UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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

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

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S APPLICATION FOR STAY OF FINAL ORDER

Respondent has failed to meet its burden to show that a stay of the Commission's Final Order pending appeal is warranted. *See* Resp't LabMD, Inc.'s Appl. for Stay of Final Order Pending Review by a U.S. Ct. of Appeals (Aug. 30, 2016) ("Application for Stay"). Respondent holds the most sensitive personal data of hundreds of thousands of consumers, employing data security practices that the Commission has found to be unfair. Additionally, 9,300 consumers whose data was exposed by those practices remain in the dark about that exposure, powerless to take the steps necessary to remedy the serious effects of that exposure. The harm consumers continue to suffer without that relief far outweighs any claimed harm to Respondent. Respondent has failed to show that is likely to succeed on appeal with its recycled arguments. And Respondent has also failed to substantiate its claims of the harm it will suffer if the Commission does not grant a stay. In light of the overwhelming interest of the consumers in the relief provided by the Final Order, the Commission should deny Respondent's Application for Stay.

BACKGROUND

The Commission issued the Complaint in the matter of LabMD, Inc. on August 28, 2013.[1] On January 6, 2014, Respondent LabMD, Inc. informed its customers—physicians and physician-practices for whom it provided testing services—that it would stop accepting new specimens for testing on January 11, 2014. CX0291 (LabMD Letter to Physicians Office re: Closing). In its March 3, 2014 responses to discovery propounded by Complaint Counsel, Respondent stated that it intended to employ the same policies and procedures to protect consumers' information in the future that it had before it stopped accepting new testing orders. CX0765 (LabMD Resps. to 2d Set of Disc.) at 5-6, 7. Respondent also stated that it did not intend to dissolve as a Corporation. *Id.* at 7.[2]

The evidentiary hearing commenced on May 20, 2014 and concluded on July 15, 2015. Op. of the Comm'n at 6. The parties filed post-trial briefs and proposed findings of fact and

[1] Respondent makes a number of factual assertions throughout its Application to Stay that Complaint Counsel disputes. For example, incredibly, Respondent states, without citation, that its witness Richard Wallace "never testified that he accessed the 1718 File through LimeWire." Appl. for Stay at 8 n.9. To the contrary, Mr. Wallace testified that he downloaded the 1718 File "using a stand-alone desktop computer." Tr. 1372. And he further testified that he searched for files on the stand-alone computer "using a standard, off-the-shelf peer-to-peer client, such as LimeWire or BearShare or Kazaa or Morpheus, any of those that are, you know, affiliated with the Gnutella network." Tr. 1342; *see also* Op. of the Comm'n at 3 (citing Init. Decision Finding ¶ 121-22). Complaint Counsel has limited its response to only those facts and issues that are germane to the Commission's consideration of the Application for Stay. In addressing only the relevant facts and issues, Complaint Counsel does not concede any of the irrelevant factual assertions made by Respondent.

[2] By March 2014, Respondent had no employees other than Michael Daugherty, its President and Chief Executive Officer; had moved all operations to its current premises; and had disconnected all but one system from the internet. CX0873 (Suppl. Decl. of Michael J. Daugherty in support of Plf.'s Resp. to Def.'s Mot. to Amend Sched. Order in *LabMD, Inc. v. FTC* (N.D. Ga.)) at 2-3; Compl. Counsel's Proposed Findings of Fact ¶ 69 (Aug. 10, 2015); CX0709 (Daugherty, Dep. at 42-43). Thus the state of Respondent's operations as described in Mr. Daugherty's declaration, Appl. for Stay, Exhibit 18 ¶¶ 4, 8-12, 17 ("Daugherty Decl."), is nearly identical to the state of operations that Commission considered when concluding that it was necessary to enter the Final Order. Op. of the Comm'n at 36.

conclusions of law on August 10, 2015[3] and replies thereto on September 4, 2015. Order on Post-Trial Briefs at 1-2 (July 16, 2015). The Chief Administrative Law Judge issued his initial decision on November 13, 2015 dismissing the case. Initial Decision (Nov. 13, 2015). Complaint Counsel appealed the Initial Decision on December 22, 2016,[4] Respondent filed its Answering Brief on February 5, 2016, and Complaint Counsel filed a Reply on February 23, 2016. At no time before the close of the evidentiary record, during the aforementioned briefing, or since did Respondent seek to submit evidence regarding its alleged insolvency or its financial condition. Likewise, Respondent did not argue this point in any of the briefing.

On July 29, 2016, the Commission issued its Opinion, reversing the Initial Decision. Op. of the Comm'n at 1. The Commission found that Respondent did not put reasonable security measures in place, and supported its finding with extensive citations to the evidentiary record. *Id.* at 11-16. The Commission held that Respondent's data security practices were unfair because its practices caused substantial injury in the form of the disclosure of sensitive health or medical information, citing to expert testimony and wide-ranging sources recognizing the harm in disclosure of health or medical information. *Id.* at 16-19. The Commission also held that Respondent's practices were *likely* to cause substantial injury, overruling the Initial Decision's holding on the meaning of "likely to cause," and grounding its interpretation in the Unfairness Statement and caselaw. *Id.* at 20-25.

The Commission further held that consumers could not reasonably avoid the harm caused by Respondent's practices. *Id.* at 25-26. And it held that no countervailing benefits to consumers or competition outweighed the substantial injury caused by Respondent's practices,

[3] Both parties subsequently filed corrected versions of some of their initial post-trial briefing on August 11 and 12, 2015.

[4] Complaint Counsel filed a Corrected Appeal Brief on January 14, 2016, correcting errors in the Table of Authorities.

based on unrebutted evidence of the many low cost solutions Respondent could have implemented. *Id.* at 26-28. Consequently, the Commission held that "LabMD's data security practices constitute an unfair act or practice within the meaning of Section 5 of the FTC Act." *Id.* at 1. The Commission also carefully considered and ruled against Respondent's affirmative defenses and miscellaneous objections. *Id.* at 28-33. The Commission entered the Final Order, "requiring that LabMD notify affected individuals, establish a comprehensive information security program, and obtain assessments regarding its implementation of the program." *Id.* at 37; Final Order (July 29, 2016). The Commission noted that the Final Order "takes account of LabMD's current limited operations." *Id.* at 36.

LEGAL STANDARD

Under Commission Rule 3.56(c), an application for a stay must address 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] why the stay is in the public interest." 16 C.F.R. § 3.56(c). It is the applicant's burden to establish that a stay is warranted. *Toys "R" Us, Inc.*, 126 F.T.C. 695, 698 (1998). Respondent's application must therefore be supported by "affidavits or other sworn statements, and a copy of the relevant portions of the record." 16 C.F.R. § 3.56(c); *Ky. Household Goods Carriers Ass'n, Inc.*, Docket No. 9309, 2005 WL 2114221, at *4-5 (F.T.C. Aug.19, 2005) (denying stay because Respondents provided "no specific factual support for [their] assertions").

ARGUMENT

I. Respondent Is Not Likely to Succeed on the Merits on Appeal

Respondent has not made a strong showing of likelihood of success on the merits on appeal. *See N.C. Bd. of Dental Exam'rs*, Docket No. 9343, 2012 WL 588756, at *1 (F.T.C. Feb. 10, 2012) ("If the balance of the equities (i.e., the last three factors) is not heavily tilted in the petitioner's favor, the petitioner must make a more substantial showing of likelihood of success on the merits in order to obtain a stay pending appeal."); *Cal. Dental Ass'n*, Docket No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996). Respondent recites a litany of its past arguments as reasons its petition for review will be granted, Appl. for Stay at 12-25, but has failed to demonstrate that its arguments will fare any better on appeal. "[M]erely repeating arguments the Commission rejected before does not provide the Commission with sufficient reason to question its prior decision or any of the bases for it, and Respondent[']s renewal of its legal arguments, without more, is insufficient to justify granting a stay." *Daniel Chapter One*, Docket No. 9329, 2010 WL 9434821, at *3 (F.T.C. Mar. 22, 2010) (internal quotation omitted). Similarly, disagreement with the Opinion of the Commission does not alone establish a likelihood of success on appeal. *Id.* at *2.

Nor do Respondent's ostensibly new arguments criticizing the Opinion of the Commission demonstrate a likelihood of success. First, Respondent argues that the Opinion of the Commission is not supported by substantial evidence. Appl. for Stay at 15-19. But Respondent's points in support of this argument are themselves only renewals of its past arguments, which are no more persuasive now. In any event, the Opinion of the Commission is well-supported legally and amply sustained by substantial evidence, and is thus not likely to be overturned on appeal. *See POM Wonderful, LLC v. FTC*, 777 F.3d 478, 499-500 (D.C. Cir.

2015) (reviewing courts give deference to Commission's factual findings supported by substantial evidence); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("[T]he court must accept the Commission's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.") (internal quotation omitted).

Respondent's next argument, that the Final Order is unlawful because it is not a cease-and-desist order, is belied by the caselaw. Appl. for Stay at 21-22.[5] Even when bringing a case in the administrative context, "[t]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Op. of the Comm'n at 34 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965)). To the contrary, "the Commission has wide latitude in fashioning orders to prevent . . . respondents from pursuing a course of conduct similar to that found to have been unfair." *Id.* (quoting *Thompson Med. Co.*, 104 F.T.C. 648, 832-33 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986) (internal quotation marks omitted). Respondent's inapposite citation to *FTC v. World Travel Vacation Brokers, Inc.*, which concerns the limits of the Commission's power to bring cases in federal court under Section 13(b) of the FTC Act, does not support its argument that the Final Order exceeds the Commission's authority. *See* 861 F.2d 1020, 1027-28 (7th Cir. 1988).

Respondent's argument that Part III of the Final Order constitutes redress is equally without merit. *See* Appl. for Stay at 22.[6] Respondent's argument seems to be that a notification requirement is equivalent to redress. However, the sole authority to which Respondent cites stands only for the proposition that the Commission cannot include actual *monetary* redress in an

[5] Respondent failed to raise this argument on appeal or in its prior briefing.

[6] Respondent failed to raise this argument on appeal or in its prior briefing.

administrative order. *Heater v. FTC*, 503 F.2d 321, 323-27 (9th Cir. 1974). Because the Final Order does not include a monetary redress requirement, *Heater* is inapposite.

Finally, Respondent argues that the Final Order forces it to retroactively comply with obligations under HITECH. *See* Appl. for Stay at 22-23.[7] It is irrelevant that the Commission's order bears a resemblance to certain regulatory obligations subsequently imposed on businesses by the United States Department of Health and Human Services. *See Ruberoid v. FTC*, 343 U.S. 470, 473 (1952) ("[T]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices . . . .") (quoting *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946) (internal quotation marks omitted).

For the reasons above, Respondent has failed to show a likelihood of success on appeal on the merits.[8]

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[7] Respondent failed to raise this argument on appeal or in its prior briefing. Also, in support of this argument, Respondent cites to its proposed exhibit RX659—a closing letter in the LimeWire LLC matter—that (1) was excluded from the evidentiary record (Order on Resp't's Mot. to Admit Exs. at 2-3 (July 15, 2015)); (2) Respondent did not attach to its filing; and (3) is completely unrelated to the proposition for which it is cited. *See* Appl. for Stay at 23; Resp't's Mot. to Admit Select Exs. at RX659 (June 12, 2015) (PDF pp. 512-514). To the extent Respondent argues on reply that it intended to cite to RX649 (Exhibit 36 to its Application), that proposed exhibit was also excluded from the evidentiary record (Order on Resp't's Mot. to Admit Exs. at 2-3 (July 15, 2015)), and furthermore should be disregarded because it is unreliable hearsay within hearsay—a blind quote in a blog post by a pseudonymous blogger—and not probative. *See* Compl. Counsel's Reply Brief to Resp't's Answering Brief at 39 (Feb. 23, 2016) (stating arguments against consideration of RX649).

[8] The Commission may also grant a stay if the case presents the application of difficult legal questions to a complex factual record, provided that the balance of the equities weighs heavily in favor of a stay. *See N. Tex. Specialty Physicians*, Docket. No. 9312, 2006 WL 271513, at *2, *2 n.2 (F.T.C. Jan. 20, 2006) (noting that the "Commission additionally considers the complexity of the case; whether the Commission has ruled on a difficult legal question; and whether the balance of the equities supports a stay," and the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury suffered absent the stay"); *Daniel Chapter One*, Docket No. 9329, 2010 WL 9434821, at *2 (F.T.C. Mar. 22, 2010) ("[I]f the equities decidedly tip in favor of the Respondents it is enough that they raise questions sufficiently serious and substantial to constitute fair ground for litigation.") (internal quotation marks omitted). Complaint Counsel agrees that this case involves an extensive and complex

II. Respondent Has Not Established Irreparable Harm Absent a Stay

Respondent bears the burden of establishing that a denial of a stay will cause irreparable harm. *Ky. Household Goods Carriers Ass'n, Inc.*, 2005 WL 2114221, at *4. "Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. [Respondent] must show, with particularity, that the irreparable injury alleged is both substantial and likely to occur absent a stay." *Id.* (quoting *Cal. Dental Ass'n*, 1996 FTC LEXIS 277, at *6-7). As discussed below, Respondent has failed to provide factual support for its claim that the costs of complying with the Order would be substantial; Respondent's arguments that the Order would cause irreparable harm by violating Respondent's constitutional rights are meritless; and Respondent has failed to show that any effect on its reputation would cause irreparable harm.

As a threshold matter, for purposes of considering a stay, the Commission should not credit Respondent's claim that it is insolvent. *See* Daugherty Decl. ¶¶ 6-8. The only evidence Respondent provides in support of this claim is the self-serving declaration of Mr. Daugherty. Complaint Counsel has not had an opportunity to test these new statements by deposition or other discovery. Respondent's current operations, as described in the Declaration, Daugherty Decl. ¶¶ 3-4, 7-10, 17, are nearly unchanged from their state in February 2014, before the close of discovery. *See* Note 2, *supra*. However, Respondent never supplemented its discovery responses or suggested in its briefing that it would be financially unable to comply with the proposed notice order.[9]

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record and presents important issues. *See* Comm'n Order Extending Deadlines for Filing Petition for Reconsideration and Answer Thereto (Aug. 12, 2016). But, as discussed in Sections II and III below, Respondent has failed to meet the high burden of showing that a stay is merited on the equities, and thus the Commission should not grant it.

[9] The Commission should be further skeptical of this claim because throughout the period of its claimed impoverishment, Respondent has employed six law firms and eleven attorneys (not including the attorneys who represented it in this proceeding) to represent it in four actions it has

A. Respondent Has Failed to Supports its Claims of Substantial Compliance Costs

Respondent asserts that it would incur substantial monetary costs to comply with the Order, claiming that such costs "may be more than $250,000.00." Appl. for Stay at 25. However, Respondent has failed to provide any competent factual support for this claim. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (citation omitted) (stating that movant must provide "specific facts and affidavits supporting assertions"). Respondent cites to *Novartis*, 128 F.T.C 233 (1999), for the proposition that unrecoverable compliance costs constitute irreparable injury. Appl. for Stay at 25. In *Novartis*, however, respondent showed that it would necessarily spend $8 million for corrective advertising absent a partial stay. *N. Tex. Specialty Physicians*, Docket No. 9312, 2006 WL 271513, at *4 (F.T.C. Jan. 20, 2016) (distinguishing *Novartis*). Respondent has failed to provide any evidence that, absent a stay, it would be subject to substantial compliance costs.

Respondent's only supporting documentation for its alleged compliance costs is the self-serving declaration of Mr. Daugherty. However, Mr. Daugherty's declaration simply reasserts the same unsubstantiated claims made in Respondent's Application for Stay. Daugherty Decl.

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initiated as a *plaintiff*. *LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD (N.D. Ga. 2014) (Respondent represented by Burleigh L. Singleton, Ronald L. Raider, and William D. Meyer of Kilpatrick Townsend & Stockton, LLP and two attorneys who also appeared in this matter); *LabMD, Inc. v. Tiversa Holding Corp. et al.*, No. 2:15-cv-00092-MPK (W.D. Pa. 2015) (Respondent represented by John R. Gotaskie, Jr. of Fox Rothschild LLP; Michael E. Ross and Eric S. Fisher of Taylor English Duma LLP; Kenneth M. Argentieri and Julie S. Greenberg of Duane Morris LLP; and James W. Hawkins of James W. Hawkins, LLC); *Daugherty et al. v. Sheer et al.*, No. 1:15-cv-02034 (D.D.C. 2015) (Respondent represented by Jason H. Ehrenberg and Peter K. Tompa of Bailey and Ehrenberg PLLC and James W. Hawkins); *Daugherty et al. v. Adams et al.*, No. 1:16-cv-02480-LMM (N.D. Ga. 2016) (Respondent represented by James W. Hawkins). Respondent has also announced that it has hired three attorneys from Ropes & Gray—partners Douglas Meal and Michelle Visser and counsel David Cohen—to represent it in its anticipated appeal of the Commission's order in this action. *See* Ropes & Gray to Represent LabMD in FTC Data Security Challenge, *available at* https://www.ropesgray.com/newsroom/news/2016/08/Ropes-Gray-to-Represent-LabMD-in-FTC-Data-Security-Challenge.aspx (last visited Sept. 7, 2016).

¶ 22. For example, Mr. Daugherty states that he has "been told that such assessments [as required by Part II of the Order] can cost in the neighborhood of $250,000.00." *Id.* Respondent offers no competent evidence or documentation to corroborate this bare assertion of a hearsay statement made by an unidentified party.

The cost of an information security assessment is highly specific to a business's size and complexity and the nature and scope of a business's activities. Respondent states that it has not had an operational computer network since July 2014, that its computer systems are not connected to or accessible via the Internet, and that its servers and other devices remain unplugged except when necessary to retrieve records for its former clients. Daugherty Decl. ¶¶ 9, 16-18. Respondent does not assert, let alone provide any evidence showing, that an information security assessment of this particular size and scope would cost $250,000. Given the limited nature and scope of its current operations, Respondent has failed to provide any facts to support its assertion that the assessments required by Part II of the Order constitute a substantial expense.

Similarly, Respondent contends that establishing and implementing a comprehensive information security program, as required by Part I of the Order, would impose substantial costs, but provides no factual support for this assertion. First, Respondent claims that even attempting to adopt a comprehensive information security program would require consulting with and paying Information Technology ("IT") professionals and attorneys. Daugherty Decl. ¶ 22(a)(iv). However, Respondent has failed to quantify or otherwise provide any specific facts regarding the costs associated with these activities. In light of the limited nature and scope of Respondent's current operations, the Commission cannot presume, without appropriate quantification and supporting evidence, that such expenses would be substantial.

Second, Respondent claims that "if Part I is interpreted to require the rebuilding of Respondent's computer network, [Mr. Daugherty's] understanding is that this will cost at least $10,000.00 plus maintenance fees." Daugherty Decl. ¶ 22(a)(v). This assertion is speculative, unsupported by any evidence, and reflects a bizarre misreading of the Order. The Order does not require Respondent to rebuild its computer network or otherwise resume more active operations. As the Opinion of the Commission explained:

> [T]he Order takes account of LabMD's current limited operations. The Order requires LabMD to establish and implement a comprehensive information security program that provides administrative, technical, and physical safeguards that are appropriate for the nature and scope of LabMD's activities. A reasonable and appropriate information security program for LabMD's current operations with a computer that is shut down and not connected to the Internet will undoubtedly differ from an appropriate comprehensive information security program if LabMD resumes more active operations.

Op. of the Comm'n at 36. Importantly, Respondent also claims that it "does not expect ever to resume operations and does not see how that could ever happen." Daugherty Decl. ¶ 19. Therefore, Respondent's assertions regarding the costs of rebuilding its computer network are purely speculative and cannot substantiate a claim of irreparable harm. *See Mich. Coal. of Radioactive Material Users, Inc.*, 945 F.2d at 154 (holding that "the harm alleged must be both certain and immediate, rather than speculative or theoretical").

Respondent also contends that notifying Affected Individuals regarding the unauthorized disclosure of their personal information, as required by Part III of the Order, would impose substantial costs in monies, time, and effort. For example, citing the price of a first-class mail stamp, Respondent estimates that the cost of postage to notify the 9,300 consumers whose personal information was contained in the Insurance File would be $4,371.00. Daugherty Decl. ¶ 22. However, the Commission has denied stays in other cases in which notification provisions would have imposed similar, *de minimis* costs. *See, e.g., N. Tex. Specialty Physicians*, 2006 WL

271513, at *5-6 (denying stay of notification provision). Furthermore, Respondent provides no quantification or evidence in support of the "time and attention" costs it claims it will incur in notifying Affected Individuals. *See* Appl. for Stay at 25-26; Daugherty Decl. ¶ 22-23. Given the limited facts Respondent has presented, it has failed to support its assertion that the notification provision would impose substantial costs. Moreover, as noted below, the Order's notification provision is necessary to ensure that Affected Individuals can reduce the risk of harm from identity theft and medical identity theft.

Finally, Respondent asserts that the requirement under Part VII of the Order to submit a written compliance report would impose a substantial expense. Mr. Daugherty's declaration asserts that Respondent would need to pay attorneys and IT professionals to assist in the preparation of the report, and that he "ha[s] been informed that this will cost about $20,000.00." Daugherty Decl. ¶ 22(d). However, as with the assessments required by Part II of the Order, the time and effort needed to prepare a written compliance report is proportionate to the nature and scope of Respondent's current operations. In light of the limited nature and scope of Respondent's current operations, the Commission should not accept, without appropriate evidence, that a written compliance report would impose a substantial cost. Respondent has failed to provide any evidence to support its estimate for the cost of the written compliance report, and has not established that any such cost would constitute irreparable harm.

B. The Order Will Not Cause Irreparable Harm to Respondent's Constitutional Rights

Respondent contends that Parts I and III of the Final Order are unconstitutionally vague, and would therefore violate Respondent's due process right to fair notice. Appl. for Stay at 27-29. The Commission has considered this argument before and implicitly rejected it. Op. of the Comm'n at 34-36; *see* Resp't's Post-Trial Reply Brief, Attachment 1 at 11-28 (Sept. 4, 2015)

(raising vagueness and other arguments regarding the Notice Order). Renewal of these failed arguments does not support Respondent's claim that it will suffer irreparable harm. *See Daniel Chapter One*, 2010 WL 9434821, at *3 (renewal of arguments does not warrant a stay). Furthermore, as the Commission's Opinion noted, "[i]n light of the discussion in our opinion and the availability of guidance about comprehensive information security programs from HIPAA and organizations such as NIST and the SANS Institute, this provision is sufficiently clear and precise that its requirements can be readily understood and met." Op. of the Comm'n at 34.

Respondent further contends that the notification requirement in Part III of the Order would irreparably harm Respondent by violating its First Amendment rights. Appl. for Stay at 29. The Commission considered and disposed of this argument. Op. of the Comm'n at 33 n.85.[10] Rather, to ensure that consumers can reduce the risk of harm from identity theft or medical identity theft, the Commission imposed appropriate relief. As the Commission's Opinion notes, "[w]ithout notification, consumers . . . would not know to take actions to reduce their risk of harm from identity theft or medical identity theft." Op. of the Comm'n at 35. The required notification is carefully tailored to provide only Affected Individuals with the information they would need to help protect themselves, and is similar in form and substance to

[10] Respondent's vague assertion that it "disagrees" with the truthful, non-misleading, factual information required by Part III of the Order, Appl. for Stay at 29, does not transform its objection to complying with the Commission's Order into a constitutional claim on which Respondent is likely to prevail. *Cf. N.Y. State 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). Moreover, Respondent's assertion that Part III would require it to disseminate facts that "remain disputed," Appl. for Stay at 29 n.36, is contradicted by its briefing. *Compare id.* ("For example, whether the factual circumstances under which Tiversa obtained the 1718 File can be accurately described as an 'unauthorized disclosure' and 'approximate time period' remain disputed."), *with* Resp't's Post-Trial Reply Brief at 23 (Sept. 4, 2015) (stating that "contrary to company policy," employee Rosalind Woodson was running LimeWire on February 25, 2008 when Richard Wallace "was able to download the 1718 file" from LabMD by searching P2P networks).

the type of notice required under HIPAA for disclosures of personal medical information that have occurred since 2010. *See id*. Therefore, the notification requirement in Part III of the Order does not violate Respondent's First Amendment rights and does not constitute irreparable harm.

C. Respondent's Has Not Shown Irreparable Harm to its Reputation

Finally, Respondent claims that the notification provision in Part III of the Order would cause it reputational harm by requiring it to send Commission-approved letters to thousands of individuals and business entities. Appl. for Stay at 29. However, Mr. Daugherty's declaration explains that Respondent began winding down its operations in mid-January 2014, and that the business has not generated any revenue from testing medical samples since that time. Daugherty Decl. ¶¶ 3-5. Given its limited operations, Respondent has failed to show that any effect the required notifications would have on its reputation would lead to irreparable harm (*e.g.*, a loss of business). To the contrary, the required notification will ensure that affected consumers know to take to action to reduce their risk of harm from identity theft or medical identity theft. Under these circumstances, any effect the Order has on Respondent's reputation is a proper remedial consequence of correcting its unfair data security practices.

For all the forgoing reasons, Respondent has failed to establish that it will suffer irreparable harm if a stay is not granted.

III. A Stay of the Commission's Order Will Harm Consumers and is Contrary to the Public Interest

The Commission considers the third and fourth factors together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *Daniel Chapter One*, 2010 WL 9434821, at *7; *Cal. Dental Ass'n*, 1996 FTC LEXIS 277, at *8; *see* 16 C.F.R. § 3.56(c) (listing factors). Even were Respondent to suffer some irreparable harm from the final

order, which it has not established, a stay should not be granted because the interest of impacted consumers and the public outweighs any such harm. Respondent contends that "[a] stay will not harm anyone" given the "absence of any evidence that any consumer has suffered harm as a result of Respondent's alleged unreasonable data security, even after the passage of many years." Appl. for Stay at 2, 30 (quoting Init. Decision at 52). But this contention is contravened by the Commission's findings that Respondent's disclosure of the 1718 file was itself a substantial privacy harm to the 9,300 consumers with sensitive personal information in the file, and that the file's exposure on LimeWire for 11 months "was also likely to cause substantial privacy harm" to the consumers. Op. of the Comm'n at 19, 25 (July 29, 2016). Respondent's mere disagreement with the Opinion of the Commission does not support a stay under the third and fourth factors any more than it supported a stay under the first two factors.

The harm or likelihood of harm to the 9,300 consumers increases every day that Respondent does not notify them and their insurance companies of the disclosure of their sensitive personal information. Without notification, consumers and their insurance companies can do little to reduce the risk of harms from identity and medical identity theft. Op. of the Comm'n at 26, 35. The only manner through which these consumers would know that their personal information was breached is notification from Respondent, especially given that "LabMD typically interacted only with physicians' offices and had no direct dealings with consumers, other than billing when insurance did not pay." Op. of the Comm'n at 23 n.68. In addition, the risk of harm is ongoing given the nature of the sensitive information breached. *See* Op. of the Comm'n at 24 (relying on expert testimony that "information like names, addresses, and Social Security numbers cannot be readily changed so that, once compromised, these types of personal information can often be used by malicious actors for an extended period . . . .").

Respondent cites the fact that the 9,300 consumers have gone without notification of the exposure of their most sensitive personal data for eight years to argue that the Commission should have brought a federal district court action and sought a preliminary injunction. *See* Appl. for Stay at 2, 30 n.37. The Commission regularly seeks injunctive relief in administrative adjudications instead of seeking preliminary injunctions, and doing so does not mean the Commission gives up its ability and duty to protect consumers in a timely manner. *See, e.g.*, *ECM Biofilms, Inc.*, Docket No. 9358 (F.T.C. Oct. 19, 2015); *Jerk, LLC*, Docket No. 9361 (F.T.C. Mar. 25, 2015). Amendments to the Commission's Part 3 and Part 4 Rules of Practice in 2009 and 2011 expedited the adjudicative review process to ensure the process is as efficient as possible. *See FTC Modifies Part 3 of Agency's Rules of Practice: Rule Changes will Further Improve the FTC's Adjudicative Process*, Aug. 12, 2011, https://www.ftc.gov/news-events/press-releases/2011/08/ftc-modifies-part-3-agencys-rules-practice (last visited Sept. 2, 2016); *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice*, Apr. 27, 2009, https://www.ftc.gov/news-events/press-releases/2009/04/ftc-issues-final-rules-amending-parts-3-4-agencys-rules-practice (last visited Sept. 2, 2016). Here, the anticipated expedited administrative process was delayed while Respondent's witness sought immunity. Op. of the Comm'n at 6 n.17.

Respondent further contends that a stay will not harm anyone because "LabMD is no longer in business, and its computer networks are not connected to the Internet." Appl. for Stay at 2, 30. However, Respondent continues to preserve tissue samples, provide past test results to healthcare providers, and maintain the personal data of 750,000 people on its computer system. Op. of the Comm'n at 4, 36. Moreover, nothing Respondent describes has materially changed from the state of its business in March 2014, *see* Note 2, *supra*, when Respondent stated that it

intended to apply the same policies and procedures going forward that it had in the past[11]—the very practices the Commission found to be unreasonable. And the state of Respondent's business and systems is immaterial to the risk of ongoing harm to the consumers whose information Respondent disclosed in the 1718 File. Op. of the Comm'n at 3, 26 n.76. Respondent's argument therefore fails to provide any rationale for staying the Final Order.

Finally, Respondent's constitutional and overreach arguments—mirroring several of the arguments it intends to raise on appeal—also fail. *See* Appl. for Stay at 30-31. As discussed in Section I above, Respondent has failed to show that it is likely to succeed on appeal with its recitation of past arguments and its new arguments disagreeing with the Opinion of the Commission. *See Daniel Chapter One*, 2010 WL 9434821, at *2-3 (renewal of arguments or disagreement with Commission's opinion do not warrant a stay). There is no public interest in restraining agencies from fulfilling their duties while respondents challenge their authority with arguments that are unlikely to succeed.

CONCLUSION

Together, the four factors weigh against granting a stay while Respondent appeals. The risk of harm to the 9,300 consumers whose sensitive personal information Respondent disclosed in the 1718 file is ongoing. Moreover, Respondent continues to maintain the personal data of 750,000 people on its computer system without any comprehensive security program appropriate for its current operations. Consumers should not have to wait any longer to be notified or to have their personal information protected. Both the harm to consumers and the public interest if a stay is granted outweigh any ostensible harm Respondent may suffer if a stay is not granted. And although this case involves important issues and a complex record, Respondent has failed to

[11] CX0765 (LabMD Resps. to 2d Set of Disc.) at 5-6, 7.

show that it is likely to succeed on appeal. For all the foregoing reasons, the Commission should deny Respondent's Application for Stay of the Final Order.

Dated: September 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2016, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark
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Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-113
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be transmitted *via* electronic mail and delivered by hand to:

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

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

September 9, 2016 By: _____

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection