UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

ORDER DENYING RESPONDENT LABMD, INC.'S APPLICATION FOR STAY OF FINAL ORDER PENDING REVIEW BY A UNITED STATES COURT OF APPEALS

On August 30, 2016, Respondent LabMD, Inc. filed an application for a stay of the Commission's Final Order in this proceeding pending review by the Eleventh Circuit Court of Appeals. Complaint Counsel opposes the application.[1] For the reasons stated below, we deny LabMD's application.

I. Background

The Commission issued its Opinion and Final Order in this matter on July 28, 2016. We found that LabMD's data security practices were unreasonable, lacking basic precautions to protect consumers' sensitive personal information, including medical information, maintained on LabMD's computer system. LabMD's lax data security practices resulted in the installation of file-sharing software that made medical and other sensitive information of 9,300 consumers accessible on a widely used peer-to-peer network for eleven months. The exposed information was accessed by at least one unauthorized third-party. We thus held that LabMD's data security practices constitute an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act. Consequently, our Final Order directs LabMD to cease its inadequate data security practices by establishing a comprehensive information security program reasonably designed to protect the security and confidentiality of the personal consumer information in its possession and periodically to obtain independent assessments regarding its implementation of the program. The Final Order also requires that LabMD notify affected individuals concerning

[1] In addition to the initial briefing submitted by the parties in connection with LabMD's Application for Stay, Complaint Counsel moved for leave to file a Surreply, and LabMD submitted a Supplemental Declaration from its CEO and President, Michael Daugherty. We grant Complaint Counsel's Motion for Leave to File a Surreply and have considered both the Surreply and Mr. Daugherty's Supplemental Declaration.

unauthorized disclosure of their personal information and imposes standard reporting requirements to ensure compliance with its substantive requirements.

Section 5(g)(2) of the FTC Act, 15 U.S.C. § 45(g)(2), provides that the Commission's Final Orders take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate" by the Commission or "an appropriate court of appeals." Absent a stay, the Final Order will become effective on September 30, 2016.

II. Analysis

In accordance with Commission Rule 3.56(c), we consider the following four factors: (1) "the likelihood of the applicant's success on appeal"; (2) "whether the applicant will suffer irreparable harm if a stay is not granted"; (3) "the degree of injury to other parties if a stay is granted"; and (4) the public interest. It is the applicant's burden to establish that a stay is warranted. *Toys "R" Us, Inc*., 126 F.T.C. 695, 698 (1998). We address each factor in turn.

A. Likelihood of Success on Appeal

In analyzing the likelihood of success on appeal factor, the Commission considers likelihood of success as well as the complexity of the case and legal questions raised. *California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *9-10 (May 22, 1996). When appropriate, the Commission has stayed its orders pending judicial review. *See, e.g., North Carolina Bd. of Dental Examiners*, 2012 WL 588756 (FTC Feb. 10, 2012).

LabMD first argues that this proceeding involves a complex factual record and important, unresolved legal questions and, consequently, that it has met the requisite standard for demonstrating a likelihood of success on appeal. While there is a sizeable factual record in this proceeding, the Commission's adjudicatory proceedings often involve extensive and complex factual records. That alone does not suggest a likelihood of success on appeal. Here, the facts regarding LabMD's computer network and data security practices are largely undisputed, and the mechanism by which consumers' sensitive personal information was exposed is straightforward: LabMD made files containing that information freely available on a peer-to-peer network.

Similarly, while this matter raises important legal questions, it involves the application of longstanding principles under Commission law that we believe we applied properly. In our view, the legal questions are not so difficult as to justify a stay when the equities cut against that result. "The necessary degree or level of possibility of success will generally vary according to an assessment of the other three factors." *California Dental Ass'n*, 1996 FTC LEXIS 277, at *10. Thus, the movant must make a higher showing of likely success on the merits if the balance of the equities does not support a stay. *North Carolina Bd. of Dental Examiners*, 2012 WL 588756, at *1.

LabMD also offers a list of substantive and procedural arguments as reasons why the Commission's decision will be overturned on appeal. None of them persuades us that LabMD is likely to prevail.

Many of LabMD's contentions – including those it characterizes as matters of first impression – are mere repetition of issues already decided by the Commission. In previous opinions and orders the Commission has addressed LabMD's claims regarding the FTC's jurisdiction over data security;[2] the meaning and application of the FTC Act's unfairness standard;[3] the reasonableness of LabMD's data security practices;[4] the requirement under the unfairness standard that the injury to consumers not be "outweighed by countervailing benefits to consumers or to competition";[5] the adequacy of notice to LabMD of the applicable standard, and the Commission's determination to proceed by adjudication rather than by rulemaking;[6] and the purported infringement of LabMD's Fourth Amendment rights.[7] For the reasons already explained in those prior orders, these arguments are without merit.

LabMD next presents a series of challenges to our Final Order, claiming it is unlawful and unenforceable. None of these contentions is persuasive.

First, LabMD claims that the Final Order exceeds the Commission's authority because it does not simply direct LabMD to "cease and desist," but instead requires affirmative actions such as the creation of a plan to protect the personal consumer information in its possession and notification to consumers whose information has been exposed. LabMD's cramped reading of Section 5's remedial authority is inconsistent with longstanding precedent. "[I]t is clear that the Commission has the power to shape remedies which go beyond the simple cease and desist order." *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756-57 (D.C. Cir. 1977). Pursuant to its broad remedial authority, "the Commission may order affirmative acts." *Heater v. FTC*, 503 F.2d 321, 324 n.7 (9th Cir. 1974). Here, in order to stop the wrongful conduct – LabMD's lax data security practices – our Final Order necessarily requires LabMD to take action. The requirements we have imposed are well within the "wide discretion" of the Commission to "determin[e] the type of order that is necessary to bring an end to the unfair practices found to exist." *See FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957).

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[2] *See, e.g.*, Order Denying Respondent LabMD's Motion to Dismiss at 3-14 (Jan. 16, 2014).

[3] *See, e.g.*, Opin. at 16-25. LabMD's suggestion that the Commission ignored the ALJ's assessment of witness credibility and demeanor at the evidentiary hearing is also misplaced. The ALJ's determination that he was not persuaded by some of the testimony presented by Complaint Counsel's experts was not a matter of demeanor. Where the ALJ did make a credibility finding, for instance in his conclusion that Tiversa CEO Robert Boback was "not a credible witness," Initial Decision at 34 ¶ 167, the Commission factored that into its ruling. Opin. at 31.

[4] *See, e.g.*, Opin. at 11-16 (July 28, 2016). LabMD is incorrect in asserting that the Expert Opinion Declaration of Cliff Baker, attached as an exhibit to LabMD's Application for Stay, is part of the record of this proceeding. *See* Respondent LabMD, Inc.'s Opposition to Complaint Counsel's Motion for Leave to File Surreply at 9, *citing* Commission Rule 3.43(i). In fact, the ALJ *rejected* LabMD's motion to admit this declaration into the record. Order on Respondent's Motion to Admit Exhibits (July 15, 2015). Rule 3.43(i) provides for the retention of rejected exhibits merely to facilitate subsequent review of evidentiary rulings. Notably, LabMD did not raise the rejection of the exhibit at any point in the Commission's consideration of Complaint Counsel's appeal.

[5] *See, e.g.*, Opin. at 26-28.

[6] *See, e.g., id*. at 28-31; Order Denying Respondent LabMD's Motion to Dismiss at 14-17.

[7] *See, e.g.*, Opin. 31-32.

The related contention that the Final Order's notice requirement is invalid because the Commission lacks authority to order redress in an administrative proceeding is similarly without merit. Here we are merely requiring LabMD to notify affected consumers so that they may take appropriate action to mitigate any past harm and prevent any potential future harm from the disclosure of their personal information. Courts have routinely affirmed Commission administrative orders requiring notice to affected consumers. *See, e.g., Daniel Chapter One*, 2009 WL 5160000 (FTC 2009) (Final Order ¶ V.B), *aff'd*, *Daniel Chapter One v. FTC*, 2010 WL 5108600, at *2 (D.C. Cir. 2010) (rejecting religious objections to consumer notification requirement in Commission order); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1500 (1st Cir. 1989) ("[t]he [order] requirement that notice be sent to all past purchasers . . . merely ensures full compliance with the spirit of the Commission's order").

Nor is the Final Order invalid because it addresses practices that LabMD contends have been discontinued. Even though LabMD has apparently stopped accepting specimen samples and conducting tests, it continues to hold personal information for approximately 750,000 consumers, continues to exist as a corporation, and has not ruled out resuming operations. Opin. at 36. Indeed, in his declaration in support of LabMD's application for stay, LabMD CEO Michael Daugherty carefully avoids a conclusive statement that LabMD will never resume operations. *See* Daugherty Declaration In Support of LabMD Inc.'s Application for Stay ¶ 14. "It is well established that the Commission has authority to enter an order even where the challenged practices have been voluntarily abandoned or revised." *Am. Home Prods. Corp.*, 98 FTC 136, 406 (1981) (citing *Am. Med. Ass'n v. FTC*, 638 F.2d 443(2d Cir. 1980)), *aff'd*, 695 F.2d 681, 703 n.38 (3d Cir. 1982); *accord Columbia Broadcasting Sys., Inc. v. FTC*, 414 F.2d 974, 982 (7th Cir. 1969) (refusing to strike portions of order directed at particular practice even though provisions establishing that practice had been deleted from all contracts).

LabMD's remaining challenge to the Final Order – that the Commission lacks authority to retroactively enforce HIPAA/HITECH notice obligations – fares no better. The requirement that LabMD provide notice to affected consumers is not an effort by the Commission to enforce HIPAA or HITECH. It is a provision to address LabMD's violation of the FTC Act. The fact that the relief we ordered bears resemblance to other statutory obligations that apply to LabMD is of no moment. As noted above, the Commission has broad discretion in fashioning appropriate relief. The Commission often requires companies to provide notice to their customers in order to remedy Section 5 violations. *See, e.g., Daniel Chapter One*, 2009 WL 5160000; *Removatron Int'l Corp.*, 884 F.2d at 1500; *see also Oracle Corp.*, No. 132-3115 (March 29, 2016) (Decision and Order ¶ 3), *available at* https://www.ftc.gov/enforcement/cases-proceedings/132-3115/oracle-corporation-matter.

LabMD makes two final, broad arguments. First, it asserts that the Commission issued its administrative complaint to punish LabMD's CEO for speaking out against the FTC's investigation and argues that this claimed retaliation violates LabMD's First Amendment rights. This assertion lacks any credible basis.

Second and equally meritless is the contention that the combination of investigative, prosecutorial, and adjudicative functions within the FTC violates a respondent's due process rights. This argument has been rejected repeatedly by the courts. *See, e.g., FTC v. Cinderella*

Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968) ("It is well settled that a combination of investigative and judicial functions within an agency does not violate due process.") (internal quotation omitted); *Gibson v. FTC*, 682 F.2d 554, 560 (5th Cir. 1982) (rejecting a claim that "the FTC system of prosecution–adjudication" infringed due process rights); *Nat'l Harness Mfrs. Ass'n v. FTC*, 268 F. 705, 707 (6th Cir. 1920) (deeming "[t]he criticism that the statute makes the commission both judge and prosecutor . . . too insubstantial to justify discussion"); *cf. United States v. Litton Indus. Inc.*, 462 F.2d 14, 16-17 (9th Cir. 1972) (explaining that the Administrative Procedure Act prohibition against the same person investigating and rendering a decision in the same matter expressly does not apply to the members of the body comprising the agency). This due process claim is no more likely to succeed in this case than it has in the past.

B. Irreparable Injury

LabMD bears the burden of demonstrating with specificity that irreparable harm is "both substantial and likely to occur absent the stay." *N. Texas Specialty Physicians*, 141 F.T.C. 456, 460 (2006). Moreover, "[s]imple assertions of harm or conclusory statements based on unsupported assumptions will not suffice." *California Dental Ass'n*, 1996 FTC LEXIS 277, at *6; *see also Toys "R" Us*, 126 F.T.C. at 698. LabMD has not met this burden.

We are not persuaded by LabMD's claim that the cost to comply with the Final Order is substantial. LabMD's assertions about costs ignore the flexibility inherent in the Final Order. As explained in our opinion, we took LabMD's current limited operations into account in our Order. Specifically, in Part I of the Order, we mandated the creation of a comprehensive information security program that provides "administrative, technical and physical safeguards that are appropriate for the nature and scope of LabMD's activities." Opin. at 36. Indeed, we acknowledged that a reasonable security program for LabMD's current operations with a computer system that is not connected to the Internet will unquestionably differ from one were LabMD to resume more active operations.

Nonetheless, Mr. Daugherty posits that if the Order is interpreted to require the rebuilding of LabMD's computer network, his "understanding is that this will cost at least $10,000.00 plus maintenance fees," (Daugherty Decl. ¶ 22(a)(v)), and that, even if that is not required, complying with Part I of the Order would still require LabMD to incur thousands of dollars in costs. *See* Supp. Daugherty Decl. ¶ 8. He also asserts that the independent assessment called for by Part II of the Order could cost over $250,000 (Daugherty Decl. ¶ 22(b)), and that the compliance reports required by Part VII would impose an additional expense of "about $20,000" (*id*. ¶ 22(d)).

However, nothing in our Order would require the "rebuilding of LabMD's computer network," as LabMD speculates. Nor is there any reason to expect that the security program, the independent assessment, or the compliance reports will impose the level of costs or other burdens LabMD claims. The requirements ordered by the Commission necessarily depend on the nature and scope of LabMD's operations. If its current operations are now as limited as LabMD asserts, the burden and cost of developing and implementing an acceptable security plan and submitting the required compliance reports should be limited. Moreover, while not

conclusively stating that LabMD will never resume full operations, Mr. Daugherty represents that he does not currently expect to restart the LabMD business or to reconnect LabMD's computers to the Internet. *Id*. ¶¶ 14, 16. Accordingly, we conclude that creating a security program and preparing the required compliance reports would be nowhere nearly as costly as LabMD claims.

LabMD also objects to Part III of the Final Order, which directs LabMD to notify the consumers whose sensitive medical and other sensitive personal information was disclosed. Because LabMD did not issue consumer notifications after it was informed that the personal information contained in the 1718 File had been exposed, our Order now requires LabMD to notify affected consumers to enable them to take appropriate steps to protect themselves from identity and medical identity theft.

LabMD claims that the burdens and costs of complying with this provision would also be substantial. It estimates, for instance, that just the cost of stamps for the consumer notices will total $4,371. *See id*. ¶ 22(c)(v). Mr. Daugherty also asserts that he no longer has staff to prepare and mail the notices and would therefore have to hire others or "do this by [him]self." *Id*. ¶ 22(c)(ii). More broadly, LabMD argues that it "does not wish to engage" in what amounts to "government-mandated speech." *Id.* ¶¶ 23-24.

These arguments are also unpersuasive. The notice contemplated by our Order is narrowly tailored and straightforward. LabMD has already provided similar notice to other consumers for a data breach LabMD experienced in 2010. Initial Decision at 39 ¶ 212. The cost of such notifications, while not trivial, is not sufficiently substantial to warrant a stay.

LabMD's First Amendment argument is also meritless. The authority LabMD cites in support, *Int'l Dairy Foods Ass'n v. Amestoy*, is inapposite.[8] Courts have rejected similar First Amendment challenges even where the speech being compelled was far more consequential and wide-ranging than the limited consumer notice provisions at issue here. *See, e.g.*, *Novartis Corp. v. FTC*, 223 F.3d 783, 788-89 (D.C. Cir. 2000); *cf. Sorrell*, 272 F.3d at 113-16 (rejecting challenge to a labeling statute).

LabMD also claims our Order will cause irreparable harm because the requirements to develop a comprehensive data security plan and to give notice to affected consumers are unconstitutionally vague. Neither provision, however, is vague; both describe what LabMD is required to do, but allow for flexibility as to how precisely to meet those requirements. That

[8] In *Amestoy*, trade associations for dairy producers claimed that a state statute that required products from cows treated with growth hormones to be so labeled infringed their constitutional right not to speak. The Second Circuit held that, without some indication that the statute concerned "human health or safety" or could be justified "on the basis of 'real' harms," compulsion based on nothing more than the "demand of [the state's] citizenry for such information, . . . is inadequate." *Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996). Subsequently, in *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, the Second Circuit explained *Amestoy* is "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" 272 F.3d 104, 115 n.6 (2d Cir. 2001); *see also N.Y. Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132-34 (2d Cir. 2009) (concluding that laws mandating certain factual disclosures are permissible as long as there is a rational basis for such disclosures).

does not render the provisions unconstitutionally vague. *See, e.g., S. Carolina Pub. Serv. Authority* v. *FERC*, 762 F.3d 41, 91 (D.C. Cir. 2014). Rather, the touchstone of the Final Order's requirements is reasonableness, making it a practical standard that inures to the benefit of LabMD. Further, as the Supreme Court has made clear, "economic regulation is subject to a less strict vagueness test," and there is "greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). This case involves economic regulation subject to the less strict vagueness test, as well as civil rather than criminal penalties.

Indeed, for more than a decade, provisions identical to the core provisions of our Order have been incorporated in numerous consent decrees resolving Commission allegations of unfair data security practices. *See, e.g., BJ's Wholesale Club*, 140 F.T.C. 467, 471 (2005) (requiring respondent to develop "a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers").

Finally, LabMD asserts that our Order will cause it to suffer reputational harm and loss of good will. Daugherty Decl. ¶ 25. Reputational harm that might arise from knowledge of LabMD's exposure of sensitive personal information is not a basis for denying affected consumers notification of what happened.

In sum, while LabMD will face some costs in complying with the Order, it has failed to establish that it will suffer substantial irreparable harm if the stay is denied. In any case, LabMD's costs must be weighed against the harm to other parties and the public interest.

C. Harm to Other Parties and the Public Interest

The remaining factors focus on whether the requested stay would harm other parties and whether it is in the public interest. The Commission considers these factors together because Complaint Counsel are responsible for representing the public interest by enforcing the law. *See, e.g., Daniel Chapter One*, 149 F.T.C. at 1600; *California Dental Ass'n*, 1996 FTC LEXIS 277, at *8. We conclude that granting a stay would risk harm to consumers and therefore is not in the public interest.

LabMD contends that "[a] stay will not harm anyone," given the purported absence of consumer harm. Stay Application at 2. Because LabMD never notified any affected consumers of the breach, we do not know how many consumers may have suffered harm due, for example, to identity or medical identity theft. Without notification, affected consumers and their insurance companies can do little to reduce the risk of harm from identity and medical identity theft or to address harms that may already have occurred.

LabMD further argues that granting the stay will not result in harm because it is no longer in business and its computers are not connected to the Internet. However, LabMD's computer system still contains sensitive medical and financial information of more than 750,000 consumers. Initial Decision at 20 ¶ 42. We believe these consumers will remain at risk until, as required by the Order, LabMD undergoes a third-party assessment and implements a data

security plan that is appropriate for the nature and scope of its activities, however limited they may currently be.[9]

In sum, the interests of consumers and the public interest strongly favor denying the stay.

III. Conclusion

Weighing the various factors, we conclude that a stay is not warranted. Although the case raises important legal questions, none of LabMD's arguments suggests that it is likely to prevail on appeal. Moreover, LabMD has not shown that it will suffer substantial irreparable harm absent a stay. On the other hand, there is potential risk of harm to hundreds of thousands of consumers if the protections provided in the Final Order are stayed during the pendency of LabMD's appeal. The equities thus cut strongly against granting the stay. Accordingly,

IT IS ORDERED that Respondent LabMD's Application for Stay of Order Pending Review by the Court of Appeals is DENIED.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: September 29, 2016

[9] Because electronic data may be moved from computer to computer via thumb drives or other devices, the mere fact that a given computer is not connected to the Internet protects against only one avenue of disclosure.