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	)	
	)	**DOCKET NO. 9357**
LabMD, Inc.	)	
a corporation.	)	**PUBLIC**
	)	

ORDER DENYING RESPONDENT LABMD'S MOTIONS FOR STAY

In two separate motions, Respondent LabMD, Inc. ("LabMD") has requested that the Commission stay the ongoing proceeding before the Administrative Law Judge in this case. First, as part of its Motion to Dismiss with Prejudice and to Stay Administrative Proceedings, filed on November 12, 2013 ("Motion to Dismiss"), LabMD requested a stay pending our resolution of the merits of that motion. *See* Motion to Dismiss at 29-30. Second, on November 26, 2013, LabMD filed a Motion to Stay Proceedings Pending Review in the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the District of Columbia ("Motion for Stay Pending Judicial Review").

For the reasons set forth below, we deny both the stay request incorporated into LabMD's Motion to Dismiss and LabMD's Motion for Stay Pending Judicial Review. In this Order, we do not address the merits of LabMD's Motion to Dismiss.

BACKGROUND

This case concerns allegations that LabMD – a provider of clinical laboratory testing services – failed to implement reasonable and appropriate measures to prevent unauthorized access to consumers' personal data stored on its computer systems. The Complaint initiating this case, issued on August 28, 2013 ("Complaint"), alleges that, as a result of LabMD's inadequate data security practices, identity thieves were able to obtain access to highly sensitive information – including patients' names combined with their dates of birth, social security numbers ("SSNs"), and information about their bank accounts, insurance coverage, or lab test results. *See* Complaint at 2-5 (¶¶ 6-21). The Complaint alleges that LabMD's conduct constituted an "unfair act or practice," in violation of Section 5(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a). *See* Complaint at 5 (¶¶ 22-23).

LabMD filed its Answer to the Complaint on September 17, 2013 ("Answer"), and as noted above, filed a Motion to Dismiss on November 12, 2013. Complaint Counsel filed a

Response in Opposition to the Motion to Dismiss ("CC Opp. to MTD") on November 22, 2013; and LabMD filed a Reply on December 2, 2013. The deadline for a Commission order resolving the merits of LabMD's Motion to Dismiss is January 16, 2014. *See* 16 C.F.R. §§ 3.22(a), 4.3(a). Factual discovery in this proceeding is scheduled to close on March 5, 2014, and the evidentiary hearing before the Administrative Law Judge is scheduled to begin on May 20, 2014. *See* Administrative Law Judge's Revised Scheduling Order (issued Oct. 22, 2013).

On November 14, 2013, LabMD filed a Verified Complaint for Declaratory Relief against the Commission in the U.S. District Court for the District of Columbia (docketed as Case No. 1:13-cv-01787-CKK) ("District Court Complaint"). On November 18, 2013, LabMD filed a "Petition for Review of Unlawful Federal Trade Commission Attempt to Regulate Patient-Information" in the U.S. Court of Appeals for the Eleventh Circuit (docketed as Case No. 13-15267) ("11th Circuit Petition"). On November 26, 2013, LabMD filed its Motion for Stay Pending Judicial Review in this proceeding. Complaint Counsel filed an Opposition to the latter motion on December 5, 2013. ("CC Opp. to MSPJR").

ANALYSIS

I. Request for Stay Pending a Decision on the Merits of LabMD's Motion to Dismiss

Our rules provide that, as a general matter, a motion to dismiss filed prior to evidentiary hearings is to be referred directly to the Commission for decision, 16 C.F.R. § 3.22(a), and the fact that such a motion is pending "shall not stay proceedings before the Administrative Law Judge unless the Commission so orders." *Id*. § 3.22(b). When we most recently revised this rule, we stated that that the "purpose of . . . paragraph (b) is to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions, . . . [so as] to expedite the proceedings." FTC, *Rules of Practice*, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1809, 1810 (Jan. 13, 2009).

In deciding whether to grant LabMD's request for a stay of the proceeding pending our resolution of its Motion to Dismiss, we exercise our discretion to oversee this adjudication, comparable to the broad discretion of a court "to stay proceedings[,] . . . incidental to the power inherent in every court to control the disposition of the [cases] on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for an exercise of judgment." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). We conclude that there is no good cause for the stay LabMD requests.

LabMD contends that a stay pending resolution of the merits of its Motion to Dismiss is justified, in part, because Complaint Counsel has sought "extensive and abusive discovery" that would impose "ruinous litigation costs" on the company. Motion to Dismiss at 29, 30. Complaint Counsel responds that this argument is no more than a "rehash" of arguments over third-party discovery that are already pending before the Administrative Law Judge. CC Opp. to MTD at 26. Significantly, the Administrative Law Judge recently issued an order resolving pending discovery disputes. *See* Administrative Law Judge's Order on Respondent's Motion for a Protective Order at 7-8 (issued Nov. 22, 2013). By precluding discovery on conduct prior to 2005 and discovery of materials relating to a book by LabMD's CEO, this Order may ameliorate

LabMD's burdens and costs to some extent. If further disputes between LabMD and Complaint Counsel emerge during the course of the discovery process, the Administrative Law Judge is well equipped to address them in the first instance.

LabMD further argues that a stay pending resolution of the Motion to Dismiss would be proper because "[f]orcing LabMD to litigate a case that the Commission does not even have jurisdiction to bring is inherently unjust and violates its due process rights." Motion to Dismiss at 30. Without expressing any view on the merits of the Motion to Dismiss, we conclude that the fact that LabMD has challenged the Commission's authority to bring this case does not justify a stay. As discussed above, when we adopted the current version of Section 3.22 of our Rules of Practice, we anticipated that parties might file dispositive pre-hearing motions, but concluded that the public interest in expediting our adjudicatory process supports allowing the proceedings before the Administrative Law Judge to continue notwithstanding the pendency of such motions. Thus, in past adjudications, we have declined to grant motions for stay of pretrial proceedings pending resolution of motions to dismiss.[1] Consistently, reviewing courts have held that litigants must participate fully in the Commission's adjudications even where they "have challenged the very authority of the agency to conduct proceedings against them." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 739 (D.C. Cir. 1987) (opinion of Edwards, J.). The Supreme Court has clearly ruled that the "expense and disruption [incurred by the respondent in] defending itself in protracted adjudicatory proceedings" before the Commission do not justify halting those proceedings prior to their conclusion, even where, as here, the respondent "alleged unlawfulness in the issuance of the complaint." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

II. Motion for Stay Pending Judicial Review

Under our rules, "[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 stay of administrative proceedings pending judicial review sought by LabMD, like stays of trial court proceedings pending appellate review in federal court, would be "an intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Thus, a party requesting a stay in an administrative adjudication – as in federal court – bears the burden of demonstrating that the applicable criteria are fully satisfied.[2] "The first two factors of the traditional standard" – likelihood of success and irreparable injury – "are the most critical." *Id.* at 434.

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[1] *See, e.g., N.C. State Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010). The U.S. District Court denied the same respondent's motion to halt the same pending proceeding. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 768 F. Supp. 2d 818, 820 n.1 (E.D.N.C. 2011).

[2] Our procedural decisions in administrative adjudications are governed by the FTC Act and our own Rules of Practice, rather than the rules and standards that govern federal courts. The same factors, however, apply to motions for stay pending appeal in both types of fora. *Compare* 16 C.F.R. § 3.56(c) (factors governing stay motions under 15 U.S.C. § 45(g)(2) and 16 C.F.R. § 3.56(a)), *with Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (factors under Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a)). These factors are: "[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

Applying this analytical framework, we conclude LabMD has failed to satisfy its burden of showing "good cause" to grant its Motion for Stay Pending Judicial Review.[3]

A. Likelihood of Success on the Merits

A party seeking a stay must "make a strong showing that [it] is likely to succeed on the merits . . . . [M]ore than a mere 'possibility' of relief is required." *Nken*, 556 U.S. at 434. LabMD has not shown that it is likely to prevail on the merits before the District Court or the Eleventh Circuit. We reach this conclusion without addressing the substantive merits of LabMD's District Court Complaint or 11th Circuit Petition – both of which present issues that substantially overlap the substantive issues LabMD raised in its Motion to Dismiss pending before us, which we are not considering or addressing in this Order. Nonetheless, we conclude that neither the District Court nor the Eleventh Circuit is likely to grant LabMD's request for declaratory or injunctive relief to halt this adjudication.

First, neither the District Court nor the Court of Appeals has jurisdiction to entertain LabMD's premature challenge to this adjudicatory proceeding. The FTC Act sets forth a detailed judicial review scheme that makes clear that a respondent in a Section 5 adjudication may obtain judicial review *only* if it (1) identifies "an order of the Commission" requiring it "to cease and desist from using any method of competition or act or practice;" (2) files "a written petition praying that the order of the Commission be set aside" with one of a specified set of U.S. Courts of Appeals; and (3) does so "within sixty days of the service of such order." 15 U.S.C. § 45(c). The Act also makes clear that this judicial review process implicates the courts' jurisdiction. *See id.* (filing of such petition triggers the court's "jurisdiction"); *id.*, § 45(d) ("[T]he jurisdiction of the [C]ourt of [A]ppeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."). Statutory requirements specifying which courts may review which types of agency decisions – such as provisions limiting judicial review to agency rulings that "are 'final' and 'made after a hearing'" – are deemed "central to the requisite grant of subject-matter jurisdiction." *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). Where, as here, it is "fairly discernible" from the text and overall structure of a statute that Congress intended that appeals of agency actions "proceed exclusively through the statutory review scheme," then that statute "precludes . . . courts from exercising jurisdiction over [a] pre-enforcement challenge" outside the prescribed procedures, and does not allow parties to "evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings, as petitioner sought to do here." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 (1994); *accord Elgin v. Dept. of Treasury*, 132 S. Ct. 2126, 2132-33 (2012).

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granted; and [4] whether the stay is in the public interest." 16 C.F.R. § 3.56(c). *See also N.C. State Bd. of Dental Exam'rs*, 151 F.T.C. 640 (2011) (denying respondent's motion for stay pending district court review).

[3] LabMD's request that the Commission rule on this motion by December 5, 2013 – a day before the due date for Complaint Counsel's response – is now moot. *See* Motion for Stay Pending Judicial Review at 8; 16 C.F.R. § 3.22(d).

Both LabMD's District Court Complaint and its 11th Circuit Petition fail this test. "The District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair practice affecting commerce' has been vested by Congress in the [agency] and in the Circuit Court of Appeals . . . ." *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48 (1938).[4] And the Court of Appeals is authorized by the FTC Act to review only an "order of the Commission to cease and desist from using any method of competition or act or practice." 15 U.S.C. § 45(c). *See Texaco, Inc. v. FTC*, 301 F.2d 662, 662 (5th Cir. 1962) (per curiam) ("The jurisdiction of this Court to review an order of the Federal Trade Commission is found in 15 U.S.C. § 45(c). Such jurisdiction arises only from a cease and desist order entered by the Commission."). The Commission has issued no cease and desist order in this proceeding.

LabMD's attempt to short-circuit this adjudicatory proceeding by going straight to court is "at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted[,] . . . . [even] in cases where, as here, the contention is made that the administrative body lacked power over the subject matter." *Bethlehem Shipbuilding Corp.*, 303 U.S. at 50-51. *See also Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950) ("it has never been held that the hand of government must be stayed until the courts have an opportunity to determine whether the government is justified" in instituting such proceedings). The law is clear that a party may not halt a legitimate law enforcement proceeding that a federal agency is conducting against that party by seeking an injunction or declaratory order, provided that the party has a meaningful opportunity to obtain judicial review after the proceeding concludes and a final order is issued. *See, e.g.*, *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927) (where respondents have a "full opportunity to contest the legality of any . . . proceeding against them[,] . . . they [could] not . . . ask relief by injunction"); *cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. at 212-13 (distinguishing *Leedom v. Kyne*, 358 U.S. 184 (1958) and its progeny).

Moreover, LabMD has no probability of success on the merits before either the District Court or the Eleventh Circuit because there is no "final agency action" in this proceeding. The Commission has merely averred "reason to believe" that violations have occurred and found "good cause" to issue a Complaint. "Serving only to initiate the proceedings, the issuance of the complaint has no . . . . legal or practical effect, except to impose upon [the respondent] the burden of responding to the charges made against it." *Standard Oil Co.*, 449 U.S. at 242. The Eleventh Circuit has found that "the 'final agency action' requirement implicates federal subject matter jurisdiction," *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1240 (11th Cir. 2003), while the D.C. Circuit treats the absence of final agency action as a failure to state a claim upon which relief can be granted. *See, e.g.*, *Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 731-32 (D.C. Cir. 2003). Either way, LabMD loses.

LabMD contends the Commission has already made up its mind, and therefore, further participation in this proceeding would be futile. *See, e.g.*, District Court Complaint at 25-26

[4] Although *Myers v. Bethlehem Shipbuilding Co.* concerned the National Labor Relations Act, the Court quoted and relied upon the legislative history of the FTC Act, which revealed Congress' unequivocal intent that this mode of review is exclusive. *See* 303 U.S. at 48 n.5.

(¶¶ 132-37). LabMD is wrong. "Although [respondent] claims that it is highly unlikely that the agency will change its position and that resort to the agency's adjudicatory proceeding would be futile, nothing in the record indicates that the outcome of a hearing, where [respondent] will have the opportunity to present its arguments to the agency, is preordained." *Reliable Automatic Sprinkler Co.*, 324 F.3d at 733. Even assuming, *arguendo*, that the Commission has expressed views in the past about some of the legal and policy issues in this case, that would "not necessarily mean that the minds of its members [are] irrevocably closed on the subject of respondents' . . . practices[,]" nor that they are "prejudiced and biased" against LabMD, so that it "could not receive a fair hearing from the Commission." *FTC v. Cement Inst.*, 333 U.S. 683, 700 (1948).[5] The Commission's ultimate ruling in this case "is contingent on a number of factors" – including an assessment of whether the facts alleged in the Complaint actually occurred, and whether those facts are sufficient to sustain a finding that LabMD committed unfair acts and practices. "Under these circumstances, where [a court] can have no idea whether or when [a sanction] will be ordered, the issue is not fit for adjudication." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Toilet Goods Assn., Inc. v. Gardner*, 387 U.S. 158, 163 (1967).

B. Irreparable Harm

A party seeking a stay must show that it "will be irreparably injured absent a stay; simply showing some 'possibility of irreparable injury' fails to satisfy the second factor." *Nken*, 556 U.S. at 434-35. LabMD asserts that, absent a stay, the pendency of this proceeding "damages LabMD's business reputation, causing it to lose customer goodwill and market share," "threaten[s] the very existence of [its] business," and "eviscerates LabMD's due process rights." Motion for Stay Pending Judicial Review at 4-5. To be sure, "[t]he harm to property and business can . . . be incalculable by the mere institution of proceedings . . . . Yet it is not a requirement of due process that that there be judicial inquiry before discretion can be exercised" to commence an adjudication. *Mytinger & Casselberry Inc.*, 339 U.S. at 599. Indeed, "every respondent to a Commission complaint" – and every litigation defendant – "could make the [same] claim[.]" *Standard Oil Co.*, 449 U.S. at 242-43. "Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify judicial intervention." *Sears, Roebuck & Co. v. NLRB*, 473 F.2d 91 (D.C. Cir. 1972). "[T]he expense and annoyance of litigation is 'part of the social burden of living under government[,]' [and] . . . '[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Standard Oil Co.*, 449 U.S. at 244 (quoting *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938), and *Renego. Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

[5] *See also N.C. State Bd. of Dental Exam'rs*, Opinion Denying Respondent's Motion to Disqualify the Commission, 151 F.T.C. 644, 648-54 (2011) (citing, *inter alia*, *Cement Institute*, *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970), and *Am. Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980)).

C. Effect on Other Parties and Public Interest

Finally, LabMD fails to satisfy the other relevant factors. Its contention that "[a] stay of this matter will injure no one at all," Motion for Stay Pending Judicial Review at 7, is ably countered by Complaint Counsel's argument that a stay could expose "consumers [to] the risk of identity theft, medical identity theft, and other harms." CC Opp. to MSPJR at 6. And needlessly delaying the pending adjudicatory proceeding could frustrate the public interest in expeditious resolution of adjudicatory matters. We cannot conclude that the stay sought by LabMD would be in the public interest.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.'s request for a stay of administrative proceedings pending disposition of the merits of its Motion to Dismiss **IS DENIED;** and

IT IS FURTHER ORDERED THAT Respondent LabMD's Motion to Stay Proceedings Pending Review in the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the District of Columbia **IS DENIED.**

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: December 13, 2013