No. 16-16270

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LABMD, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of an Order
of the Federal Trade Commission
(FTC Docket No. 9357)

FTC'S OPPOSITION TO FEE REQUEST

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Eleventh Circuit Rule 26.1-1 Certificate of Interested Persons

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Introduction

LabMD had a narrow success on appeal. The Court declined to address the vast majority of its arguments, but agreed with one claim raised fleetingly in LabMD's brief. Yet LabMD now seeks to ratchet that limited victory into a claim for $1.8 million in attorney's fees and costs incurred not only in the appeal, but also in the underlying enforcement action (where LabMD did not even raise the argument that prevailed here) and in a rash of unsuccessful collateral litigation in other courts.

The Court should reject the petition in full. The Equal Access to Justice Act permits the award of litigation expenses against the government only when its position was not substantially justified. The FTC was fully justified in bringing an administrative enforcement action against LabMD for its serious failures to maintain the security of patient files, in finding that LabMD's actions violated the FTC Act, and in adopting a remedial order to rectify the lapses. This Court did not address the validity of the Commission's findings; it held only that the remedial order was void for vagueness. But that finding does not by itself render the Commission's position unjustified. Indeed, the Commission had used virtually the same order in dozens of data-security cases and it had been both approved and enforced by other courts.

Separately, LabMD's fee request is vastly inflated. The overwhelming majority of the fees sought were not reasonably incurred in the service of the narrow issue the Court decided. LabMD is not entitled to fees incurred in (1) the administrative action that it lost; (2) multiple failed lawsuits against the Commission and its employees, all of which it lost; and (3) attacks on the substance of the Commission's decision that the Court declined to address. LabMD did not segregate the time spent on the minor but successful issue from the time spent on all the others. In addition, LabMD seeks fees for the appeal at rates far higher than allowed by the Act.

Background

LabMD operated a medical testing laboratory that collected the sensitive medical and financial information of more than 750,000 patients. Despite holding such deeply personal data, the company failed to take even basic steps to protect that information, like restricting access to patient information to employees who needed it, training employees on data security risks and safeguards, or controlling the software placed on its computers. LabMD's lax data security practices led to a serious breach. A LabMD employee installed file-sharing software on a company computer, thereby exposing to millions of internet users a file (the "1718 file") containing sensitive personal and medical information (including birthdates, Social Security numbers, and laboratory test codes) about more than 9,300 consumers.

The 1718 file was downloaded by an employee of the data security company Tiversa, which was attempting to solicit business from LabMD, and later provided to FTC investigators.[1] That incident spurred the FTC to undertake an investigation and an administrative enforcement proceeding, which in turn led not only to the petition for review, but also a flood of other litigation initiated by LabMD seeking to halt or undermine the proceeding.

In contrast to how LabMD now portrays that incident, its depiction of the facts was succinctly stated by the D.C. Circuit in rejecting one of LabMD's several failed collateral attacks against the FTC and its enforcement proceeding:

> In May 2008, data-security company Tiversa Holding Corporation notified LabMD that Tiversa located a LabMD PDF file with personal information about 9,300 patients on LimeWire, a peer-to-peer file-sharing application. Tiversa was able to access and download this file, known as the "1718 File," through its data-monitoring technologies that run a prodigious number of searches across file-sharing networks. Tiversa also informed LabMD that the 1718 File had "spread," meaning that other users searched for and downloaded the file on various peer-to-peer networks. LabMD determined that the 1718 File was on LimeWire because the application was installed on a LabMD billing computer, and the company removed LimeWire imme-

[1] Although LabMD repeatedly calls this "theft" and the file "stolen," (LabMD Pet. 4, 6), as the D.C. Circuit correctly noted, "Daugherty and LabMD do not deny—nor could they—that the 1718 File was publicly available from a LabMD computer on LimeWire's peer-to-peer network, and that Tiversa was able to access and download the file over that system." *Daugherty v. Sheer*, 891 F.3d 386, 391 (D.C. Cir. 2018). Peer-to-peer network users are not thieves, but the intended recipients of files shared over those networks. *E.g.*, *United States v. Pirosko*, 787 F.3d 358 (6th Cir. 2015).

> diately. LabMD employees searched for the 1718 File on other networks, but did not find it.

Daugherty v. Sheer, 891 F.3d 386, 388 (D.C. Cir. 2018). The court noted that the suit for damages against FTC attorneys "in their personal capacities [was] LabMD's fourth offensive foray in response to the FTC's enforcement effort." *Id.* at 389.

A. The FTC's Administrative Proceeding

After learning that LabMD had exposed consumers' sensitive information, the Commission began to investigate LabMD's data security practices. In 2013, the agency issued a complaint alleging that the company's lack of data security was an unfair practice that violated the FTC Act. *See* 15 U.S.C. § 45(a).

Following an evidentiary hearing, an administrative law judge initially held that the FTC's complaint counsel failed to prove that LabMD's data-security failures caused or were likely to cause substantial consumer injury, as required by Section 5(n) of the FTC Act. *In re LabMD, Inc.*, 2016 FTC LEXIS 128 (July 28, 2016).

The full Commission reversed. Its opinion focused principally on whether LabMD's lax data security was an unfair practice under the FTC Act because it had "cause[d] or [was] 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(n). The Commission held that LabMD's data security practices were unfair for two reasons. First, the

disclosure of deeply personal medical data to an unauthorized recipient by itself is a "substantial injury" within the meaning of Section 5(n), even without economic loss. *In re LabMD*, 2016 FTC LEXIS 128 at *25-26. Second, unauthorized exposure of the file to millions of potential viewers created a high likelihood of a large harm, which satisfied the "likely to cause" standard for unfairness even absent evidence of actual injury.[2] *Id.* at *61-62. Such exposure is likely to cause injury because it poses a significant risk of substantial injury. *Id.* at *27-28.

The Commission entered a remedial order highly similar to orders approved by courts time and again in numerous other data security cases. *In re LabMD, Inc.*, 2016 FTC LEXIS 123 (July 28, 2016). The order had three main provisions. First, it required LabMD to implement "a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers." *Id.* at *3. The program was required to be "fully documented in writing" and to "contain administrative, technical, and physical safeguards appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected about consumers." *Id.* It set out specific safeguards that the

[2] The Commission did not rely on the testimony (focused on in LabMD's fee request) of a Tiversa witness that the 1718 file had "spread" on the internet. Instead, the Commission found that the testimony was not credible or reliable and noted that FTC complaint counsel had not relied on that testimony in its post-trial brief before the ALJ or in its appeal to the Commission. *In re LabMD*, 2016 FTC LEXIS 128 at *91-92.

program must include, such as: (1) an employee designated to oversee information security, (2) the identification of security risks, (3) the design and implementation of safeguards to control those risks, (4) requirements that service providers also maintain appropriate safeguards, and (5) that the program be regularly evaluated and adjusted. *Id.* at *3-4. Second, the order required LabMD to obtain a third-party professional's assessment its data security plan every other year and report the assessment to the Commission. *Id.* at *5-7. Third, it required LabMD to notify consumers whose information had been exposed. *Id.* at *7-9. The Commission had used substantially similar orders (without the notification requirement) in more than fifty other cases.

B. LabMD's Petition for Review and the Court's Decision

In seeking to overturn the Commission's decision, LabMD devoted the bulk of its argument to claims that the Commission had improperly found LabMD's data-security practices "unfair" under Section 5(n) of the FTC Act and that LabMD lacked fair notice of the Commission's data security requirements. LabMD Br. 12-43. Tucked in a host of other issues was a one-page argument that the Commission's remedial order was impermissibly vague. LabMD Br. 51-52.

A panel of this Court agreed with that argument and vacated the Commission's order. The Court held that the order was insufficiently specific because it "does not instruct LabMD to stop committing a specific act or practice. Rather, it

commands LabMD to overhaul and replace its data-security program to meet an indeterminable standard of reasonableness." *LabMD, Inc. v. FTC*, 891 F.3d 1286, 1300 (11th Cir. 2018). The Court further found the order "devoid of any meaningful standard informing the court of what constitutes a 'reasonably designed' data-security program." *Id.* at 1301. In a footnote, the decision dismissed the provisions of the order described above on the ground that they were "equally vague." *Id.* at 1300 nn.41-42

Beyond that single issue, the Court expressly declined to decide the merits of LabMD's claims, stating: "The only issue we address is the enforceability of the FTC's order." *Id.* at 1292 n.12. The Court therefore did *not* set aside the FTC's decision that LabMD violated the FTC Act. *Cf. Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005) (vacating both remedial order and opinion finding liability).[3] Instead, the Court "assume[d] arguendo that the Commission is correct and that LabMD's negligent failure to design and maintain a reasonable data-security program invaded consumers' right of privacy and thus constituted an unfair act or practice."[4] 891 F.3d at 1296-1297.

[3] *Abrogated by FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

[4] LabMD incorrectly states that the Court "vacated the Commission's *judgment*." LabMD Pet. 3. In fact, the Court vacated only the Commission's *order*.

C. LabMD's Collateral Attacks on the Agency Proceeding.

Not content to defend itself in the FTC's administrative enforcement proceeding, LabMD and its CEO, Michael Daugherty, initiated a barrage of litigation in other venues seeking to interrupt the proceeding, bringing multiple suits against the FTC and its Commissioners and employees. Some of those efforts—which were all unsuccessful—are summarized below. LabMD asks the Court to make the government—*i.e.*, taxpayers—foot the bill for all of this failed litigation.

2013 Petition for Review (11th Cir.). In 2013, LabMD petitioned for review of the FTC's enforcement proceeding in this Court, although there was no final decision from the Commission. *See LabMD v. FTC*, No. 13-15267. The Court issued a jurisdictional question, which prompted LabMD to file a motion to stay the administrative proceeding. *See id.*, LabMD Mot. to Stay (Dec. 23, 2013). After briefing, the Court dismissed the case and denied LabMD's motion to stay. *Id.* (Order of Feb. 18, 2014).

2013 Complaint (D. D.C.). At the same time, LabMD sued the FTC and its Commissioners in the District of Columbia. *See* Complaint, *LabMD v. FTC*, No. 1:13-cv-01787 (D.D.C. Nov. 13, 2013). LabMD voluntarily dismissed that case in February 2014.

2014 Complaint (N.D. Ga.). Shortly after dismissing the D.C. case, LabMD sued in the Northern District of Georgia, seeking again to enjoin the administrative

proceeding. *See* Complaint, *LabMD v. FTC*, No. 1:14-cv-810 (N.D. Ga.) (March 20, 2014). The district court granted the FTC's motion to dismiss.

2014 Appeal (11th Cir.). LabMD appealed the Georgia case and again asked this Court to stay the administrative proceeding. *See* LabMD Mot. to Stay, No. 14-12144 (11th Cir.) (May 15, 2014). The Court denied the stay and affirmed the district court's dismissal. *LabMD v. FTC*, 776 F.3d 1275 (11th Cir. 2015). LabMD unsuccessfully sought rehearing en banc.

2015 Complaint (D.D.C.). In 2015, LabMD sued individual FTC employees who allegedly had been involved in the investigation. The district court dismissed most of the claims, but found that the FTC employees were not entitled to qualified immunity on a claim of retaliation in violation of the First Amendment. *Daugherty v. Sheer*, 248 F. Supp. 3d 272, 290 (D.D.C. 2017). On appeal, the D.C. Circuit reversed and held the employees immune from that claim. *Daugherty v. Sheer*, 891 F.3d 386 (D.C. Cir. 2018).

Legal fees associated with all of this litigation are included in the $1.8 million that LabMD now seeks.[5]

[5] LabMD also filed at least six other lawsuits, three appeals, and a petition for certiorari against Tiversa. *See LabMD v. Tiversa*, No. 1:11-cv-04044 (N.D. Ga.) (appealed in Nos. 12-14504 & 17-11274 (11th Cir.), cert. petition filed, No. 18-435); *Daugherty v. Adams*, No. 1:16-cv-02480 (N.D. Ga.) (appealed in No. 17-1130 (11th Cir.)); *LabMD v. Tiversa*, Nos. 2:15cv92 & 2:17cv1365 (W.D. Pa.); *LabMD v. Bryan Cave*, No. 18-cv-3790 and U*.S. ex rel Daugherty v. Tiversa* No. 14-cv-

Argument

Under the "American rule," litigants bear their own costs and attorney's fees. Congress enacted a limited exception to this rule in the Equal Access to Justice Act (EAJA), which "directs a court to award 'fees and other expenses' to private parties who prevail in litigation against the United States if, among other conditions, the position of the United States was not 'substantially justified.'" *Comm'r v. Jean*, 496 U.S. 154, 155 (1990). To be eligible for a fee award, a litigant must satisfy four conditions: "(1) that the claimant be a 'prevailing party'; (2) that the Government's position was not 'substantially justified'; (3) that no 'special circumstances make an award unjust'; and, (4) pursuant to 28 U.S.C. § 2412(d)(1)(B), that any fee application be submitted to the court within 30 days of final judgment in the action and be supported by an itemized statement." *Id.* at 158.

The government's position is substantially justified if it had "a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). But even if the government's position was not substantially justified, the Court then must determine whether the fees requested are reasonable in light of the success obtained. The court "must filter out time spent on unsuccessful claims and award the prevailing party fees related solely to time spent litigating the winning claim(s)." *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298 (1st Cir.

4548 (S.D.N.Y). LabMD's fee petition is not sufficiently detailed to determine how much of the legal work on those cases it includes.

2001); *Hensley v. Eckerhart*, 4612 U.S. 424 (1983). The court must also deduct hours in pursuit of claims the applicant made but that the court did not decide. *Hardisty v. Astrue*, 592 F.3d 1072, 1077 (9th Cir. 2010).

LabMD prevailed on a single narrow issue, but it is not entitled to any fees because the FTC's position was substantially justified both in the administrative enforcement action and on appeal. The Commission's investigation of LabMD's security practices and its administrative complaint were plainly justified by a serious security breach that exposed thousands of consumers' personal health information. Although LabMD argues that the Commission's interpretation of unfairness was not justified, no authority supports that argument. The only court of appeals to address the matter upheld the Commission's unfairness authority, which the agency has repeatedly invoked against companies large and small. *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236 (2014). This Court assumed that the Commission properly found a violation of the FTC Act. *LabMD, Inc. v. FTC*, 891 F.3d 1286, 1296 (11th Cir. 2018).

The Commission's adoption and defense of its remedial order—the sole issue decided by the panel—was also substantially justified. Before the panel's decision, numerous courts had approved and enforced nearly identical orders, each one requiring "reasonable" data security measures; more than 50 companies have agreed

to abide by such orders. Any reasonable agency would have continued to use the same tried-and-true approach, without any reason to question its legal validity.

Beyond that, LabMD seeks fees that bear no reasonable relation to the limited success it achieved. More than half of the fees were incurred in the administrative enforcement action, not in service of LabMD's one successful argument on appeal—LabMD never argued before the Commission that the remedial order was unenforceable.

Worse, the fees sought for the administrative proceeding include time spent unsuccessfully litigating collateral attacks against the FTC. EAJA does not authorize the Court to award fees for those other matters. LabMD makes no attempt to segregate the time spent defending against the FTC enforcement action from time spent on unsuccessful issues, unadjudicated issues, or collateral litigation. Compounding that problem, much of the time for which LabMD claims fees is inadequately described or so heavily redacted that it is impossible to ascertain the work that was billed, much less the matter to which the work relates.

LabMD's request for over $676,000 in fees incurred on the appeal is also unreasonable. As with the administrative action, LabMD fails to segregate work on the unsuccessful and undecided issues that accounted for the vast bulk of its brief from work on the successful one-page argument on which it ultimately secured re-

lief. In addition, LabMD seeks reimbursement at unjustifiable rates that are multiple times the maximum allowed by EAJA.

I LABMD PREVAILED ON ONE NARROW ISSUE.

Parties are prevailing under EAJA "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought."[6] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). LabMD is a prevailing party under this standard because the Court vacated the Commission's remedial order. But as discussed below, the small degree to which LabMD prevailed bears directly on any fees that could be awarded, even if the FTC's position were not substantially justified, which, also explained below, it was.

Attempting to maximize the scope of its success, LabMD exaggerates the record. For example, it claims (LabMD Pet. 4) that it "repeatedly and ultimately prevailed against the FTC." Other than its narrow victory before this Court, however, LabMD at most achieved only a few interim gains that did not "change the legal relationship" between it and the FTC and thus do not amount to prevailing under EAJA. *Thomas v. NSF*, 330 F.2d 486, 493 (6th Cir. 2003).

For example, although LabMD suggests (LabMD Pet. 9) that it "prevailed" in the ALJ's initial decision, the full Commission later reversed the ALJ's ruling

[6] The Supreme Court interprets the term "prevailing party" consistently in all of the fee-shifting statutes. *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016).

and this Court did not disturb the Commission's opinion. A litigant "who achieves a transient victory at the threshold of an action can gain no award . . . if, at the end of the litigation, her initial success is undone." *Sole v. Wyner*, 551 U.S. 74, 78 (2007).

Similarly, LabMD is not a "prevailing party" under EAJA with respect to this Court's grant of its motion to stay. *See* LabMD Pet. 9-10. The stay only maintained the status quo and thus did not materially alter the legal relationship between the parties. *E.g. Mastrio v. Sebelius*, 768 F.3d 116, 120-122 (2d Cir. 2014) (plaintiff was not a prevailing party based on TRO that neither altered status quo nor resulted from merits determination). LabMD states (LabMD Pet. 10) that the motions panel "conclud[ed] that the FTC's interpretation of the injury requirement in section 5(n) was unreasonable." In fact, the panel held only that LabMD had asserted reasons "why the FTC's interpretation *may* not be reasonable." *LabMD, Inc. v. FTC*, 678 F. App'x 816, 820 (11th Cir. 2016) (emphasis added). The merits panel expressly declined to reach the issue, instead assuming "that the Commission is correct and that LabMD's negligent failure to design and maintain a reasonable data-security program invaded consumers' right of privacy and thus constituted an unfair act or practice." 891 F.3d at 1296.

LabMD did not prevail in any of the many other cases it filed against the FTC. It dismissed its first case in the district court in D.C. It lost its premature peti-

tion for review in this Court. It lost before the district court in Atlanta and again on appeal to this Court. And it also lost its case against individual FTC employees in the D.C. Circuit.

II THE COMMISSION'S POSITION WAS SUBSTANTIALLY JUSTIFIED.

A prevailing party may be awarded fees and other expenses only if "the position of the United States was not substantially justified." 28 U.S.C. § 2412(d). Because the Commission's position was substantially justified, LabMD is not entitled to an award.

To be "substantially justified" under EAJA, the government's position must be "justified to a degree that could satisfy a reasonable person" in that it has "a reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. at 565; *accord Bergen v. Comm'r of Soc. Sec.*, 454 F.3d 1273, 1277 (11th Cir. 2006). The government's "position" is considered as a whole, including both the underlying administrative action and the appeal. *See Comm'r v. Jean*, 496 U.S. 154 (1990); *see also, e.g.*, *Vacchio v. Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005); *Cunningham v. Barnhart*, 440 F.3d 862, 864 (7th Cir. 2006). The court must therefore "arrive at one conclusion that simultaneously encompasses and accommodates the entire civil action." *Saysana v. Gillen*, 614 F.3d 1, 5 (1st Cir. 2010) (cleaned up).

LabMD asserts (LabMD Pet. 14) that the Commission's position was unjustified in three separate respects: (1) that the agency "had no basis in fact or law to

pursue the Enforcement Action against LabMD"; (2) that the Commission's reading of the "injury requirement in Section 5(n) was not reasonable as a matter of law"; and (3) that the Commission's pursuit of "an overly broad, vague, and unenforceable cease and desist order was not reasonable as a matter of law." All three contentions are incorrect.

To begin with, the Commission had an undisputed factual basis to investigate LabMD and approve a complaint against it. The company left the personal medical information of more than 9,000 consumers exposed to millions of users on a peer-to-peer network, from which it was downloaded at least once. Indeed, when LabMD made the same argument before the D.C. Circuit, the court found that LabMD's "own characterization of the facts belies any implication that the FTC's enforcement action was specious." *Daugherty v. Sheer*, 891 F.3d at 391.

The Commission also had a reasonable legal basis to allege and ultimately find that LabMD's data-security failures caused or were likely to cause substantial injury and thus violated Section 5(n) of the FTC Act. The FTC has been using Section 5 to police corporate data security practices for nearly twenty years, and no court has ever adopted LabMD's theory that the statute does not apply. The Commission was also justified in finding that the exposure of personal data, even without concrete harm, can be an "injury" within the meaning of Section 5(n). Indeed, while the administrative case was pending, the Third Circuit held that "[a]lthough

unfairness claims usually involve actual and completed harms, they may also be brought on the basis of likely rather than actual injury," and that "the FTC Act expressly contemplates the possibility that conduct can be unfair before actual injury occurs." *Wyndham*, 799 F.3d at 246.[7] LabMD raised essentially the same claims in this Court, yet the panel assumed that the Commission's approach was lawful. LabMD is thus incorrect to assert that the Commission had "no cause to claim that LabMD violated Section 5."

The Commission was likewise justified in entering a remedial order that required LabMD to establish and maintain a reasonable data security program. Courts have regularly approved injunctions containing the same requirements as the LabMD order.[8] The Commission has entered into more than 50 consent orders that contain the same language. And the Commission had no reason to doubt the legality of its requirement to establish a reasonable data security program because

[7] *Wyndam* and the Commission's history of successful data privacy enforcement disprove LabMD's claim that there was "no support for the Commission's interpretation" and its description of the FTC's interpretation as "contorted and unprecedented." *See* LabMD Pet. 3, 7.

[8] Orders containing identical or nearly identical requirements were approved in:

- *FTC v. Wyndham Worldwide Corp.*, No. 2:13-CV-01887 (D. N.J. Dec. 11, 2015);
- *FTC v. PLS Fin. Servs., Inc.*, No. 1:12-cv-8334 (N.D. Ill. Oct. 26, 2012);
- *United States v. RockYou, Inc.*, No. 12-CV-1487 (N.D. Cal. Mar. 27, 2012);
- *FTC v. Lifelock*, No. 2:10-cv-00530 (D. Az. Mar. 9, 2010) (Two orders);
- *FTC v. Navone*, No. 2:08-CV-01842 (D. Nev. Dec. 29, 2009);
- *United States v. Rental Res. Servs., Inc.*, No. 09-CV-524 (D. Minn. Mar. 6, 2009);
- *United States v. ValueClick, Inc.*, No. CV08-01711 (C.D. Cal. Mar. 17, 2008);
- *United States v. Choicepoint Inc.*, No. 1:06-CV-0198 (N.D. Ga. Feb. 15, 2006);
- *FTC v. Ruby Corp.*, No. 1:16-cv-02438 (D.D.C. Dec. 18, 2016); and
- *United States v. VTech Electronics, Ltd.*, No. 1:18-cv-114 (N.D. Ill. Jan. 23, 2018).

it had successfully enforced violations of the very same requirement. *See United States v. Choicepoint Inc.*, No. 1:06-CV-0198 (N.D. Ga. Oct. 14, 2009 & Sept. 3, 2010); *FTC v. Lifelock*, No. 2:10-cv-00530 (D. Ariz. Jan. 4, 2016). Indeed, the touchstone of the Commission's data security program is reasonableness. As the Commission has explained, "a company's data security measures must be reasonable and appropriate in light of the sensitivity and volume of consumer information it holds, the size and complexity of its business, and the cost of available tools to improve security and reduce vulnerabilities." *Statement Marking the FTC's 50th Data Security Settlement* (Jan. 31, 2014). Thus, although the panel held that the order imposed an "indeterminable standard of reasonableness" (891 F.3d at 1300), the Commission was entirely justified in relying on its longstanding and consistent approach.

For all the same reasons, the Commission's position was also substantially justified on appeal. Thus, although LabMD ultimately prevailed in its argument that the Commission's order was unenforceable, it is not entitled to any award of fees.

III LABMD'S FEE REQUEST IS UNREASONABLE.

LabMD's petition should be denied on the independent ground that it has failed to establish a reasonable fee.

First, LabMD's petition seeks over $1.1 million in fees and costs for work performed during the administrative proceeding, but none of that work was expended in pursuit of the sole claim upon which LabMD prevailed on appeal, which LabMD did not even raise before the Commission. The Court therefore should deny any claim based on the work of five law firms that did not represent LabMD on appeal.

Second, the Court should separately reject LabMD's claim to the extent it seeks fees that were incurred neither in this appeal nor in the administrative proceeding under review, but in other matters such as LabMD's collateral lawsuits against the Commission and LabMD's lobbying activities. EAJA does not authorize the Court to award fees incurred in proceedings other than its review of agency proceedings, and in any event LabMD's collateral litigation was all unsuccessful.

Third, the Court should reject LabMD's request because it fails to adequately describe the work for which it claims fees, making it impossible to determine whether the charges are reasonable.

Fourth, LabMD's claim for fees incurred for the appeal should be rejected because the vast majority of the time for which LabMD seeks an award was spent on LabMD's unsuccessful claims regarding Section 5(n) of the FTC Act, Due Process, and other matters that the Court did not decide. In addition, the Court should reject LabMD's attempt to claim "market rates" for the work on the appeal.

LabMD fails to show any special factor that would justify enhancing the fee beyond the statutory maximum adjusted for inflation.

A. LabMD is not entitled to any fees incurred during the administrative proceeding.

The Supreme Court has held that "the most critical factor" in deciding an appropriate fee award "is the degree of success obtained." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). This factor is "particularly crucial" when an applicant "succeeded on only some of his claims." *Id.* at 434 (cleaned up). Because "work on an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved . . . no fee may be awarded for services on the unsuccessful claim." *Id.* at 435. Thus, it is "well established" that when a party achieves only limited success, any fee award should not include time expended "on the litigation as a whole." *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1306 (11th Cir. 2001) (quoting *Hensley*, 461 U.S. at 436). Instead, "the court must filter out the time spent on unsuccessful claims" and positions that were "challenged by the claimant but unaddressed by the reviewing court." *Gay Officers Action League*, 247 F.3d at 298; *Hardisty*, 592 F.3d at 1077.

None of the time billed during the FTC's administrative proceeding should be included in a reasonable fee because none of it was spent litigating the winning claim in this Court. The winning claim related solely to the enforceability of the Commission's remedial order, a claim LabMD did not make before the Commis-

sion.[9] Every minute of LabMD's attorneys' time in the administrative proceeding was spent on issues on which it did not prevail before the agency and which this Court did not address.[10] In the end, the Court did not disturb the Commission's liability finding.

The majority of LabMD's fee request falls into this category. Specifically, as stated in one of LabMD's declarations, "Cause of Action served as counsel for Petitioner LabMD in the *In the matter of LabMD, Inc.* before the Federal Trade Commission . . . and in collateral matters in federal courts." Vecchione Decl. 2. Cause of Action retained two other firms, Dinsmore & Shohl and Kilpatrick Stockton, "in making an appearance either before the FTC or in other courts related to this matter." *Id.* But Cause of Action and the other firms represented LabMD only "until the appeal . . . when the representation was taken over by Ropes & Gray." *Id.* at 3. In addition, the bills submitted by Katten Muchin and Wilson Elser also reflect work mostly or entirely billed before LabMD filed its petition for review. Katten's bills reflect only work in 2014; Wilson's bills reflect only 15.4 hours after 2016, most which involved conversations with LabMD president Michael Daugh-

[9] A proposed order was attached FTC complaint counsel's appellate brief; LabMD did not argue in response that the requirement to establish a reasonable data-security program was vague. *See* FTC Certified Index, Docs. 336, 343.

[10] As explained below, much of the time billed *during* the administrative proceeding was not spent *in* the administrative proceeding, either because it was spent litigating LabMD's collateral cases or because it was not spent litigating at all.

erty about various news articles; none of the work involved preparing any part of LabMD's petition for review. *See* Callaway Decl. 8-25; Bialek Decl. Part 3 at 56-68. None of the time billed by these firms was spent litigating LabMD's successful claim. None of it justifies a fee award.[11]

B. LabMD is not entitled to fees for work in collateral litigation or other matters.

EAJA permits the award of fees "incurred" in, as relevant here, "judicial review of agency action," but only in a "court having jurisdiction of [the] action." 28 U.S.C. § 2412(d)(1)(A). By its own terms, then, the statute precludes an award of attorney's fees to a party for work that was *not* incurred in the action under review. *See Lundin v. Mecham*, 980 F.2d at 1461 (refusing to award fees for a related case in another circuit because EAJA "expressly forbids the award of fees in actions over which the court lacks jurisdiction"). Thus, "[i]n order for a court to award fees under the EAJA, it must have jurisdiction over the underlying action." *Zambrano v. I.N.S.*, 282 F.3d 1145, 1149-1150 (9th Cir. 2002). Here, LabMD improperly claims fees for work that was incurred not this Court or in the action under review,

[11] LabMD also incorrectly seeks an inflation-adjusted hourly rate for the agency proceedings. EAJA permits such adjustments generally for court proceedings; for agency proceedings, however, the fee is capped at $125 per hour "unless the *agency determines by regulation* that an increase in the cost of living or a special factor . . . justifies a higher fee." 5 U.S.C. § 504(b)(1)(A) (emphasis added). The FTC has not adopted such a regulation; the hourly rate is fixed at $125.

but in LabMD's collateral attacks on the FTC or other matters. The Court should reject those claims.

1. Kilpatrick Stockton

LabMD seeks over $155,500 in fees and costs for work performed by Kilpatrick Stockton, none of which was for this appeal or the underlying proceeding. *See* Corrected Hawkins Decl. Ex. I (pdf p. 197). The firm's declaration states that Kilpatrick was counsel for LabMD in the 2013 case that LabMD brought—unsuccessfully—in the Northern District of Georgia. *See* Vecchione Decl. Part 2 at 81-82. It is impossible to determine the work that Kilpatrick performed from LabMD's petition because the firm's bills have been redacted to the extent that individual entries read, in their entirety, "Review" or "Draft." *E.g.*, *id.* at 113. Even so, the firm did not appear before the FTC and its bills cover work only from March 2014 to July 2015, well before LabMD's petition for review in this Court. *See* Vecchione Decl. Part 2 at 112-126; Part 3 at 1-36. The Court may not award any fees based on this work because they were not incurred in the action under review.

2. Katten Muchin

LabMD seeks nearly $21,800 in fees and costs for work performed by Katten Muchin, all of which is related to LabMD's effort to persuade the House of Representatives Committee on Oversight and Government Reform to investigate

Tiversa. *See* Corrected Hawkins Decl. Ex. K (pdf p. 201); Callaway Decl. Ex. A (pdf pp. 9, 12, 14, 17). Although Katten's declarant claims that the firm "represented LabMD in its defense of an administrative proceeding filed against LabMD by the Federal Trade Commission," the firm's bills belie that claim. The bills describe time spent in connection with "hill activity," such as meetings with the "House Oversight Committee" and its former chairman and his staff, preparing draft testimony, and attending a "hearing before House Oversight." Callaway Decl. Ex. A (pdf pp. 9, 12, 17). None of the entries suggests the firm's attorneys represented LabMD before the FTC. *See id.*

EAJA does not provide a basis to award fees that were not incurred in a "civil action . . . including proceedings for judicial review of agency action." 28 U.S.C. § 2412(d)(1)(A). Because Katten's fees were incurred in legislative proceedings and not in any civil action or judicial review of an agency action, LabMD cannot recover any fees for that work.

3. Wilson Elser

LabMD claims $141,000 in fees and costs incurred by Wilson Elser, the firm retained by LabMD's insurer.[12] As described above, nearly all of the firm's work

[12] The first entry on Wilson Elser's first bill involves "review of correspondence from Shekar Adiga"—a claims examiner for insurer Markel— "re new assignment for LabMD in defense of claim by FTC." Bialek Decl. p. 8. The firm's primary responsibility appears to have been keeping LabMD's insurance carrier updated on the status of the administrative proceeding and LabMD's multiple collateral attacks

was incurred during the administrative proceeding and therefore it cannot support any fee award here. In addition, many of the firm's time entries expressly relate to LabMD's collateral litigation, including (i) the unsuccessful 2014 petition for review in this Court (*see* Bialek Decl. Part 1 at 35-36); (ii) Potential claims against Tiversa (*id.* at 42-43 (Fourth Amendment claim); Part 2 at 30-36 (copyright claim)); (iii) the Georgia case (*id.*, Part 1 at 45-49, 55-56, 59-61, 63-69; Part 2 at 2, 7, 9-11, 13, 27-28, 49, 54); (iv) the House Oversight hearing (*id.*, Part 2 at 33, 38-39, 41-44, 58-59); (v) actions against Tiversa in Pennsylvania (*id.*, Part 2 at 66, 83-84); and (vi) LabMD's claim against FTC employees in the District of Columbia (*id.*, Part 3 at 8).[13]

4. Dinsmore & Shohl

Fees incurred by this firm should be excluded in their entirety because it is impossible to tell the matter for which they were incurred. Although Dinsmore & Shohl did appear in the administrative proceeding before the FTC, the firm also

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on it. The firm thus spent much of the time billed reviewing materials from the various proceedings and preparing reports on those matters to the insurer, or updating the insurer by telephone. *See, e.g.*, Bialek Decl. Part 1 at 8-17, 24, 25, 27-31, 36, 45-49, 55-56, 59-61, 63-65, 68; Part 2 at 4-5, 10, 12-13, 17-24, 28-30, 36-37, 42, 44-46, 48-51, 55, 59, 62-63, 66-67, 69-70; Part 3 at 2-4, 8-9, 13-14, 17, 20-21, 30-31, 35-36, 38-40, 48, 53, 59, 67.

[13] In addition, Wilson's bills contain numerous entries for time spent updating LabMD's insurer and communicating with LabMD's other attorneys. *See supra* n.12. Many of the latter entries involved an internal dispute about Cause of Action's withdrawal from the case at the conclusion of the administrative proceeding.

represented LabMD in collateral litigation. But LabMD's fee request does not segregate any of the work that Dinsmore did on the collateral matters from work in the administrative proceeding, and its bills are so heavily redacted that it is impossible to determine what work was performed, much less for what matter. Many of the entries on Dinsmore's bills amount to no more than a verb such as "draft" or "revise." To illustrate, the first few entries from Dinsmore's first bill are reproduced below.

Detail of Current Hours Worked

Date	Timekeeper	Hours	Description
11/01/13	WAS	0.50	Review and analyze [redacted].
11/01/13	KMS	2.60	Research [redacted] to prepare argument.
11/01/13	KMS	0.20	Telephone conference with M. Pepson regarding [redacted].
11/01/13	SRH	4.00	Drafted and revised [redacted]
11/02/13	KMS	3.30	Draft [redacted].
11/02/13	KMS	1.20	Revise [redacted].
11/02/13	KMS	0.80	Work on [redacted].

Vecchione Decl. Part 1 at 56. Nevertheless, it is clear that the bills do include work on LabMD's collateral litigation. For example, the bill for November 2014—when Dinsmore filed a petition for review that this Court dismissed for lack of jurisdiction—includes $450 in "Filing and Recording Fees," equal to the filing fee for a petition for review. *Id.* at 60. As with the other firms, LabMD cannot recover either

for the work in the administrative proceeding or for the unrelated work; in Dinsmore's bills it is impossible to tell the one from the other.

5. Cause of Action

LabMD seeks $79,000 in fees and $111,000 in costs based on work by Cause of Action in the administrative action and LabMD's collateral litigation. *See* Vecchione Decl. 2. The organization's declarant expressly states that Cause of Action represented LabMD only "until the appeal" to this Court. *Id.* at 3. Like the firms already discussed, none of Cause of Action's time was spent on LabMD's successful argument and none of it justifies a fee award. In addition, Cause of Action's costs are not segregated between the administrative action and collateral matters, and they include items that are not chargeable because they are overhead (such as computer and office supplies), or that would not be chargeable to a client (such as "catering," entertainment, "processing fees," and "legal fees"). *See id.*, Part 4 at 111-119.

C. LabMD has not reasonably described the work performed or segregated work on its successful claim.

It is LabMD's burden to show the hours reasonably worked via an "itemized statement, 28 U.S.C. 2412(d)(1)(B); *Hensley*, 461 U.S. at 437. It has not done so.

EAJA requires a "full and specific accounting" of the tasks performed, including "the dates of performance[,] the number of hours spent on each task," and a description of the nature of the tasks. *Weinberger v. Great N. Nekoosa Corp.*, 925

F.2d 518, 527 (1st Cir. 1991). "The applicant should exercise 'billing judgment' with respect to hours worked, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." *Hensley*, 461 U.S. at 437 (internal cross-reference omitted). Counsel must make "a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Gay Officers Action League*, 247 F.3d at 296.

A detailed request allows the court to "make an independent determination whether or not the hours claimed are justified." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). These details also "allow[] the paying party to dispute the accuracy of the record as well as the reasonableness of the time spent." *Calhoun v. Acme Cleveland Corp.*, 801 F.2d 558, 560 (1st Cir. 1986). "Without sufficient detail . . . the court cannot determine with a high degree of certainty, as it must, that the billings are reasonable." *Id.*

As described above, LabMD failed to exercise billing judgment, instead including excessive, redundant, and unnecessary hours in its fee petition, which includes fees for work plainly unrelated not just to the successful argument on appeal but also to the enforcement action at all. Besides including unnecessary and duplicative work by Wilson Elser,[14] the bills submitted by Dinsmore & Shohl and Kil-

[14] *See supra* n.12. Wilson's bills also include a great many entries for reviewing press reports and other materials that Michael Daugherty sent to the firm and for

patrick Stockton also fail to provide sufficient detail to determine whether the work performed is reasonable; they are so heavily redacted that individual time entries are often reduced to only a few words. LabMD's failure to exercise billing judgment or adequately describe the work for which it seeks fees is another reason to reject the petition.

D. LabMD failed to segregate work on its successful argument on appeal and is not entitled to an enhanced fee.

Lastly, LabMD's request for over $676,000 in fees incurred on the appeal is unreasonable both because it fails to provide sufficient detail to segregate the work performed on its winning claim and because it seeks an unjustified enhanced hourly rate. If the Court determines that LabMD is entitled to an award, the amount should reflect only the hours reasonably worked on the successful issue itself, multiplied by the inflation-adjusted statutory maximum. As demonstrated below, that amounts to just over $5,600.

LabMD seeks fees for *all* of its appellate counsel's work. It has not segregated time spent on the unsuccessful and undecided issues that dominated its brief from time spent on the successful one-page argument that the Commission's order was unenforceable. *See* Cohen Decl. 12, 20-41. Although appellate counsel Ropes and Gray submitted 21 full pages of detailed time entries describing work on a host

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exploring Daugherty's ideas for attacks against the FTC and Tiversa. *E.g.*, Bialek Decl. Part 1 at 13, 20-21, 31, 36-37, 41-43, 46, 49-50, 52-53, 58, 59-63.

of discrete legal issues, none of the entries mention the one winning argument about the vagueness of the FTC's order. *Id.* at 20-40. In contrast, dozens of entries specifically mention LabMD's failed argument that the Commission's order was not supported by substantial evidence. *E.g.*, *id.* at 24-25, 27-33, 38-39.

Instead, the vagueness issue appears to have been block-billed with work on other issues regarding the "validity" of the FTC's order, corresponding to the argument in part III of LabMD's opening brief that the order is "invalid." *Compare* Cohen Decl. 25-30 *with* LabMD Opening Br. 48-52. Ropes & Gray billed 56.25 hours for work on that topic. Comparing their relative length in the brief, the vagueness argument (25 lines) represents 30.5 percent of part III overall (82 lines total). Apportioning the time thus suggests that 17.15 hours were spent on vagueness. The firm also billed 11.5 hours involving "LabMD's ability to comply with the order, and the potential effect the order has on LabMD's First Amendment rights." Cohen Decl. 28. Since vagueness involves LabMD's "ability to comply" but not the First Amendment, it is reasonable to assume half of that time (5.25 hours) was spent on the vagueness argument. Finally, the firm block-billed 36.5 hours for LabMD's reply brief arguments on "invalidity" and "additional discovery," which correspond to sections VI and VII of the reply. Cohen Decl. 32-34. The reply contains 26 lines on vagueness (p. 27-28 & n.17), representing 16.9 percent of the 154 lines of argument in parts VI (validity) and VII (discovery) together

(pp. 24-32), or 6.16 hours of the 35.6-hour total. In sum, a reasonable accounting of the time LabMD spent on its prevailing argument is 17.15 + 5.25 + 6.16 hours, or 28.56 hours total. Multiplied by the $125 statutory maximum (adjusted for inflation[15]) yields a maximum reasonable fee award of $5,633.75.

The work on the appeal does not justify LabMD's request for an enhanced fee. LabMD requests rates from $430 to $725 per hour but EAJA provides that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that . . . a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 42 U.S.C. § 2412(d)(2)(A)(ii). Ropes & Gray claims that an enhanced fee is justified because "of the required significant time and resources, the number and complexity of the issues; the average market rate in Atlanta; the total victory achieved by LabMD; and the fact that the Ropes & Gray lawyers involved in this matter were seasoned and talented litigators with enormous data security and appellate litigation experience." Cohen Decl. 14. But the Supreme Court has considered whether those factors are "special" and rejected nearly all of them. In *Pierce v. Underwood*, the Court held that the special factors justifying an enhancement "do not include 'the novelty and difficulty of issues, the undesirability of the case, the work and ability of counsel, and the results obtained.'" *United States v. Aisenberg*, 358 F.3d 1327, 1343 (11th Cir.

[15] The highest inflation-adjusted (but not otherwise enhanced) rate that LabMD seeks is $197.26 per hour. *See* Corrected Hawkins Decl. Exs. H & J.

2004) (quoting *Pierce*, 487 U.S. at 573). Those factors "are little more than routine reasons why market rates are what they are. *Pierce*, 487 U.S. at 573.

For its part, LabMD claims that Ropes & Gray possesses "distinctive knowledge and specialized skill"; specifically, that the firm is "nationwide leader in the cybersecurity litigation space," and also that the firm possesses specialized appellate skill. LabMD Pet. 17. But even if those factors could support an enhanced fee in some appropriate case, they do not support one here. The only issue that prevailed was whether the FTC's remedial order was too vague to inform LabMD of what was required. Litigating that issue required no specialized skill in data security nor even any specialized appellate skill. To the contrary, evaluating the potential vagueness of an administrative agency's order is an ordinary task that is "applicable to a broad spectrum of litigation"—the very sort of factor that the Supreme Court found does not justify an enhanced fee under EAJA. *Pierce*, 487 U.S. at 573.[16]

Conclusion

The fee petition should be denied.

[16] As indicated above, the FTC does not dispute that if any fee were warranted for the work on the appeal, a cost-of-living adjustment would also be warranted.

Respectfully submitted,

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