



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

LabMD Appeals Data Security Ruling As FTC Heads Deny Stay

By **Allison Grande**

Law360, New York (September 30, 2016, 8:02 PM EDT) -- LabMD moved to bring its heated dispute with the Federal Trade Commission over the strength of the lab's data security to the Eleventh Circuit on Thursday, the same day that the agency's heads rejected the lab's bid to pause pending the appeal their recent ruling finding the lab's practices to be unreasonable.

In its highly anticipated petition for review, LabMD Inc. urged the appellate court to take a look at "all aspects" of the administrative proceeding that the FTC brought against the medical testing laboratory more than three years ago, which culminated with the commissioners **issuing a final order** in July that overturned their own administrative law judge in finding that LabMD's data security practices had caused harm to consumers and directing LabMD to undertake a series of corrective measures.

Besides the final order, the lab also asked the Eleventh Circuit to review "all interlocutory orders, rulings and opinions." The lab specifically drew the appellate court's attention to more than two dozen developments in the complex dispute, including **multiple refusals** by the commissioners to toss the case and **to disqualify** FTC Chairwoman Edith Ramirez's and the administrative law judge's rulings on issues ranging from the lab's **bid to sanction** the FTC for its handling of a patient data file that LabMD claims was stolen by cybersecurity firm Tiversa to **fights over the admissibility** of conversations that FTC attorneys allegedly had about the evidence.

The step by LabMD to shift the dispute to the Eleventh Circuit came on the same day that the FTC's three active commissioners announced their decision to reject the lab's hotly contested bid to pause the commissioners' July order — which was slated to take effect on Friday — until after the appellate court ruled on the matter.

Under the commissioners' final order, the lab would be required to cease its inadequate data security practices and take steps such as establishing a comprehensive information security program and notifying consumers affected by the alleged leak of a patient data file from its servers in 2008.

LabMD had **argued that the ruling** would unfairly subject the lab to hefty compliance costs and bestow upon the regulator "new data security civil penalty powers" that would spell trouble for "every U.S. business that uses computers" if allowed to take effect, while the commission's attorneys **countered that** the lab's "recycled arguments" were unlikely to gain traction with a federal appellate court and that thousands of consumers would be harmed by a stay.

Siding with the commission, the FTC heads concluded that a stay was not warranted

because the four factors that must be weighed in considering a stay tilted in favor of the public interest in protecting the nearly 10,000 consumers whose data had been contained on the leaked patient data file that had been discovered by Tiversa and turned over to the commission.

"While LabMD will face some costs in complying with the order, it has failed to establish that it will suffer substantial irreparable harm if the stay is denied," the commissioners ruled. "On the other hand, there is potential risk of harm to hundreds of thousands of consumers if the protections provided in the final order are stayed during the pendency of LabMD's appeal."

The commissioners also determined that LabMD had failed to show that any of its arguments were more than "a mere repetition" of contentions that have already been raised and that these assertions were likely to prevail on appeal.

"While this matter raises important legal questions, it involves the application of long-standing principles under commission law that we believe we applied properly," the commissioners wrote. "In our view, the legal questions are not so difficult as to justify a stay when the equities cut against that result."

LabMD's arguments that the corrective actions required by the order exceed the commission's authority and that the ruling addresses practices that are no longer being implemented by the defunct lab additionally fail to hold water because the FTC has "wide discretion" to determine how to bring an end to unfair practices and the lab continues to hold old test results for 750,000 consumers and "has not ruled out" resuming operations.

In a statement provided to Law360 Friday, LabMD CEO Michael Daugherty said that he was "not surprised" the the commissioners denied a stay "given the FTC's mean-spirited manner," and that his side was looking forward to "finally being in the Eleventh Circuit" and removed from what Daugherty has long characterized as an unfair administrative process.

"The FTC has been caught cavorting with criminals who lied about evidence used against LabMD and 85 other organizations. Rather than fold, the FTC doubled down, pretending this never happened and arguing there is harm even if your data never leaves your network," Daugherty added. "I would take a hard look at any law firm or association that parrots the FTC and profits from this mess. The FTC's practices are bad news for every company in the country."

An FTC spokesman said Friday the commission had no comment on the latest developments.

LabMD is represented in the administrative proceeding by Patrick J. Massari and Erica L. Marshall of Cause of Action Institute and in the Eleventh Circuit appeal by Douglas H. Meal, David T. Cohen, Michelle L. Visser, Douglas Hallward-Driemeier and Ashton R. Lattimore of Ropes & Gray LLP.

The FTC is represented in the administrative proceeding by staff attorneys Alain Sheer, Laura Riposo VanDruff, Megan Cox, Ryan Mehm, John Krebs and Jarad Brown and in the Eleventh Circuit appeal by staff attorneys Theodore Metzler and Michael Hoffman.

The administrative proceeding is In the Matter of LabMD Inc., docket number 9357, before the Federal Trade Commission. The appeal is LabMD Inc. v. Federal Trade Commission, case number 16-16270, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Bruce Goldman.

All Content © 2003-2016, Portfolio Media, Inc.