PUBLIC

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

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

RESPONDENT'S MOTION TO DISMISS

Pursuant to Rule 3.22(a), Respondent LabMD, Inc. (LabMD) moves to dismiss because Complaint Counsel has failed to establish a *prima facie* case. Given the Federal Trade Commission's (FTC) fundamental failures of proof, there is no reason to defer a ruling until after post-trial briefing. Instead, LabMD's motion should be granted at the earliest possible time. *Cf. In re McWane, Inc.*, 2012 FTC LEXIS 174, *3-5 (F.T.C. Nov. 7, 2012).

STANDARD OF REVIEW

If, at the close of the evidence offered in support of the complaint, Complaint Counsel has failed to establish a *prima facie* case, then, on respondent's motion, the complaint should be dismissed. 16 C.F.R. § 3.22(a). Complaint Counsel must prove by a preponderance of the evidence[1] (1) that LabMD's data-security practices were unreasonable; (2) that these allegedly unreasonable data-security practices caused the exposure of the 1718 file and the Day Sheets, which exposure, in turn, caused or is likely to cause, "substantial" injury to consumers; (3) that

[1] *See In re McWane, Inc.*, FTC Dkt No. 9351, at 235-36, 2013 FTC LEXIS 76, at *512-13 (May 8, 2013) (Initial Decision); *Steadman v. SEC*, 450 U.S. 91, 98 (1981). Congress aimed to eliminate agency decision-making premised on evidence that is irrelevant, immaterial, unreliable, non-probative, and of insufficient quantity, i.e., "less than preponderance." *Steadman,* 450 U.S. at 102. Thus, an agency decision must be in accordance with "the weight of the evidence," not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict. *Id.*

this injury was unavoidable by the consumers; and (4) there was no countervailing benefit to consumers or competition. 15 U.S.C. § 45(n); 5 U.S.C. §556(d). "The Commission is not concerned with trivial or merely speculative harms." Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980), *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1984 FTC LEXIS 2, at *308-09 (1984) (emphasis added); *accord Reilly v. Ceridian Corp.*, 664 F.3d 38, 44-46 (3d Cir. 2011). Established judicial principles "help[] the agency ascertain whether a particular form of conduct does in fact tend to harm consumers." *Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *313 (citation omitted).

In ruling on this motion, the Administrative Law Judge (ALJ) exercises his role as fact-finder, and Complaint Counsel is not entitled to any favorable inferences. *See United States v. $242,484.00*, 389 F.3d 1149, 1172 (11th Cir. 2004) (en banc); *see also Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-65, 1170 (11th Cir. 2005).[2]

[2] For example, this Court has ruled that *ex parte* investigative hearing transcripts will not generally be given much weight. Uncertified Final Pretrial Conf. Trans. 6:20-7:1 (May 15, 2014). Complaint Counsel's Pretrial Brief and experts' reports rely heavily on such a transcript from a former LabMD employee, Kurt Kalustian, who, among other things, lied about his employment history. *See* RX415. Complaint Counsel knew Kalustian was bound by a confidentiality agreement and that LabMD's counsel had requested notice prior before any current or former LabMD employees were examined. However, Complaint Counsel took his testimony without LabMD's knowledge or consent. CX0735.

Kalustian was not then employed by LabMD, but because the FTC knew of both the confidentiality agreement and of LabMD's claimed privilege, his testimony was arguably improperly taken. *See* District of Columbia Rule of Professional Conduct 4.2; 18 U.S.C. § 1905; *United States ex rel. Mueller v. Eckerd Corp.,* 35 F. Supp. 2d 896, 898 (M.D. Fla. 1999). "If the FTC acts improperly or illegally in obtaining evidence for the adjudicative proceeding with investigatory subpoenas, [LabMD] should be entitled to have any evidence so obtained—as well as its 'fruits'—excluded from the proceeding or to obtain a reversal of any adverse judgment founded upon improperly admitted 'tainted' evidence." *Atlantic Richfield Co. v. Federal Trade Com.*, 546 F.2d 646, 651 (5th Cir. Tex. 1977); *Knoll Associates, Inc. v. Federal Trade Com.*, 397 F.2d 530, 535 (7th Cir. 1968). Therefore, Kalustian's testimony and all of its "fruits" should be excluded.

ARGUMENT

I. COMPLAINT COUNSEL HAS FAILED TO MAKE A PRIMA FACIE CASE.

After four and one-half years of investigation and litigation at taxpayer expense, and despite having the full weight and authority of the federal government at their disposal, Complaint Counsel has failed to prove by a preponderance of the evidence that harm is "likely" for purposes of Section 5 because the record is bare of any causal connection between LabMD's allegedly unreasonable data-security practices and the alleged exposure of the 1718 file and Day Sheets.

Complaint Counsel has also failed to prove by a preponderance of the evidence that the harm caused or likely caused to consumers by LabMD is "substantial" because the record is bare of even one identifiable victim of identity theft, medical identity theft, or fraud caused by the exposure of the 1718 file or the Day Sheets due to LabMD's allegedly unreasonable data-security practices. Instead, the "harm" here is purely abstract and speculative.

To begin with, Dr. Raquel Hill opined that LabMD's data security practices between January, 2005 and July, 2010, were "inadequate" and did not meet IT industry standards. Tr. Vol. 2 at _____ (Hill Cross, May 21, 2014).[3] Professor Hill also assumed that harm was likely. Tr. Vol. 2 at _____ (Hill Cross, May 21, 2014). She concluded that the alleged inadequacies were the cause of the 1718 file and Day Sheets escaping LabMD's possession although she did not form any opinion as to how they escaped. Tr. Vol. 2 at _____ (Hill Cross, May 21, 2014). Most importantly, upon questioning by this Court, Dr. Hill admitted to assuming that harm was likely—an element that Complaint Counsel must prove. Tr. Vol. 2 at _____ (Hill Cross, May 21, 2014).

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[3] All transcript citations are to uncertified rough draft transcripts. LabMD will file a final version of this motion with citations to the official transcripts as soon as reasonably practicable.

Complaint Counsel's other experts, Rich Kam and James Van Dyke, each were hired to testify regarding hypothetical consumer risk and each assumed LabMD's allegedly unreasonable data-security to be the cause for exposure of the 1718 file and the Day Sheets.[4] Tr. Vol. 3 at _____ (Van Dyke Cross, May 22, 2014); Tr. Vol. 3 at _____ (Kam Cross, May 22, 2014). They, too, did not know how the 1718 file or the Day Sheets escaped LabMD's possession. Tr. Vol. 3 at _____ (Van Dyke Cross, May 22, 2014); Tr. Vol. 3 at _____ (Kam Cross, May 22, 2014) ("I think I stated that I assumed LabMD's failure to provide reasonable and appropriate security caused this risk."). However Complaint Counsel offered no evidence demonstrating how these documents escaped LabMD's possession, much less that they escaped due to any specific allegedly unreasonably inadequate data-security practice or practices.[5]

Neither Kam nor Van Dyke actually measured or testified to the likelihood of harm to consumers as a result of LabMD's allegedly unreasonable data-security practices. Instead, each

[4] Kam's opinions about paragraph 21 of the Complaint were primarily based on the CLEAR spreadsheet excluded by this Court. *See* CX0742 at 7, 23. Kam said that "[he] used the Federal Trade Commission's CLEAR analysis in order to assess the likely risk of injury to identity theft based on the multiple uses of their—of people's Social Security numbers." Tr. Vol. 3 at _____ (Kam Cross, May 22, 2014). Kam apparently reasoned that the excluded spreadsheet was "the most relevant information in order to determine and estimate the number of people who might be affected by identity theft in the Sacramento disclosure." Tr. Vol. 3 at _____ (Kam Cross, May 22, 2014). When this Court inquired, Kam said that he did not verify the spreadsheet because he "assumed" it was accurate, noting that he had undergone about 45 minutes of CLEAR training. Tr. Vol. 3 at _____ (Kam, May 22, 2014). He did this even though his own Ponemon Institute study concluded that medical identity theft is usually attributable to people knowingly sharing personal and medical information or theft by family members. Tr. Vol. 3 at _____ (Kam Cross, May 22, 2014).

[5] As Complaint Counsel and Dr. Hill readily admit, there is no such thing as perfect data security. Tr. Vol. 1 at 100:12-13, 109:20-25, 110:18-24 (Hill Direct, May 20, 2014). In other words, LabMD's data-security practices could have been reasonable and still the 1718 file and the Day Sheets could have "gotten out." Given that the FTC has refused to provide written data-security standards, and given that the Commission obviously believes that HIPAA compliance is not enough, the causal chain between LabMD's allegedly unreasonable data-security practices and the circumstances under which 1718 file and the Day Sheets "got out" should have been the centerpiece of Complaint Counsel's proof. Complaint Counsel's failure to connect this chain is both puzzling and fatal to their case.

testified as to the rate at which they expected consumers to experience identity theft, medical identity theft, or fraud based upon their assumptions that the 1718 file and the Day Sheets escaped LabMD's possession due to LabMD's allegedly unreasonable data-security.

> That relates to the 1718 File because we know from the 1718 File from the testimony of Mr. Boback that it was found in four places where it didn't belong, so that's the indicator of the first thing, exposure of the data. And I use that to make an estimate, a projection—pardon me—of the amount of harm that those people who have had their data exposed in an unauthorized way are likely to encounter.

Tr. Vol. 4 at _____ (Van Dyke Re-Cross, May 23, 2014).

Kam admitted that LabMD's security practices were not significant in his consideration. Tr. Vol. 3 at _____ (Kam Cross, May 22, 2014). Van Dyke admitted that the only thing that mattered to him was whether the individual in possession of the files was authorized to have them:

> My position, Your Honor, is that it does not matter what the identity is of the recipient of unauthorized information because there is a single overriding factor that matters so much that quite literally in this case, in my opinion, nothing else matters. And that is, was the individual who had access to the information authorized or unauthorized to have access to that information.

Tr. Vol. 4 at _____ (Van Dyke, May 23, 2014).

Van Dyke and Kam testified that the unauthorized disclosure of Protected Health Information, or PHI, in the 1718 file, sometime in February, 2008, and the Day Sheets, sometime in October, 2012, should result in literally thousands of cases of identity theft, medical identity theft, and fraud. Tr. Vol. 3 at _____ (Van Dyke Direct, May 22, 2013); Tr. Vol. 4 at _____ (Van Dyke, May 23, 2014); Tr. Vol. 2 at ______ (Kam Direct, May 21, 2014); Tr. Vol.3 at _____ (Kam, May 23, 2014). But, remarkably, there is no evidence of even one such case.

In forming their opinions, each of Complaint Counsel's "expert" witnesses admit that they gave little or no consideration to how the 1718 file and Day Sheets escaped LabMD's possession. Given that it is universally accepted that there is no perfect security, then one could

conclude that using certain methods the documents were just as likely to have escaped LabMD's possession if LabMD was employing Dr. Hill's recommended security practices as they would using LabMD's security practices at the time. For example using Dr. Hill's recommended security practices the 1718 file could have been downloaded on a thumb drive and secreted away. Given that no consideration of this fact was paid by any of Complaint Counsel's witnesses, they have failed to prove that LabMD's allegedly unreasonable data-security practices caused or were likely to cause the harm that its witnesses speculate should have occurred.

II. Complaint Counsel Has Failed To Prove "Substantial Injury" And So This Case Should Be Dismissed.

Complaint Counsel must prove by a preponderance of the evidence a consumer injury that is substantial, tangible and more than merely speculative to make a *prima facie* case. 15 U.S.C. § 45(n); *Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *308-09. Complaint Counsel has failed to prove that there was even one actual victim of identity theft, medical identity theft, or fraud due to LabMD's allegedly unreasonable data-security practices. Dr. Hill, Kam, and Van Dyke each speculated that harm occurred. But even if their testimony is credulously taken at full face value, speculation about possible identity theft and fraud is not enough as a matter of law to satisfy Section 5(n)'s substantial-injury requirement.[6]

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[6] The record demonstrates that Complaint Counsel's expert testimony ought to be given little, if any, weight. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592–94 (1993) (the following guide trial courts in their evaluation of expert testimony reliability: (1) whether the technique has been subjected to peer review or publication, (2) the "known or potential rate of error," (3) a "reliability assessment," in which the "degree of acceptance" within a scientific community may be determined and reviewed, and (4) the "testability" of the technique).

There is a fatal disconnect between expert theory and case facts. If Hill, Kam, and Van Dyke each testified accurately, then thousands should have suffered identity theft or fraud in the many years since the 1718 file and Day Sheets were exposed, but Complaint Counsel has proven none. On this ground alone, Complaint Counsel's expert testimony should be stricken as LabMD has requested. *See GE v. Joiner,* 522 U.S. 136, 146 (1997) ("[N]othing in either

The FTC relies on established judicial principles to "help[] the agency ascertain whether a particular form of conduct does in fact tend to harm consumers" under Section 5. *Id.* at *313 (quoting Unfairness Policy Statement). As a matter of law, the potential and speculative harms testified to by Hill, Kam, and Van Dyke are not even the "identifiable trifle" needed to show "injury in fact" for Article III standing. *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig*., 2014 U.S. Dist. LEXIS 64125, at *27-33 (D.D.C. May 9, 2014) (listing cases).[7] Therefore, such "harm" should not be deemed "substantial" for Section 5 purposes and this case should be dismissed. *See generally Reilly*, 664 F.3d at 44-46; *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 166 (1st Cir. 2011).

CONCLUSION

Given that Complaint Counsel has failed to prove by a preponderance of the evidence the causal link between LabMD's allegedly unreasonable data-security practices between 2005 and July, 2010, and the alleged exposure of the 1718 file and the Day Sheets to unauthorized third parties, and that there is nothing more than speculative harm, it cannot meet the first prong of its

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Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

[7] The Court said:

> Plaintiffs begin by asserting that an increased risk of harm alone constitutes an injury sufficient to confer standing to sue. Due to the data breach, they claim that they are 9.5 times more likely than the average person to become victims of identity theft. That increased risk, they maintain, in and of itself confers standing. But … that is not true.

Backup Tape, 2014 U.S. Dist. LEXIS 64125 at *22 (citations omitted). Cost-of-monitoring claims and speculative claims about alleged loss of value of personal and medical information are not injury-in-fact. *Id.* at *30, 37-38. Instead, an identifiable person must be able to show concrete harm, such as being cheated out of insurance premiums. *Id.* at *38. With respect to alleged "privacy" harm, "the Supreme Court has intimated that disclosure of personally identifiable information alone, along with some attendant emotional distress, may constitute 'injury enough to open the courthouse door' in privacy actions." *Id.* at *37. But a person's data must actually be used to for that person to be harmed. *Id.* at *38.

unfairness test—that LabMD's data security practices were likely to cause substantial consumer injury—and this case should be dismissed.[8]

For the foregoing reasons, this Court should GRANT LabMD's Motion and dismiss the complaint with prejudice.

Respectfully submitted,

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Counsel for Respondent

[8] In fact, the only plausible explanation for the 0% rate of return for identity fraud is that the 1718 file was stolen by Tiversa from a LabMD computer, given to Dartmouth College to spice up its report, and then given to the FTC, precisely as LabMD has contended all along. The 1718 file and the Day Sheets are not accessible on any unsecured network and have literally only been in the possession of LabMD, Dartmouth College, Tiversa, The Privacy Institute (used as a conduit to transfer the 1718 file from Tiversa to the FTC) and, Complaint Counsel.

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	)	
LabMD, Inc.,	)	
a corporation.	)	
	)	

[PROPOSED] ORDER GRANTING Respondent LabMD, INC.'S MOTION TO DISMISS

This matter came before the Court on May 27, 2014, upon a Motion to Dismiss filed by Respondent LabMD, Inc. ("LabMD") pursuant to Commission Rule 3.22(a), 16 C.F.R. §3.22(a), for an Order dismissing the Federal Trade Commission's ("FTC") Complaint with prejudice. Having considered LabMD's Motion and all supporting and opposition papers, and good cause appearing, it is hereby ORDERED that the Complaint is DISMISSED with prejudice.

ORDERED:

____
D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
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CERTIFICATE OF 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.

Dated: May 27, 2014

By: /s/ Michael D. Pepson
Michael D. Pepson