No. 16-16270

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

LabMD, Inc.,

Petitioner,

v.

Federal Trade Commission,

Respondent.

Petition for Review from the Federal Trade Commission, *In the Matter of LabMD, Inc.*, FTC Matter/File Number: 102 3099, Docket Number: 9357

TIME SENSITIVE MOTION TO STAY ENFORCEMENT OF THE COMMISSION'S FINAL ORDER PENDING APPEAL, AND FOR A TEMPORARY STAY WHILE THE COURT CONSIDERS THE MOTION (RELIEF REQUESTED BY NOVEMBER 29, 2016)

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FOR THE

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LABMD, INC, *Petitioner*, v. FEDERAL TRADE COMMISSION, *Respondent*.	)	Case File No. 16-16270 FTC Docket No. 9357

CORPORATE DISCLOSURE STATEMENT AND AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner LabMD, Inc. ("LabMD"), by and through its undersigned counsel, hereby states that LabMD does not have a parent corporation and that no publicly held corporation owns ten percent or more of LabMD's stock. Further, pursuant to Eleventh Circuit Rule 26.1-1, Petitioner hereby certifies that the following persons and entities have an interest in the outcome of this petition:

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Dated: October 7, 2016

Respectfully submitted,
Counsel for LabMD, Inc.

s/ David T. Cohen

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Counsel for LabMD, Inc.

This is a case of federal agency overreach that destroyed a small medical testing company and, absent immediate intervention from this Court, threatens to inflict further irreparable harm through the final agency order that is the subject of this appeal. The agency in question is the Federal Trade Commission ("FTC" or the "Commission"), and the order in question is the FTC's Final Order in the Matter of LabMD, Inc. ("LabMD"), Docket No. 9357 (the "Order"), which went into effect on September 30, 2016. LabMD timely asked the FTC to stay the Order pending this appeal, but the FTC declined, leaving LabMD no choice but to seek such a stay from this Court. LabMD also seeks an immediate, temporary stay while the Court considers this motion, because as described below, LabMD has no ability to comply with the Order and accordingly, absent a stay, it will be in non-compliance beginning on November 30, 2016.

LabMD's request should be granted. First, LabMD has a substantial likelihood of success, most notably because the Order rests on interpretations of Section 5 of the FTC Act that (i) run directly counter to the plain language and/or the FTC's own longstanding written interpretations of Section 5; (ii) have never before been articulated by the FTC or adopted by any court of appeals; and (iii) if allowed to stand would effectuate a breathtaking expansion of the FTC's authority

that the legal community and members of Congress[1] have already called into serious question. Second, the equities weigh heavily in favor of the requested stay.

A. Facts

LabMD is a small, now-defunct company that, prior to being driven out of business by the FTC, conducted diagnostic testing for cancer by using medical specimen samples, along with relevant patient information, to provide diagnoses to its physician customers. Initial Decision ("ID") 18-19 ¶¶ 26-28.[2] As a collector of personal health information ("PHI"), LabMD was subject to the detailed medical data-security standards set by regulations issued pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). *See* Commission Opinion ("Op." or "Opinion") 12 & n.22.

In early 2008, Tiversa Holding Corporation ("Tiversa") stole a LabMD file (the "1718 File") containing a limited amount of PHI relating to just over 9,000 consumers from a LabMD workstation in Atlanta, Georgia. *See* ID 24, 26-30 ¶¶ 82, 100-130; Declaration of David T. Cohen ("Cohen Decl.") Ex. K ("Wallace Tr.") 1348:19-1352:13; Op. 3, 17. Tiversa committed this theft just a few short months

[1] *See, e.g.*, Stmt. of Sen. John Thune (R-S.D.), Chairman of U.S. Sen. Comm. on Commerce, Sci., & Transp., Hrg. on Oversight of the Fed. Trade Comm'n (Sept. 27, 2016), available at http://www.commerce.senate.gov/public/index.cfm/hearings?Id=8719C13D-7DB4-4FE1-9F26-DDA55BF46852&Statemnt_id=4DA30A64-0CCD-4B51-AB12-F5BE66A40631[hereinafter "Thune Stmt."].

[2] LabMD accepts these and other cited portions of the Initial Decision solely for purposes of this motion.

after a private meeting with the FTC in which Tiversa bragged to the FTC about its ability to use a vulnerability in certain "peer-to-peer" file-sharing applications (the "P2P vulnerability") to hack into unsuspecting companies and steal documents containing consumers' personal information.[3] *See* ID 30-31 ¶¶ 130-134; Wallace Tr. 1348:19-1352:13. After stealing the 1718 File, Tiversa undertook a scheme to extort LabMD, repeatedly contacting the company to sell its service to "remediate" the P2P vulnerability. ID 30 ¶¶ 128-29. LabMD refused, instead promptly remediating the P2P vulnerability on its own. ID 58. Tiversa then entered into a deal with the FTC pursuant to which Tiversa transferred the 1718 File to the FTC through a shell company Tiversa had created for that purpose. ID 30-32 ¶¶ 131-45.

In January 2010, based entirely on the stolen 1718 File, the FTC began an investigation into LabMD's data security practices. ID 6. On July 22, 2013 – "coincidentally" just three days after LabMD's CEO disclosed his intent to publish a book criticizing the FTC's investigatory overreach – the FTC informed LabMD that it intended to issue an administrative complaint against LabMD, which it did the following month. *See LabMD, Inc. v. F.T.C.*, 776 F.3d 1275, 1277 (11th Cir. 2015). The complaint alleged that LabMD had violated Section 5's prohibition on "unfair" acts and practices because its data security practices did not include certain measures that, "taken together," were necessary to provide "reasonable"

[3] The FTC's exact response to Tiversa's boasts is unknown, because LabMD was denied discovery regarding that response. *See* Part C.2 *infra*.

security against the theft of the 1718 File. *See* Compl. 3 ¶ 10.

In November 2013, after the filing of the FTC's complaint and after having again met with the FTC,[4] Tiversa fabricated false evidence that the 1718 File had spread across the Internet, and it provided that fabricated evidence to the FTC. ID 32 ¶ 146-149. During the administrative trial, the FTC relied heavily on Tiversa's fabricated evidence that the 1718 File had spread across the Internet, offering that "evidence" in support of the FTC's core allegation that consumers had or were likely to suffer substantial consumer injury by reason of LabMD's supposedly lax data security practices in regard to the 1718 File. ID 60. Ultimately, Tiversa's fabrication of evidence showing the purported "spread" of the 1718 File was revealed; the FTC was forced to withdraw that "evidence" and it purported to disclaim any reliance on that evidence or on the testimony of Tiversa's CEO; and the FTC never came up with a shred of *real* evidence that the 1718 File had ever been stolen by anyone other than Tiversa or had otherwise "spread" across the internet. ID 32-33 ¶¶ 146-54, 159. Nor did the FTC present any evidence that any of the persons or entities who *did* obtain the 1718 File[5] used or were likely to use that file in a way that might harm consumers. ID 69.

Undeterred by these gigantic evidentiary gaps in its case, the FTC plowed

[4] Here again, LabMD was denied discovery into the communications between the FTC and Tiversa at, leading up to, or following the meeting. *See* Part C.2 *infra*.
[5] Namely, Tiversa, the FTC, and a Dartmouth professor who received the file from Tiversa in connection with government funded research. ID 69 n.34.

forward with its action against LabMD. Meanwhile, in January 2014, as a result of the crushing burdens imposed on it by the FTC's investigation and litigation, LabMD was forced to wind down operations. *See* Declaration of LabMD, Inc. President and Chief Executive Officer Michael J. Daugherty in Support of LabMD's Time Sensitive Motion to Stay Enforcement of the Commission's Final Order Pending Appeal ("Daugherty Decl.") ¶¶ 3-5; ID 19 ¶ 36. At that time, LabMD stopped accepting specimen samples and conducting tests. ID 19 ¶ 36; Daugherty Decl. ¶ 3. LabMD's financial condition is now beyond repair. Daugherty Decl. ¶¶ 5-8. It has de minimis assets and no revenue. *Id*. It has no prospect of resuming its business and it has no ability to pay the substantial costs entailed in complying with the Order. *Id*. ¶¶ 6, 30-33. Lead counsel for LabMD on this appeal (Ropes & Gray LLP) is providing its services *pro bono*.

B. Procedural History

After the administrative trial, the Administrative Law Judge ("ALJ") dismissed the FTC's complaint, holding that the FTC had failed to prove that LabMD's supposedly lax data security practices caused or are likely to cause substantial consumer injury as required by Section 5(n) of the FTC Act. ID 88. On appeal, however, the FTC reversed the ALJ, finding that in 2007 (when, at the earliest, the 1718 File was first placed on the LabMD workstation that had the P2P vulnerability), LabMD's data security practices did not include certain specified

measures (the "Additional Security Measures") that, taken together, were necessary to provide "reasonable" security for the 1718 File. Op. 1, 3, 11. The FTC further found that if LabMD had employed the Additional Security Measures back in 2007, the P2P vulnerability that put the 1718 File at risk of theft would either never have happened or would have been discovered sooner. Op. 16. Based on those findings, and despite there being no evidence that the 1718 File was ever used by anyone in any way that actually caused any tangible injury to any consumer, the FTC found that LabMD's failure to employ the Additional Security Measures:

1. *caused* substantial consumer injury because Tiversa's 2008 theft of the 1718 File *in and of itself* caused each consumer whose PHI was in the 1718 File to suffer an *intangible* privacy harm, Op. 25, and in any event

2. *were*, at some point in the past, *likely to cause* substantial consumer injury, because back in 2007-2008 the 1718 File theoretically "could have" been obtained via the P2P vulnerability by unauthorized parties other than Tiversa who *could have* used the file in ways that *could have* resulted *in tangible* harm to consumers whose PHI was in the 1718 file. Op. 21.

Based on the above findings, the FTC found LabMD's failure to employ the Additional Security Measures to protect the 1718 File during 2007-2008 to have been "unfair" under Section 5. Op. 1, 16.

Rather than addressing LabMD's purported Section 5 violation by entering the type of "cease and desist" order permitted by the FTC Act, the FTC entered an Order that included a number of mandatory injunctive terms that imposed highly

burdensome obligations wholly unrelated to the supposed security vulnerability at issue, the speculative and minimal nature of the harm supposedly caused by that vulnerability, or the then circumstances of LabMD, which had already ceased operations. Under the Order, for example, LabMD is required to (i) immediately establish and maintain a "reasonable" comprehensive information security program; (ii) obtain biennial assessments by an outside auditor, with the first assessment due by April 2017, and (iii) notify consumers whose PHI was included in the 1718 File in a form approved by the FTC on or before November 30, 2016.

LabMD timely applied to the FTC for a stay of the Order. Daugherty Decl. ¶ 35. Despite having reached a decision to deny LabMD's request by no later than September 26, 2016, the FTC waited to enter its short, conclusory order (the "Stay Denial Ruling"), Cohen Decl. Ex. A, until 7:21 pm on September 29, 2016 – just hours before the Order was to become effective at 12:00 am on September 30 – evidently to force LabMD to rush to file, and this Court to rush to decide, LabMD's anticipated request for a judicial stay of the Order. Cohen Decl., Exs. L, M. LabMD now moves this Court for such a stay.[6]

[6] The court of appeals may stay an agency order pending its review of that order. FED. R. APP. P. 18. Grant of such a stay depends upon four factors: "(1) whether the [movant] has made a strong showing that [it] is likely to succeed on the merits; (2) whether the [movant] will be irreparably injured absent a stay; (3) whether the issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); 11th Cir. R. 27-1; *see also Iowa Utils. Bd. v. F.C.C.*, 109 F.3d

C. LabMD Has a Substantial Likelihood of Success on the Merits

1. The Order Is Predicated on Egregious Misinterpretations and Misapplications of Section 5(n) of the FTC Act

The Opinion repeatedly misinterprets and misapplies § 5(n) of the FTC Act, which states that the Commission "shall have no authority" to declare an act or practice "unfair" "unless the act or practice [1] causes or is likely to cause substantial injury to consumers[,] [2] which is not reasonably avoidable by consumers themselves[,] and [3] not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

For starters, the Opinion was wrong in holding that *intangible* harms, such as "embarrassment" and "reputational" harm to consumers (which in any event were not shown to have occurred), or such as the wholly conceptual consumer harm the FTC found to be inherent in the mere theft of a consumer's sensitive personal information, can be "substantial" under § 5(n) even where the practices being challenged did not cause and are not likely to cause any *tangible* consumer injury. *See* Op. 17. As recognized by the ALJ, both the legislative history of § 5(n) and the FTC's own 1982 Policy Letter (the "Policy Letter") make clear that

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418, 427 (8th Cir. 1996) (granting motion to stay implementation of new pricing rules by Federal Communications Commission); *State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 292 (6th Cir. 1987) (granting stay of Nuclear Regulatory Commission's final order). Where, as here, "'the balance of the equities . . . weighs heavily in favor of granting the stay,'" the movant need only show that its motion presents a "'substantial case on the merits'" to obtain a stay. *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

"[e]motional impact and more subjective types of harm alone are not intended to make an injury unfair." ID 69; S. Rep. 103-130, 1993 WL 322671, at *13; *see also* Policy Letter, Letter from FTC Chairman J.C. Miller, III to Senator Packwood and Senator Kasten (March 5, 1982), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 27, 32 (1983) (hereinafter cited by reference to H.R. Rep. No. 156) ("As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm such as emotional distress . . . .").

The Opinion tries to evade these core interpretive sources by claiming the FTC's 1980 Policy Statement on Unfairness (the "Policy Statement"), Letter from FTC to Senators Ford and Danforth (Dec. 17, 1980), appended to *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 WL 565290, at *95 (1984), recognizes that "in extreme cases, subjective types of harm might well be considered as the basis for a finding of unfairness." Op. 10. *The Policy Statement in fact says no such thing.* To the contrary, the footnote in the Policy Statement that the Opinion cites for this proposition says, expressly, that "emotional effects might possibly be considered as the basis for unfairness" *only* "where tangible injury could be clearly demonstrated." Policy Statement, 1984 WL 565290, at *104 n.16. Thus, far from supporting the Opinion's position that intangible harms can in and of themselves constitute "substantial" consumer injury under Section 5(n), what the Policy Statement actually says is that some sort of *tangible* (meaning either economic or

physical) consumer injury must *always* be caused or likely to be caused by the practice in question in order for that practice to be validly declared "unfair" under Section 5.[7] As Senator Thune aptly said last week in criticizing the Order during FTC Chairperson Ramirez's testimony regarding this case before the Senate Commerce Committee, "for some time now, a key element in any unfairness case has been whether or not a practice causes substantial – *that is, monetary, but not subjective* – injury to consumers." Thune Stmt.[8] The Order runs roughshod over that "key element" and must be reversed for this reason alone – especially since the harm the FTC found to be substantial here (i.e., the harm supposedly inherent in the mere disclosure of one's sensitive personal information to an unauthorized person) in reality is not even "intangible," but rather is purely conceptual.

The Opinion also plainly erred in construing § 5(n)'s requirement that the practice in question must either cause or be "*likely to cause*" the alleged injury as

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[7] The Opinion's effort to get around the legislative history of Section 5(n) is just as weak. The Opinion asserts that the legislative history suggests that *intangible* injury can be *substantial* injury because it refers to "abusive debt collection practices" and "high pressure sales tactics" as examples of "unfair practices." Op. 10. But this portion of the legislative history was *not* referring to the FTC Act. It was referring to *state court* application of *state* consumer protection laws and clarifying that Congress "intends no effect on those or other developments under State law." S. REP. 103-130, 1993 WL 322671, at *13. The legislative history is unequivocal in stating that, under the FTC Act, "[e]motional impact and more subjective types of harm alone are not intended to make an injury unfair." *Id.*

[8] Senator Thune's criticisms of the Opinion on this and other grounds have been echoed throughout the legal community, and by other members of Congress, in the few short months since the Opinion's issuance. *See* Daugherty Decl. Exs. B-G, M.

permitting a practice to be declared unfair when it merely creates "a significant risk of causing" that harm. *See* Op. 21 ("showing a 'significant risk' of injury satisfies the 'likely to cause' standard"). Based on this interpretation of the word "likely," and on its further leap that a "significant risk" of an injury can exist "even if the likelihood of the injury is low," *id.*, the Opinion found that LabMD's failure to employ the Additional Security Measures was "likely to cause" tangible consumer injury even though such injury *was not* a probable result of those practices. Op. 16. "In interpreting the language of [a] statute, [the] Court must assume that Congress used the words of the statute as they are commonly and ordinarily understood[.]" *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995) (per curiam). The plain meaning of "likely" is "having a high probability of occurring . . .[,] very probable," or "in all probability." Merriam-Webster Online Dictionary, 2016, http://www.merriam-webster.com/. The FTC's conclusion that LabMD's failure to employ the Additional Security measures was "likely" to cause tangible harm, even though such failure had a low likelihood of causing such harm, thus contradicts the ordinary meaning of the word "likely" and requires reversal of the Order.[9] *See McLymont*, 45 F.3d at 401; United States v. *Myers*, 972 F.2d 1566,

[9] The Opinion defended its interpretation of the word "likely" by claiming that in the remote chance that tangible consumer injury ever materialized as a result of LabMD's failure to employ the Additional Security Measures, that injury would be severe. Op. 10. But as a matter of basic English grammar, the *severity* of a potential injury (while it might inform the inquiry into § 5(n)'s *separate*

1572 (11th Cir. 1992).

Moreover, under § 5(n), only a practice that causes or "*is* likely" to cause substantial injury may be declared unfair. § 45(n) (emphasis added). The use of the present tense makes clear that the FTC had no authority to declare LabMD's failure to employ the Additional Security Measures "unfair" on the basis of "likely" harm unless it could justifiably conclude *at the time it declared that failure unfair* (i.e., the date of the Order) that substantial consumer injury *is* likely to result *at some point in the future* from LabMD's failure to employ the Additional Security Measures more than eight years ago. *See Medberry v. Butler*, 185 F.3d 1189, 1193 (11th Cir. 1999) (holding that use of present tense in statute precluded prisoner from proceeding under "imminent danger" provision based on past danger). The FTC, however, declared LabMD's failure to employ the Additional Security Measures "unfair" on the basis that tangible consumer harm *was* likely, *at some point in the past*, to result from such failure, and never evaluated the *present* likelihood of such failure causing that harm. Op. 20 ("LabMD's unauthorized exposure of the 1718 file . . . *was also 'likely* to cause substantial injury'") (emphasis added).

The FTC's reading of "*is* likely" to mean "*was* likely" was no mere oversight or careless wording on the FTC's part. LabMD had fully addressed the

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requirement that the injury at issue be "substantial") tells one nothing about whether the injury is *likely*.

P2P vulnerability more than *eight* years earlier, before the FTC had even begun an investigation, and had gone out of business entirely more than *two* years before the Order entered. The FTC thus knew full well when it entered the Order that it had no evidence upon which to find that *any* likelihood *then* existed of LabMD's long-ago failure to employ the Additional Security Measures causing *future* consumer harm. The Opinion's Alice-in-Wonderland reading that "is" means "was" thus represented the FTC's only way to rule against LabMD on the "likely harm" issue, and the error in that reading therefore requires reversal of the Order.

The FTC also committed reversible error in concluding that the supposed harm to consumers from LabMD's failure to employ the Additional Security Measures was "not outweighed by countervailing benefits to consumers or to competition." *See* § 45(n); Op. 26. This essential element of § 5(n) required the FTC to compare (1) the costs of LabMD's implementing and maintaining the Additional Security Measures *plus* any additional costs associated with LabMD's compliance with the Order going forward (the "Relevant Costs"), with (2) the value of the consumer harm that would potentially have been avoided if LabMD had taken the Additional Security Measures multiplied by the increased probability of avoiding that harm as a result of implementing those measures, taking into account the security measures LabMD already had in place (the "Relevant Benefits"). *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 255 (3d Cir. 2015)

("45(n) . . . informs parties that the relevant inquiry here is a cost-benefit analysis . . . that considers a number of relevant factors, including the probability and expected size of reasonably unavoidable harms to consumers given a certain level of cybersecurity and the costs to consumers that would arise from investment in stronger cybersecurity."); Policy Statement, 1984 WL 565290, at *97 ("The Commission also takes account of the various costs that a remedy would entail.").

On the "Relevant Costs" side of the equation, the FTC did not calculate, or even reasonably estimate, the total costs of implementing the Additional Security Measures.[10] The FTC also wholly failed to account for the costs LabMD would incur in complying with the Order – costs that, as noted above, the FTC itself has said are relevant to the cost/benefit analysis. On the "Relevant Benefits" side of the equation, the FTC made no attempt to perform the analysis necessary to meet its statutory obligation. This failure, of course, is not altogether surprising, given that the harm the FTC contends occurred or might have occurred from LabMD's failure

[10] Instead, the FTC asserted in conclusory fashion that the costs associated with implementing the Additional Security Measures were "relatively low." *See* Op. 27-28. But in arriving at that conclusion the FTC failed to account for the significant *personnel-related costs* of the additional IT staff LabMD would have needed day-in, day-out throughout the relevant time period to *actually perform, assess, and address* the additional file integrity, IDS, and firewall log monitoring, the additional vulnerability assessments, and the additional penetration tests and vulnerability scans included in the Additional Security Measures. Op. 26-28. Instead, and without any evidence, the FTC claimed LabMD's existing two-person IT staff somehow would have had the time to perform all of these additional functions. *See* Op. 28 ("LabMD already had multiple IT personnel on staff").

to implement the Additional Security Measures *impermissibly* consists entirely of (i) intangible and conceptual harms that would add no value to this portion of the analysis, and (ii) highly unlikely tangible harms that would add minimal value due to their improbability. The FTC's failure to accurately perform these required analyses requires reversal of the Order.[11]

2. Additional FTC Errors Require Reversal of the Order

In recognition of this Court's 20-page limit for stay motions, LabMD will not detail the FTC's remaining errors that separately require the Order to be set aside. Such errors include, without limitation, the following:

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[11] Apart from relying on incorrect interpretations of § 5(n), the FTC's unfairness analysis was also fatally incomplete, because the FTC erroneously assumed that satisfying the three elements of § 5(n) is *sufficient* to find a practice "unfair" rather than being merely a *necessary* condition to such a finding. By its own express terms, § 5(n) *limits* rather than *defines* the circumstances where the FTC may declare a practice "unfair." 15 U.S.C. § 45(n) ("[t]he Commission shall have *no* authority" "*unless*" the stated prerequisites are met) (emphasis added); *see* ID 89 (§ 5(n) "establish[es] an outer limit to the Commission's authority to declare an act or practice unfair."); *F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 244-45 (3d Cir. 2015) (stating that the elements enumerated in § 5(n) may be necessary but insufficient conditions for unfairness liability). Thus, in addition to showing that the practice in question met § 5(n)'s three-pronged test, the FTC must further show that the practice involved culpable conduct before it may declare that practice "unfair" under Section 5. Here, however, the FTC made no finding that LabMD's failure to employ the Additional Security Measures was deceptive or otherwise involved conduct that was sufficiently culpable to permit that failure to be declared "unfair." *See Crawford v. LVNV Funding, LLC*, 758 F.3d 1254, 1258 (11th Cir. 2014) (defining "unfair" as "marked by injustice, partiality, or deception" or having the "tendency or capacity to deceive" under Fair Debt Collection Practices Act); *Webster's Ninth New Collegiate Dictionary* (1988); *see also* S. Rep. No. 74-1705, at 2-3 (1936). The FTC's failure, and inability, to make this required finding creates yet another reason why the Order must be reversed.

- Part II of the Opinion erred in finding that LabMD's failure to employ the Additional Security Measures rendered LabMD's security for the 1718 File "unreasonable" and hence "unfair," because the FTC's reasonableness analysis was not based on a cost/benefit test, and because its findings of fact are unsupported by substantial evidence, relying on "evidence" the ALJ dismissed as speculative, methodologically flawed, and/or fabricated. *See Schering-Plough Corp. v. F.T.C.*, 402 F.3d 1056, 1062 (11th Cir. 2005).
- LabMD had no reason in 2007 to foresee, and thus lacked fair notice that, (a) the lawfulness of its data security practices would be tested based on whether they included the Additional Security Measures, and (b) some eight-plus years later the FTC would adopt the interpretations of § 5(n) discussed in Part C.1 above, none of which had then been advanced by the FTC or adopted by any court of appeals. *See F.C.C. v. Fox*, 132 S. Ct. 2307 (2012).
- The FTC's attempt to regulate LabMD's data security practices creates an "irreconcilable conflict" with HIPAA and the regulations promulgated thereunder, which precludes the FTC from enforcing Section 5 against LabMD and other HIPAA-covered entities. *See Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007).
- The Order is invalid, even assuming it correctly found that LabMD violated Section 5, because (a) the conduct the FTC determined was unfair (i.e.,

LabMD's failure to employ the Additional Security Measures) occurred over eight years ago and will not likely recur (*see Marlene's, Inc. v. F.T.C.*, 216 F.2d 556, 559 (7th Cir. 1954) ("The [C]ommission is not authorized to issue a cease and desist order as to practices long discontinued, and as to which there is no reason to apprehend renewal.") (citation omitted); (b) the Order includes impermissibly vague requirements, such as Part I's requirement that LabMD establish a "reasonable" data security program (*see F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 367-68 (1962) (orders must be "sufficiently clear and precise to avoid raising serious questions as to their meaning and application"); and (c) the Order includes requirements, such as Part III's requirement to notify consumers, that bear no reasonable relationship to the alleged violation of Section 5 (*see Am. Med. Ass'n v. F.T.C.*, 638 F.2d 443, 453 (2d Cir. 1980) ("[A]n FTC order should not be drawn so broadly that it will cover legitimate practices") (quotations omitted).

- LabMD is entitled to discovery into whether the FTC violated LabMD's First Amendment rights by filing this action in retaliation over Mr. Daugherty's criticism, *see LabMD, Inc. v. F.T.C.*, 776 F.3d 1275, 1277 (11th Cir. 2015), and/or violated LabMD's Fourth Amendment rights through its collaboration with Tiversa, *see United States v. Mekjian*, 505 F.2d 1320, 1327-28 (5th Cir. 1975) – topics on which LabMD was denied discovery below. *See* 15 U.S.C. §

45(c).

D. The Balance of the Equities Weighs Heavily in Favor of Staying the Order Pending Appeal

1. Staying the Order Pending Appeal Will Not Injure Consumers, Prejudice the FTC, or Harm the Public Interest

As the ALJ found, "[t]he record in this case contains no evidence that any consumer … has suffered any harm[.]" ID 52. "[T]he absence of any evidence that any consumer has suffered harm as a result of [LabMD's] alleged unreasonable data security, even after the passage of many years," *id.*, demonstrates that no consumers will be harmed by staying the Order pending appeal. Moreover, LabMD is no longer in business, and its computer networks are not connected to the Internet, so there is no current consumer need for the Order's onerous data security requirements. Daugherty Decl. ¶¶ 3-5, 10; *see also* ID at 20 ¶ 39-40; Op. 36.

The Stay Denial Ruling's speculation that there remains a "potential risk of harm" to consumers (Cohen Decl., Ex. A at 7-8) is unsupported by any citation to the record, because no evidence of any such risk exists. To the contrary, as noted in Section C.1 above, LabMD fully addressed the P2P vulnerability *more than eight years ago* and went out of business entirely *more than two years ago*. The FTC thus knows full well that *no risk* of consumer harm *now exists* by reason of LabMD's long-ago alleged failure to employ the Additional Security Measures.

Finally, the FTC has never suggested that it would be prejudiced by staying

the Order pending appeal. Nor, given the absence of any likelihood that consumer injury would result from staying the Order pending appeal, does the public interest counsel against such a stay.

2. LabMD Would Be Immediately and Irreparably Harmed Absent a Stay of the Order

The Order requires LabMD to pay for third-party data-security assessments, notices to thousands of individuals and their health insurance companies, and a toll-free telephone number, as well as prepare detailed reports for the FTC. Daugherty Decl. ¶¶ 30-32; *see* Order, Pts. I-III. These requirements thus mandate that, prior to any judicial review of the Order, LabMD incur substantial monetary compliance costs (estimated to be more than $250,000), which costs LabMD has no ability to pay and in any event would be unrecoverable due to the FTC's sovereign immunity, even if this Court ultimately sets aside the Order *in toto*. Daugherty Decl. ¶¶ 5-8, 33. Further, the Order requires LabMD to devote substantial time and attention to the variety of tasks the Order affirmatively requires LabMD to perform, including mailing letters, preparing numerous written reports, and interacting with (and paying) third-party contractors; LabMD, however, has no personnel who can perform such tasks and no funds with which to hire such personnel. *Id.* ¶¶ 5-8, 30-33; *see* Order, Pts. I-VII.[12]

[12] The Stay Denial Ruling's conclusion that compliance would "be nowhere nearly as costly as LabMD claims," Cohen Decl., Ex. A at 5-6, was conclusory and

Absent a stay of the Order, then, LabMD will be forced either to incur substantial unrecoverable compliance costs (that it currently has no ability to pay) or to face the possibility of civil penalties.[13] That is irreparable harm. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding that a plaintiff would suffer "irreparable injury" if forced to choose make such a decision). Moreover, given that LabMD has no ability to comply with the Order, unless the Order is stayed pending appeal, LabMD will be in non-compliance with the Order on November 30, 2016, following the Order's November 29, 2016 deadline for LabMD to send notices to the individuals whose PHI was in the 1718 file. Such non-compliance, were it to occur, would cause irreparable injury to LabMD by suggesting that LabMD not only violated the law in the past (which is untrue) but also is unwilling to comply with the law in the future (which is also untrue). Daugherty Decl. ¶ 33; *see also Kroupa v. Nielsen*, 731 F.3d 813, 820-21 (8th Cir. 2013) (reputational injury constitutes irreparable harm).

CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court stay the Order pending appeal and enter a temporary stay of the Order pending the Court's decision on LabMD's request for a stay of the Order pending appeal.

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speculative, ignoring the detailed information contained in the declarations LabMD provided in support of its application for a stay.

[13] *See* 15 U.S.C. § 45(l)-(m); 81 Fed. Reg. 42,476 (June 30, 2016) ($40,000 penalty for violation of Order).

Dated: October 7, 2016

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared using 14-point Times New Roman font.

Dated: October 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on October 7, 2016, I filed the foregoing document in the United States Court of Appeals for the Eleventh Circuit using the court's Electronic Case Files ("ECF") system, which generates a notice that is emailed to attorneys of record registered to use the ECF system, including the following attorneys for Respondent Federal Trade Commission:

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Under 11th Circuit Rule 25-3(a), no independent service by other means is required.

Dated: October 7, 2016

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