No. 14-12144

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LABMD, Inc.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee.

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

BRIEF FOR APPELLEE FEDERAL TRADE COMMISSION

LabMD v. FTC, No. 14-12144

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, Appellee, Federal Trade Commission, certifies that the following individuals and entities, in addition to those listed in Appellant's Brief, have an interest in this case:

Abby C. Wright, U.S. Department of Justice

Mark B. Stern, U.S. Department of Justice

Beth S. Brinkmann, U.S. Department of Justice

Stuart Delery, U.S. Department of Justice

Sally Quillian Yates, U.S. Department of Justice

Joel Marcus, Federal Trade Commission

LabMD v. FTC, No. 14-12144

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary. The district court correctly concluded, based on bedrock principles of administrative law, that it did not have jurisdiction to entertain a lawsuit seeking to enjoin ongoing agency proceedings.

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JURISDICTIONAL STATEMENT

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 2201, and 5 U.S.C. § 702. R1, ¶ 3. On May 12, 2014, the district court dismissed plaintiff's suit for lack of subject matter jurisdiction. R33, at 18. Plaintiff timely filed a notice of appeal on May 14, 2014. R36, at 1. This Court has jurisdiction under 28 U.S.C. § 1291.

that the agency had exceeded its statutory jurisdiction).[1] Surveying relevant precedents, the district court noted that courts "have universally [held] that a direct attack on the agency's statutory or constitutional authority to conduct an investigation or commence an enforcement action does not allow a plaintiff to evade administrative review or avoid administrative procedures." R33, at 11. The court further explained that "[i]f the Commission concludes that the Plaintiff engaged in 'unfair . . . acts or practices,' and enters a cease and desist order, the Plaintiff has a statutory right to 'obtain a review of such order in the court of appeals.'" R33, at 4 (quoting 15 U.S.C. § 45(c)).

B. Factual and Statutory Background

1. The FTC Act

1. Section 5 of the FTC Act broadly "empower[s] and direct[s]" the Commission "to prevent persons . . . from using . . . unfair . . . acts or practices in or affecting commerce." 15 U.S.C. § 45(a). As a part of an enforcement action or rulemaking proceeding, the Commission has authority to determine that an act or practice is "unfair" when that act or practice "[1] causes or is likely to cause substantial injury to consumers which is [2] not reasonably avoidable by consumers

[1] Decisions of the Fifth Circuit before October 1, 1981, are binding precedent of this Court.

themselves and [3] not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n).

Pursuant to this authority, "[t]he Commission has been involved in addressing online privacy issues for almost as long as there has been an online marketplace." Federal Trade Commission, Privacy Online: A Report to Congress, at 2 (June 1998), *available at* http://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf. For well over a decade, the Commission has taken the position that the failure to maintain reasonable and appropriate data security measures constitutes an unfair act or practice in violation of Section 5. *See* Order Denying Respondent LabMD's Motion to Dismiss, R1-3, at 8. In line with this position, the FTC has previously brought "administrative adjudicatory proceedings and cases in federal court challenging practices that compromised the security of consumers' data and resulted in improper disclosures of personal information collected from consumers online." *Ibid.*

2. The FTC Act sets out the administrative process triggered by the filing of an administrative complaint, including a hearing before an ALJ following an opportunity for pretrial discovery. *See* 16 C.F.R. pt. 3. The Act also allows an aggrieved party to

and enters a final order to cease and desist, the respondent "may obtain a review of

security measures; maintain and update operating systems on computers and other devices; and use readily available measures to prevent and detect unauthorized access to consumers' personal information. R1-5, at 3. The administrative complaint alleges that, taken together, these practices constitute a failure to provide reasonable and appropriate security for personal information on LabMD's computer networks. *Ibid.* The complaint further alleges that these acts caused or are likely to cause substantial unavoidable injury to consumers with no offsetting benefits. R1-5, at 5; *see also* 15 U.S.C. § 45(n).

3. Plaintiff's Prior Judicial Actions

In November 2013, LabMD filed a complaint against the FTC in the District Court for the District of Columbia, seeking to enjoin the FTC's administrative proceeding against it on the grounds that the FTC lacked statutory authority to regulate LabMD's data security practices, that application of the FTC Act to LabMD violated the Due Process Clause, and that the FTC was acting to retaliate against LabMD's president's public criticism of the agency on the internet and in a book published in 2013. *LabMD v. FTC,* No. 1:13-cv-1787 (D.D.C. Nov. 14, 2013).

While its complaint was pending in district court, LabMD also filed an action in this Court to enjoin the administrative proceedings on the same grounds that it advanced in its suit in the District Courtthis 1 Tlurinforcabledetect s-4.re der admin,

opinion about whether a district court has jurisdiction to hear [the plaintiff's] claims or about the merits of those claims." *LabMD Inc. v. FTC*,

would be reviewable in this Court at the conclusion of the administrative action in the event that the Commission's decision were adverse to LabMD. The court rejected plaintiff's attempt to style its suit as a challenge to final agency action under the Administrative Procedures Act (APA). The court explained that the "Commission's denial of LabMD's Motion to Dismiss the Administrative Complaint on the grounds that the FTC does not have the statutory authority to regulate data security practices under Section 5 is the type of Order that 'ha[s] long been considered nonfinal.'" R33, at 12 (quoting *DRG Funding Corp. v. Secretary of HUD*, 76 F.3d 1212, 1215 (D.C. Cir. 1996)). The court observed that "[t]he Commission's Order is the equivalent of a district court's decision to deny a motion to dismiss, 'which—unlike a final order ending the case—assures its continuation.'" *Ibid.* The court noted that plaintiff's assertion that the FTC proceeding was outside the agency's authority made no "difference to the finality analysis because the purpose of finality is to prevent piecemeal 'consideration of rulings that may fade into insignificance by the time the initial decisionmaker disassociates itself from the matter.'" R33, at 11-12 (quoting *Aluminum Co. of America v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986)).

On May 14, 2014, LabMD filed a notice of appeal and filed a motion for an emergency stay in this Court the next day. The government opposed, and this Court denied the motion for emergency stay on May 19.

SUMMARY OF ARGUMENT

LabMD asks this Court to block an ongoing administrative proceeding before the Federal Trade Commission in which the Commission alleges that LabMD violated the FTC Act by failing to employ reasonable and appropriate measures to prevent unauthorized access to consumers' sensitive personal information. A hearing before an Administrative Law Judge commenced on May 20, and LabMD may present all of its legal and factual defenses to the ALJ. If aggrieved by the ALJ's decision, LabMD may seek de novo review before the full Commission. If the Commission ultimately imposes a cease-and-desist order, LabMD may then seek judicial review in this Court. What LabMD may not do is disrupt Congress's carefully crafted procedure for review of FTC adjudications and ask this Court to prematurely put a halt to the administrative action in order to weigh in on legal and factual questions the Commission has not finally resolved.

This Court's precedent makes clear that all challenges to FTC proceedings—including constitutional challenges—must be brought at the conclusion of FTC administrative proceedings. LabMD may not circumvent the process established by Congress by seeking to entangle this Court in premature consideration of questions that are properly addressed on the basis of an administrative record after issuance of a final decision if, in fact, the outcome of the administrative proceedings is adverse to plaintiff.

Because the Court lacks jurisdiction, it need not reach the merits of LabMD's challenges, which are, in any event, groundless. The FTC Act grants the Commission broad authority to protect consumers from the harm that arises from the unauthorized release of their sensitive personal information. The complementary medical privacy statutes administered by the Department of Health and Human Services do not curtail the scope of the FTC's authority, which the Commission may exercise through individual adjudications without promulgating regulations prior to initiating an enforcement action. For present purposes, however, the critical point is that this Court can address these arguments in the event that LabMD seeks review of a final Commission order. No jurisdiction exists to hear these arguments at the present juncture.

STANDARD OF REVIEW

This Court reviews *de novo* the 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).

ARGUMENT

The District Court Lacked Jurisdiction Over This Action.

A. The district court correctly concluded that it lacked jurisdiction to enjoin ongoing agency proceedings.

1. The former Fifth Circuit explained nearly half a century ago that Congress has provided for direct and exclusive review of FTC proceedings in the courts of

appeals. "All constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered" at that time, "and this statutory right to review has long been viewed as constituting a speedy and adequate remedy at law."

FTC Act is comparable in all respects to the scheme at issue in *Thunder Basin.* Like the action in *Thunder Basin,* plaintiff's suit is an "attempt to make an 'end run' around the statutory scheme," and "would allow the plaintiff to short-circuit the administrative review process and the development of a detailed factual record by the agency." *Great Plains Coop v. CFTC,* 205 F.3d. 353, 355 (8th Cir. 2000) (holding that district court lacked jurisdiction to interfere with ongoing administrative proceedings). As the court in *Great Plains Coop* explained, questions regarding the agency's jurisdiction, like all other issues, are subject to judicial review "only after a final order has been issued . . . and then only by direct review in the appropriate court of appeals." *Id.* at 356.

The Supreme Court in *Thunder Basin* also made clear that constitutional, as well as statutory claims, should be considered on review of final agency action, declaring that "petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals" on review of a final determination. 510 U.S. at 215. This Court had reached the same conclusion even prior to *Thunder Basin,* holding that the exclusive scheme for review of Federal Aviation Administration orders precluded a *Bivens* action for First Amendment and due process violations. *See Green v. Brantley*, 981 F.2d 514 (11th Cir. 1993). The Court declared that "[w]here Congress has provided in the courts of appeals an exclusive forum for the correction of procedural and substantive administrative errors, a plaintiff may not bypass that forum by suing for damages in district court." *Id.* at 521. This Court subsequently applied the holdings of *Thunder Basin* and *Green* in *Doe v. FAA*, 432 F.3d 1259 (11th Cir. 2005), rejecting the

plaintiffs' contention that "their allegation of a constitutional violation removes their complaint from the purview of the statutory review scheme[.]" *Id.* at 1263.

2. LabMD makes no attempt to square its arguments with this uniform precedent. Indeed, even prior to *Thunder Basin,* its reliance on the Administrative Procedure Act would have been precluded by *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 101 S. Ct. 488 (1980), in which the Supreme Court reversed a court of appeals ruling that would have allowed a district court to review the Commission's determination that it had sufficient "'reason to believe' that [respondent] was violating the Act" to warrant its opening an administrative proceeding. *Id.* at 241. The Supreme Court ruled that, "[s]erving only to initiate the proceedings, the issuance of the complaint averring reason to believe has no legal force . . . [or] practical effect, except to impose upon [respondent] the burden of responding to the charges made against it." The Supreme Court noted that "[t]o be sure, the issuance of the complaint is definitive on the question whether the Commission avers reason to believe that the respondent to the complaint is violating the Act." The Court declared, however, that "the extent to which the respondent may challenge the complaint and its charges" in the court of appeals if the Commission enters a cease-and-desist order "proves that

the averment of reason to believe" was not "definitive" so as to render it final agency subject to review under the APA. *Id.* at 241.[5]

Even if the decision in *Standard Oil* had never issued, and even if the FTC Act did not provide for exclusive direct review in the courts of appeals, plaintiff's invocation of the APA would be unavailing.[6] The APA permits judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.[7] An administrative complaint and the subsequent denial of a motion to dismiss the complaint are not final agency actions because they are indisputably interlocutory and because neither imposes any legal rights or obligations. *See Bennett v. Spear,* 520 U.S. 154, 178, 117 S. Ct. 1154, 1166

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[5] Like LabMD, Standard Oil filed a motion to dismiss the FTC administrative action, which the Commission denied. *Standard Oil*, 449 U.S. at 235 n.5. This fact did not transform either the administrative complaint or the denial of the motion to dismiss into final agency action.

[6] LabMD appears to have abandoned an argument that the district court had jurisdiction under *Leedom v. Kyne,* 358 U.S. 184, 79 S. Ct. 180 (1958). For the reasons explained by the district court, *Leedom* has no application here. *See* R33, at 17-18.

[7] LabMD appears to argue (at LabMD Br. 3 n.1 and 20 n.22) that because the D.C. Circuit has held that failure to demonstrate "final agency action" does not speak to the district court's subject matter jurisdiction, any case that holds otherwise is no longer good law. *See, e.g., Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 660-61 (D.C. Cir. 2010). This Court takes a different approach to this question. *See Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1240 (11th Cir. 2003) ("[T]he 'final agency action' requirement implicates federal subject matter jurisdiction."); *Fanin v U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 877 (11th Cir. 2009) (same). In any event, the Court need not weigh in on this doctrinal question as the district court was

(1997). As the district court observed, "[t]he Commission's Order is the equivalent of a district court's decision to deny a motion to dismiss, 'which—unlike a final order ending the case—assures its continuation.'" R33, at 12 (quoting *DRG Funding Corp. v. Sec'y of HUD*, 76 F.3d 1212, 1215 (D.C. Cir. 1996)).

None of the cases cited by plaintiff, LabMD Br. 20-23, suggests that the APA authorizes a court to review the filing of an administrative complaint or an agency's denial of a motion to dismiss. In *TVA v. Whitman*, 336 F.3d 1236, 1239 (11th Cir. 2003), for example, this Court held that "legally inconsequential" agency decisions are not final agency action subject to review. In *CSI Aviation Servs. v. U.S. Dep't of Transportation*, 637 F.3d 408 (D.C. Cir. 2011), review was available because the agency issued cease-and-desist letters that effectively required immediate compliance and were not "subject to further agency consideration or possible modification." *Id*. at 412. There were no ongoing agency proceedings and no "disputed facts that would bear on" whether the company had violated the law. *Ibid*. *Athlone Indus. Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983), addressed exhaustion, not finality. *See Ukiah Valley Med. Ctr v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990) (explaining that *Athlone* dealt with exhaustion and not finality). And *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006), is inapposite because it involved review of an FTC press release that, unlike an administrative complaint, was not reviewable under the ordinary FTC judicial review provisions.

Finally, any assertion that permitting the administrative review process to go forward would be "futile" because of the Commission's review record does not provide a basis for jurisdiction. *See* LabMD Br. 21. Plaintiff's contentions parallel those made in *American Airlines, Inc. v. Herman*, 176 F.3d 283 (5th Cir. 1999), where the plaintiff urged that "it would be futile for it to pursue the administrative process because the [agency] already has 'finally and definitively rejected each of American's challenges to its statutory and regulatory authority.'" *Id.* at 292 (citation omitted). The court explained, however, that "[t]he requirement that the reviewable order be 'definitive' in its impact on the rights of the parties is something more than a requirement that the order be unambiguous in legal effect. It is a requirement that the order have some substantial effect *which cannot be altered by subsequent administrative action.*" *Id.* (quoting *Atlanta Gas Light Co. v. Fed. Power Comm'n,* 476 F.2d 142, 147 (5th Cir. 1973) (emphasis and alteration in original)). The Commission has not yet ordered LabMD to cease and desist from doing anything. There thus exists no "substantial effect which cannot be altered by subsequent administrative action." *Ibid.*

3. LabMD notes that the FTC cited the Commission's denial of the motion to dismiss in unrelated litigation in the District Court for the District of New Jersey. *See* LabMD Br. at 19 & n.20 (citing *FTC v. Wyndham Worldwide Corp.*, --- F.Supp.2d ----, No. 13-1887, 2014 WL 1349019 (D.N.J. Apr. 7, 2014)). It also notes the FTC's contention that the view of the law set out in the denial of the motion to dismiss was entitled to deference under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 104 S. Ct. 2778

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

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

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

1. LabMD's first amendment and due process claims, like its challenges to the FTC's statutory authority, are properly considered as part of judicial review following

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

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

a. First, LabMD has failed to move its first amendment claims "across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). Agency officials are entitled to a presumption "that they have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 463-64, 116 S. Ct. 1480, 1485-1486 (1996) (quoting *United States v. Chemical Foundation*, 272

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

LabMD's reliance on the fact that Mr. Daugherty's publication of his book occurred at roughly the same time as the filing of the administrative complaint cannot withstand scrutiny. LabMD Br. 15. Mr. Daugherty's book was published approximately three years

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

b. LabMD's due process claim regarding fair notice may also be dismissed for

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Serv. Co., 344 U.S. 392, 394, 73 S. Ct. 361, 363 (1953)); *see also Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 979 (D.C. Cir. 1985).

C. LabMD's remaining arguments go to the merits of FTC's enforcement action and, in any event, are groundless.

LabMD's opening brief and accompanying 133-page "motion for judicial notice" attempt to enmesh this Court in the factual disputes currently being resolved by an ALJ and ultimately subject to Commission review. *See, e.g,* LabMD Br. 10-13; LabMD Br. 12 & n.12 (arguing that the file containing personal information was obtained illegally and should be excluded); *id.* at 13 (discussing congressional interest in the case). These efforts only underscore the prematurity of LabMD's suit in this Court. LabMD plainly wishes to have this Court resolve the merits of FTC's enforcement proceeding against it before FTC has the opportunity to do so.

In any event, LabMD's brief makes equally plain that its contention that the FTC cannot regulate unfair practices that harm consumers if those practices concern data security is without basis. *See* R1, ¶¶ 104, 118.

It is of no moment that the FTC Act does not address data security. Section 5 of the Act broadly empowers the FTC to take action against any "unfair . . . acts or practices in or affecting commerce," as long as the act or practice "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(a), (n). Congress crafted this standard broadly to

afford the Commission substantial discretion in its application. It therefore does not "delineate the specific 'kinds' of practices which will be deemed unfair," but allows the FTC "to define unfair practices on a flexible, incremental basis." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 978 (D.C. Cir. 1985). Indeed, the Supreme Court has long held that "[n]either the language nor the history of the [FTC] [A]ct suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories." *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 310 (1934).

Thus, federal courts have upheld Commission determinations finding a wide range of acts or practices that satisfy the applicable criteria to be "unfair" within the meaning of Section 5, even though these practices are not explicitly mentioned in Section 5. *See, e.g.*, *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1155 (9th Cir. 2010) (creating unverified checks that enabled individuals to take unauthorized withdrawals from consumers' bank accounts); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009) (covert retrieval and sale of consumers' telephone billing information); *Orkin Exterminating Co. v. FTC,* 849 F.2d 1354, 1364 (11th Cir. 1988) (unilateral breach of standardized service contracts).

Accepting plaintiff's analysis would hobble the FTC's ability to keep pace with ever-changing methods of consumer harm. But Congress plainly intended the Commission to have the flexibility to adapt to changing commercial practices, and Congress recognized one hundred years ago that there "is no limit to human inventiveness" in commerce. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240, 92 S.

Ct. 898, 903 (1972) (quoting H.R. Conf. Rep. 63-1142, at 19 (1914) ("It is impossible to frame definitions which embrace all unfair practices.")). Congress thus determined not to specifically enumerate "unfair practices" given that "[e]ven if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." *Ibid*.

Nor does the Health Insurance Portability and Accountability Act of 1996 (HIPAA) divest the FTC of otherwise applicable Section 5 authority. LabMD contends in effect that HIPAA impliedly repealed the FTC's Section 5 authority, but "an implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the [later] Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Carcieri v. Salazar,* 555 U.S. 379, 395, 129 S. Ct. 1058, 1068 (2009) (quoting *Branch v. Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429 (2003)). However, when two statutes "are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *J.E.M. Agr. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44, 122 S. Ct. 593, 605 (2001). LabMD has pointed to no inconsistency between the FTC Act and HIPAA, and sensitive personal information may be protected under both regimes. Indeed, in adopting regulations implementing HIPAA, HHS stated that "[s]ecurity standards in this final rule establish a minimum level of security that covered entities must meet. We note that covered entities may be required by other

Federal law to adhere to additional[] or more stringent security measures." 68 Fed. Reg. 8334, 8355 (Feb. 20, 2003).[9]

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)(7)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,346 words as counted by Microsoft Word and was prepared in proportionally spaced 14-point Garamond font.

s/ Abby C. Wright
Abby C. Wright
Counsel for FTC

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Abby C. Wright
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