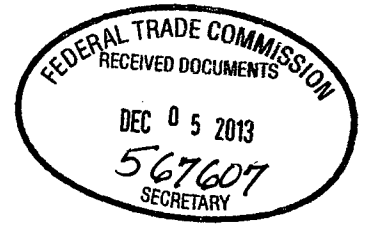


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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

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

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT LABMD, INC.’S MOTION TO STAY PROCEEDINGS**

INTRODUCTION

Respondent LabMD, Inc.’s (“LabMD”) November 26, 2013 Motion to Stay Proceedings represents its third attempt in four weeks to avoid ordinary discovery and delay these proceedings.¹ See Mot. for Prot. Order (Nov. 5, 2013); Mot. to Dismiss (Nov. 12, 2013). Respondent’s Motion fails because Respondent has not met its burden to justify a stay. Moreover, an order staying the proceedings would frustrate the public interest and undermine the Commission’s adjudicative processes.

¹ Without seeking leave of the Commission, Respondent’s Motion requests that the Commission decide its Motion prior to the December 6, 2013 deadline set forth in Rule 3.22(d), 16 C.F.R. § 3.22(d), for Complaint Counsel to submit this Response. See Resp. Mot. 8. Complaint Counsel opposes this request for expedited consideration, which was not discussed during the parties’ meet-and-confer. See n.2, *infra*.

BACKGROUND

The Complaint alleges that LabMD engaged in fundamental, systemic security failures that put at risk sensitive personal information consumers entrusted to the company. Compl. ¶¶ 6-11, 17-21. LabMD's failures, which began before 2005 and continued well past 2008, included the following: (1) not developing, adopting, or maintaining a comprehensive information security program to protect personal information; (2) not identifying commonly known or reasonably foreseeable risks to sensitive consumer information; (3) not limiting employees' access to only the consumer information needed to do their jobs; (4) not adequately training employees about security risks and practices; (5) not appropriately authenticating users; (6) not adequately updating computer operating systems and equipment; and (7) not adequately preventing and detecting unauthorized access to personal information. *Id.* ¶ 10. LabMD's practices in this regard defy common sense security principles developed and used by industry and government.

As a result of LabMD's failures, a document containing the sensitive personal information of approximately 9,300 consumers ("the P2P insurance aging file") was shared to a public file sharing network without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20. The sensitive information included consumers' names, dates of birth, Social Security numbers, information relating to laboratory tests conducted, and health insurance policy numbers. *Id.* ¶ 19. As alleged in the Complaint, these are exactly the kinds of personal data used to perpetrate identity theft. *Id.* ¶¶ 6-7, 9, 12, 21. Indeed, LabMD documents containing consumers' sensitive personal information were found in the possession of identity thieves in Sacramento, California. *Id.* ¶ 21. LabMD's failure to adopt reasonable and appropriate security measures to protect this

information caused or is likely to cause substantial consumer harm that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. Compl. ¶ 22; *see also* 15 U.S.C. § 45(n).

The Commission issued its Complaint on August 28, 2013. Nearly three months later, on November 14, 2013, LabMD filed a four-count Complaint in the United States District Court for the District of Columbia, which names as defendants the Commission, the Commissioners, and Jessica Rich, Director of the Bureau of Consumer Protection. Compl., *LabMD, Inc. v. F.T.C.*, No. 13-01787 (D.D.C. Nov. 14, 2013). In federal district court, LabMD seeks, *inter alia*, a declaratory judgment and an injunction preventing the Commission from proceeding against LabMD in its administrative proceedings. *Id.* at 31-32. Notably, LabMD has moved for neither a temporary restraining order nor a preliminary injunction. On November 18, 2013, LabMD filed a two-sentence “Petition for Review” in the United States Court of Appeals for the Eleventh Circuit. Pet., *LabMD, Inc. v. F.T.C.*, No. 13-15267 (11th Cir. Nov. 18, 2013). In the Eleventh Circuit, LabMD seeks “review of the Federal Trade Commission’s on-going proceeding known as FTC Docket No. 9357,” and it argues that the Commission “has predetermined the outcome of the administrative process and exhaustion is futile.” *Id.* As of the date of this filing, LabMD has not perfected service of its Petition for Review. Nor has LabMD served its Civil Appeal Statement, which is required by the Eleventh Circuit’s Rule 33-1(a).

ARGUMENT

The Commission’s “longstanding policy” is that “adjudicative proceedings shall be conducted expeditiously” Rules of Practice Amendments, 61 Fed. Reg. 50640 (Sept. 26, 1996). To this end, the Commission’s Rules of Practice require counsel for the parties to “make

every effort at each stage of a proceeding to avoid delay.” 16 C.F.R. § 3.1. The extraordinary relief sought in Respondent’s Motion would obstruct these goals by postponing the ongoing proceedings and creating perverse incentives for respondents to file collateral federal actions.² Respondent cites no controlling precedent that justifies the relief it seeks in its Motion.

I. RESPONDENT’S BARE ALLEGATIONS ARE INSUFFICIENT TO JUSTIFY EXTRAORDINARY RELIEF OF STAYING PROCEEDINGS

Respondent fails to meet its burden to show that it is entitled to the extraordinary relief it seeks in its Motion to Stay. Commission Rule 3.41(f) provides that “[t]he pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs.” 16 C.F.R. § 3.41(f). “The pendency of a collateral proceeding in federal district court does not provide the requisite showing of good cause to change the evidentiary hearing date.” *In re N.C. Board of Dental Examiners*, 2011 FTC LEXIS 16, at *6 (Feb. 15, 2011).

Rather than submit competent evidence to make its requisite showing of good cause, Respondent baldly asserts that it is likely to succeed on the merits of its jurisdictional claims before the Commission and on the merits of its statutory and Constitutional claims before two federal courts. These assertions are inadequate as a matter of law. *Id.* at *3-6. Respondent’s bare allegations of irreparable harm are similarly misplaced. *See In re N.C. Board of Dental*

² Rule 3.22(g) and Paragraph 4 of the Additional Provisions to the Scheduling Order (Sept. 25, 2013) require Respondent’s counsel to “recite the date, time, and place of [the] conference between counsel. . . .” Respondent’s “Statement Pursuant to Scheduling Order,” attached to its Motion to Dismiss, does not include these details. More importantly, at no time during the parties’ meet-and-confer did counsel for Respondent disclose that Respondent intended to request expedited consideration of its Motion, much less ask Complaint Counsel’s consent to the Commission’s expedited review.

Examiners, Docket No. 9343, 2012 WL 588756, at *2 (F.T.C. Feb. 10, 2012) (evaluating a respondent's burden under Rule 3.56 (stay of cease and desist order), 16 C.F.R. § 3.56, concluding that "[s]imple assertions of harm or conclusory statements based on unsupported assumptions will not suffice") (citation omitted); *cf. F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is part of the social burden of living under government. . . . Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury") (internal quotations and citations omitted).³ Moreover, Respondent's *ad hominem* attacks on the Commission and its staff's motives, Resp. Mot. 5-7, do not demonstrate good cause to stay the proceedings. Finally, contrary to Respondent's suggestion, Complaint Counsel has never and does not now concede that a delay would not adversely affect consumers' interests. To the contrary, Complaint Counsel has alleged and will prove at trial that Respondent's conduct caused or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. *See* Compl. ¶ 22.

II. STAYING ADMINISTRATIVE PROCEEDINGS WOULD FRUSTRATE THE PUBLIC INTEREST

Respondent's failure to seek preliminary relief in its federal district court action and its three-month delay in filing this Motion demonstrate that its collateral federal court proceedings and this request are little more than attempts to frustrate the public interest and undermine the

³ Administrative Law Judge Chappell has rejected Respondent's arguments regarding Complaint Counsel's so-called "discovery tactics" (Resp. Mot. 5-6). *See* Order on Mot. for Prot. Order (Nov. 22, 2013) (denying in nearly all respects Respondent's Motion for a Protective Order, which, if granted, would have prevented virtually all third-party discovery).

Commission's adjudicative processes. A stay of the administrative proceedings would not be in the public interest. *See* Rules of Practice, 74 Fed. Reg. 1804, 1816 (Jan. 13, 2009) (reasoning that the Commission, rather than the ALJ, should consider motions to stay because such decisions are "likely to implicate public interest considerations . . ."). First, resolving the Complaint's allegations without needless delay is necessary to protect consumers from the risk of identity theft, medical identity theft, and other harms. *See* Compl. ¶¶ 12, 22. Second, allowing Respondent to manufacture a stay of these proceedings by filing specious claims in federal district court and in the Eleventh Circuit "create[s] perverse incentives" for Respondent to initiate "duplicative proceedings and would place [Respondent], rather than the Commission, in control of the administrative proceedings schedule." *In re N.C. Board of Dental Examiners*, 2011 FTC LEXIS 16, at *6. Finally, needlessly delaying the Commission's efficient adjudicative processes will "have a negative impact on the Commission's adjudicatory program and law enforcement mission," *In re Inova Health Sys. Found.*, Docket No. 9326, 2008 FTC LEXIS 57, at *3 (May 29, 2008), and will frustrate the "public interest in expeditious disposition of adjudicatory matters," *In re Int'l Harvester Co.*, Docket No. 9147, 1981 FTC LEXIS 37, at *2 (July 15, 1981).

CONCLUSION

For the foregoing reasons, the Commission should deny Respondent's Motion to Stay Proceedings.

Dated: December 5, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2013, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system. The electronic copy sent to the Office of the Secretary is a true and correct copy of the paper original.

I also certify that I caused a paper copy of the foregoing document with an original signature to be filed with the Office of the Secretary.

I also certify that I caused twelve (12) copies of the foregoing document to be delivered to the Office of the Secretary, Room H-113.

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

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-110
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I also certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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December 5, 2013

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