 261, 265 (11th Cir. 1987) ("[W]e do not agree that the [agency's] mere litigating position is due to be given deference. . . . [T]he Supreme Court has on a number of occasions proscribed granting deference to a litigating position . . . ."). And while it would be notable that some other court had afforded Chevron deference to the FTC's Order—because that would imply a finding of finality—the court in the case proffered by LabMD did not afford Chevron deference. The FTC merely asked for it.

Even though the Supreme Court has previously held that an FTC complaint is not final agency action, see FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239, 101 S. Ct. 488, 493 (1980), LabMD suggests that its challenge to the FTC's jurisdiction can be heard at this early stage in the administrative proceeding because it falls within an exception to Standard Oil. Later circuit court cases interpreting Standard Oil suggest that its holding does have limited exceptions which would allow district court review of administrative actions. See, e.g., Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n, 707 F.2d 1485, 1489 & n.30 (D.C. Cir. 1983) (recognizing an exception to the exhaustion requirement and permitting district court review of an agency's authority to impose civil penalties);

CSI Aviation Servs., Inc. v. U.S. Dep't of Transp., 637 F.3d 408, 412–13 (D.C. Cir. 2011) (holding that a Department of Transportation warning letter and exemption order were sufficiently "final" because they (1) included a definitive statement that the plaintiff's business was violating the Federal Aviation Act; (2) presented a "purely legal" question with no factual disputes; and (3) imposed an immediate burden by effectively requiring the business to stop operating). Even if those exceptions applied in this Circuit, LabMD's challenge here does not fit within their terms. As set forth in our discussion above, the FTC Complaint and Order are not sufficiently definitive, cleanly legal, or immediately burdensome so as to require our review at this stage. The FTC is best suited to develop the factual record, continue to evaluate its position on the issues, and apply its expertise to complete the proceeding. All of this will allow for more robust appellate review by this Court when the action concludes.

III.

LabMD next suggests that its constitutional and ultra vires claims can be heard even if we do not reach the APA claim. But under similar circumstances, the Supreme Court has declined to consider constitutional claims before the administrative process was completed. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215, 114 S. Ct. 771, 780 (1994) (holding that the district court did not have subject-matter jurisdiction to hear a pre-enforcement due process challenge).

The Court in Thunder Basin emphasized that the claims "c[ould] be meaningfully addressed in the Court of Appeals" after final agency determination. Id. Our own Court's decision in Doe v. FAA, 432 F.3d 1259 (11th Cir. 2005), also clarifies that all constitutional claims must be funneled through the direct-appeal process after a final agency action if that is the scheme created by Congress. Id. at 1262–63. The FTC Act provides for appellate review by the Courts of Appeals after the agency action is complete, see 15 U.S.C. § 45(c), and similar to the challenger in Doe, LabMD's claims can be heard at that time.

LabMD cites National Parks Conservation Association v. Norton, 324 F.3d 1229, 1241 (11th Cir. 2003), to say that, absent an explicit provision limiting constitutional review in the agency's enabling statute, the federal courts should always be able to hear well-pleaded complaints. Though it is true that in Norton we addressed the merits of an equal-protection claim after finding that agency action was not sufficiently final to confer jurisdiction over a connected APA claim, nothing in that holding requires us to do the same here. Though there is tension between Norton on one hand and Thunder Basin and Doe on the other, we conclude that LabMD's constitutional claims should be heard only upon completion of the agency proceedings. We have consistently looked to how "inescapably intertwined" the constitutional claims are to the agency proceeding, reasoning that the harder it is to distinguish them, the less prudent it is to interfere

in an ongoing agency process. See Doe, 432 F.3d at 1263; Green v. Brantley, 981 F.2d 514, 521 (11th Cir. 1993) (declining to reach the merits of a constitutional challenge that was "inescapably intertwined with a review of the procedures and merits surrounding the [agency's] order"). LabMD's claims cannot now be heard because the facts supporting them are indistinguishable from those relating to the procedures and merits of the FTC action.

LabMD suggests that its First Amendment retaliation claim—alleging that the FTC brought its Complaint to retaliate against LabMD for Mr. Daugherty's book— is less intertwined with the enforcement proceeding than its other constitutional claims. This, LabMD contends, is because the retaliatory conduct was complete at the moment the Complaint was filed. LabMD suggests that the District Court need only examine the filing of the FTC's Complaint to determine whether it was retaliatory in violation of the First Amendment. Any later developments in the administrative proceeding, LabMD reasons, have no bearing on whether the filing of the Complaint itself was retaliatory. Thus, LabMD concludes that the matters are not intertwined, and its retaliation claim should be heard even before the administrative proceeding ends.

Even if we were to accept LabMD's distinction as true, none of our cases suggest that First Amendment retaliation claims must be treated differently than other constitutional claims under Thunder Basin and Doe. We conclude that

LabMD's First Amendment claim must join its other claims to await appellate review after the Commission's proceedings are final, as Congress contemplated in the FTC Act.

The District Court correctly held that it did not have jurisdiction over LabMD's claims. And until the administrative proceeding is complete, we too have no jurisdiction to evaluate the merits. We **AFFIRM** the District Court's Order dismissing the case for lack of subject-matter jurisdiction.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-12144

D.C. Docket No. 1:14-cv-00810-WSD

LABMD, INC.,

Plaintiff - Appellant,

versus

FEDERAL TRADE COMMISSION,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(January 20, 2015)

Before MARTIN and ANDERSON, Circuit Judges, and COTE,* District Judge.

MARTIN, Circuit Judge:

LabMD, Inc. is an Atlanta-based laboratory that performed cancer-detection testing services for doctors. After the Federal Trade Commission (FTC) discovered that LabMD patient information files were available on a peer-to-peer file-sharing network, it launched an investigation into LabMD's data-security practices. The investigation persisted for three years, leading LabMD's CEO, Michael Daugherty, to publicly criticize the FTC's actions. Shortly after Mr. Daugherty posted an online trailer for his book, "The Devil Inside the Beltway," which he says exposes corruption in the federal government, the FTC filed an administrative complaint against the company. The administrative proceeding is ongoing.

This appeal addresses the District Court's dismissal of LabMD's challenges to the FTC's ability to regulate and conduct enforcement proceedings in the area of healthcare data privacy. LabMD argues that the FTC's enforcement action violates the Administrative Procedure Act (APA), is ultra vires, and is unconstitutional.

Before we can reach the merits of LabMD's claims, we must first face the central question of whether the District Court has subject-matter jurisdiction to consider LabMD's challenges while the administrative proceeding is ongoing.

* Honorable Denise Cote, United States District Judge for the Southern District of New York, sitting by designation.

Because we hold that the FTC's Order denying LabMD's motion to dismiss was not a "final agency action," as is required of claims made under the APA, those claims were properly dismissed. And because we conclude that LabMD's other claims—that the FTC's actions were ultra vires and unconstitutional—are intertwined with its APA claim for relief and may only be heard at the end of the administrative proceeding, we affirm the District Court's order dismissing the case for lack of subject-matter jurisdiction.

I.

In 2008, internet-security company Tiversa, Inc. notified LabMD that it had obtained sensitive patient information from LabMD. Under circumstances that remain hotly disputed by the parties, the FTC learned about the possible breach of security involving patient information and began an investigation into LabMD's data-security practices in 2010. On July 19, 2013, Mr. Daugherty posted an online trailer to his book highlighting corruption in the federal government, including specific claims about the FTC. Three days after Mr. Daugherty posted the trailer online, the FTC gave notice of its intent to file a complaint against LabMD.

In August 2013, the FTC filed its administrative complaint, alleging that LabMD violated Section 5 of the FTC Act by engaging in an "unfair . . . act[] or practice[]" by failing to prevent unauthorized access to its patient information. LabMD moved to dismiss the FTC Complaint, which the FTC denied in a January

2014 Order. LabMD next filed suit in the District Court for the District of Columbia, seeking an injunction to stay the administrative action from going forward on the grounds that it was an improper expansion of FTC jurisdiction, was retaliatory, and violated the Due Process Clause. LabMD v. FTC, No. 1:13-cv-1787 (D.D.C. Nov. 14, 2013). LabMD filed a similar action in this Court, making the same allegations. LabMD Inc. v. FTC, No. 13-15267-F (11th Cir. Feb. 18, 2014). We denied LabMD's claim, citing our lack of jurisdiction over a non-final agency action, but we declined to address whether the District Court could hear any of the claims. Id. LabMD voluntarily dismissed its District of Columbia suit.

On March 20, 2014, LabMD filed this suit in the Northern District of Georgia, alleging that: (1) the FTC's administrative action against LabMD is arbitrary and capricious in violation of the APA because the FTC has no authority to regulate protected health information (PHI); (2) the action is ultra vires and exceeds its statutory authority; (3) the FTC's application of Section 5 to LabMD's security protocols violates the Due Process Clause of the U.S. Constitution because it did not provide fair notice or access to a fair tribunal and a hearing; and (4) the FTC violated LabMD's First Amendment right to free speech. The FTC filed a motion to dismiss, which the District Court granted.

II.

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Under the Bennett standard, the Order and Complaint LabMD seeks to have us review are not final. First, neither document is a consummation of the agency's decisionmaking process. LabMD suggests that these documents "effectively determined there would be legal consequences imposed on LabMD," because the filing of an FTC complaint almost certainly leads to a cease-and-desist order. But, high odds of a cease-and-desist order coming from the FTC do not advance our ability to review the FTC actions. It is the nature of the action we must consider, and the Complaint and Order do not finally decide these issues. By definition, the denial of a motion to dismiss ensures that the proceeding will continue to a later, final order. In the same way, a complaint is just an initial document.

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CSI Aviation Servs., Inc. v. U.S. Dep't of Transp., 637 F.3d 408, 412–13 (D.C. Cir. 2011) (holding that a Department of Transportation warning letter and exemption order were sufficiently "final" because they (1) included a definitive statement that the plaintiff's business was violating the Federal Aviation Act; (2) presented a "purely legal" question with no factual disputes; and (3) imposed an immediate burden by effectively requiring the business to stop operating). Even if those exceptions applied in this Circuit, LabMD's challenge here does not fit within their terms. As set forth in our discussion above, the FTC Complaint and Order are not sufficiently definitive, cleanly legal, or immediately burdensome so as to require our review at this stage. The FTC is best suited to develop the factual record, continue to evaluate its position on the issues, and apply its expertise to complete the proceeding. All of this will allow for more robust appellate review by this Court when the action concludes.

III.

LabMD next suggests that its constitutional and ultra vires claims can be heard even if we do not reach the APA claim. But under similar circumstances, the Supreme Court has declined to consider constitutional claims before the administrative process was completed. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215, 114 S. Ct. 771, 780 (1994) (holding that the district court did not have subject-matter jurisdiction to hear a pre-enforcement due process challenge).

The Court in Thunder Basin emphasized that the claims "c[ould] be meaningfully addressed in the Court of Appeals" after final agency determination. Id. Our own Court's decision in Doe v. FAA, 432 F.3d 1259 (11th Cir. 2005), also clarifies that all constitutional claims must be funneled through the direct-appeal process after a final agency action if that is the scheme created by Congress. Id. at 1262–63. The FTC Act provides for appellate review by the Courts of Appeals after the agency action is complete, see 15 U.S.C. § 45(c), and similar to the challenger in Doe, LabMD's claims can be heard at that time.

LabMD cites National Parks Conservation Association v. Norton, 324 F.3d 1229, 1241 (11th Cir. 2003), to say that, absent an explicit provision limiting constitutional review in the agency's enabling statute, the federal courts should always be able to hear well-pleaded complaints. Though it is true that in Norton we addressed the merits of an equal-protection claim after finding that agency action was not sufficiently final to confer jurisdiction over a connected APA claim, nothing in that holding requires us to do the same here. Though there is tension between Norton on one hand and Thunder Basin and Doe on the other, we conclude that LabMD's constitutional claims should be heard only upon completion of the agency proceedings. We have consistently looked to how "inescapably intertwined" the constitutional claims are to the agency proceeding, reasoning that the harder it is to distinguish them, the less prudent it is to interfere

in an ongoing agency process. See Doe, 432 F.3d at 1263; Green v. Brantley, 981 F.2d 514, 521 (11th Cir. 1993) (declining to reach the merits of a constitutional challenge that was "inescapably intertwined with a review of the procedures and merits surrounding the [agency's] order"). LabMD's claims cannot now be heard because the facts supporting them are indistinguishable from those relating to the procedures and merits of the FTC action.

LabMD suggests that its First Amendment retaliation claim—alleging that the FTC brought its Complaint to retaliate against LabMD for Mr. Daugherty's book— is less intertwined with the enforcement proceeding than its other constitutional claims. This, LabMD contends, is because the retaliatory conduct was complete at the moment the Complaint was filed. LabMD suggests that the District Court need only examine the filing of the FTC's Complaint to determine whether it was retaliatory in violation of the First Amendment. Any later developments in the administrative proceeding, LabMD reasons, have no bearing on whether the filing of the Complaint itself was retaliatory. Thus, LabMD concludes that the matters are not intertwined, and its retaliation claim should be heard even before the administrative proceeding ends.

Even if we were to accept LabMD's distinction as true, none of our cases suggest that First Amendment retaliation claims must be treated differently than other constitutional claims under Thunder Basin and Doe. We conclude that

LabMD's First Amendment claim must join its other claims to await appellate review after the Commission's proceedings are final, as Congress contemplated in the FTC Act.

The District Court correctly held that it did not have jurisdiction over LabMD's claims. And until the administrative proceeding is complete, we too have no jurisdiction to evaluate the merits. We **AFFIRM** the District Court's Order dismissing the case for lack of subject-matter jurisdiction.