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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

D-LINK CORPORATION

and

D-LINK SYSTEMS, INC.,

Defendants.

No. 3:17-cv-00039-JD

DEFENDANT D-LINK SYSTEMS, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS

Date: Thursday, March 9, 2017
Time: 10:00 a.m.
Courtroom: 11

Judge: Hon. James Donato

I. INTRODUCTION

The Federal Trade Commission ("FTC" or "Commission") Opposition ("Op.") confirms why this Court should agree with the Acting Chairwoman of the FTC, Hon. Maureen K. Ohlhausen (who voted against issuance of this Complaint in a 2-1 vote),[1] and grant D-Link Systems's Motion to Dismiss ("MTD"). The Opposition's flawed legal arguments and misguided reliance on unidentified "press" reports (presumably about European "botnets" not involving products sold by D-Link Systems in the U.S.) to fill gaping factual holes in the Complaint should be rejected.

II. ARGUMENT

A. "Unfairness" Liability Cannot Be Based on Alleged Past Conduct and Risks

The FTC does not deny that the Complaint fails to allege risks or practices in the present tense. *See* Op. 3. The FTC's reliance on the "present perfect verb tense" to substitute for its failure to plead current vulnerabilities and harms in the present tense speaks for itself. *See* Op. 3.

Without addressing any of the Ninth Circuit or Supreme Court cases D-Link Systems cites, *compare* MTD 4-5, *with* Op. 3-4, the FTC cites an inapposite Second Circuit decision, *see* Op. 3. *Dobrova v. Holder*, 607 F.3d 297 (2d Cir. 2010), involved a dispute over the meaning of the phrase "has previously been admitted" in a statute, and the court found that "[u]se of this tense evinces Congress's intent to include any previous admission for lawful permanent residence," *see id*. at 300-302. The *Dobrova* dicta the FTC relies on was derived from § 5.119 of the 2003 Chicago Manual of Style, *see id*. at 301; § 5.119 recognizes that this "present perfect tense" can also "denote[] an act, state or condition that is now completed…." Chicago Manual of Style, p. 178 § 5.119 (15th ed. 2003) (example: "{I have put away the clothes}"). *Accord Barrett v. United States*, 423 U.S. 212, 216 (1976) ("present perfect tense" found to "denot[e] an act that has been

[1] *See* MTD 2 & n.4. The FTC's Acting Chairwoman recently stated: "The FTC's statutory authority, our longstanding policy statements, and Congressional guidance are all clear: The FTC should focus enforcement on matters where consumers are actually injured or likely to be injured, or where companies don't keep their promises, to the consumer's detriment. The agency should focus on cases with objective, concrete harms such as monetary injury and unwarranted health and safety risks…. [W]hen the FTC has strayed from a focus on actual harm, it has struggled, both in influence and in the courts." Hon. Maureen K. Ohlhausen, Acting Chairwoman, FTC, Keynote, ABA 2017 Consumer Protection Conf., 3-5 (Feb. 2, 2017) ("FTC Chair Keynote"), https://www.ftc.gov/system/files/documents/public_statements/1069803/mko_aba_consumer_protection_conference.pdf.

completed"); *Carr v. United States*, 560 U.S. 438, 448 (2010) (citing *Barrett* for this proposition).

So too here. The Complaint at best shows that the "present perfect tense" was used to denote alleged completed acts. *See* Compl. ¶¶ 15-18. For instance, the Complaint avers: "The risk that attackers would exploit *these vulnerabilities* to harm consumers *was* significant." Compl. ¶ 17 (emphasis added). That is the past tense. *Cf*. Op. 4:25-26 ("DLS's actions caused or were likely to cause substantial consumer injury"). The reference in the first sentence of paragraph 17 to "these vulnerabilities" suggests it is referring back to paragraphs 15 and 16.

The FTC's reliance on 15 U.S.C. § 45(b), *see* Op. 4, to support its surplusage argument is also misplaced, since that provision solely applies to *administrative* actions, which this is not. Instead, the FTC is here invoking its "proper case" authority under 15 U.S.C. § 53(b). *See* Compl. ¶ 2; Op. 1.[2] *See generally FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086-89 (9th Cir. 1985) (discussing § 13(b)). Thus, the Complaint cites to § 13(b) for jurisdiction, *see* Compl. ¶ 2; Op. 1, which is in the present and future tenses, *see* 15 U.S.C. § 53(b). Section 5(b)'s use of the past tense "has been," juxtaposed with § 13(b)'s use of the present and future tenses, reinforces § 5(n)'s plain present-tense language. *See* MTD 4; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

Even if, counterfactually, § 5(b)'s "has been" language had *any* relevance whatsoever to this proceeding, the FTC's surplusage argument, Op. 4, still fails. The plain language of the statute refutes the FTC: § 5(n)'s present-tense requirements only limit the FTC's authority with respect to "unfair acts or practices," *see* 15 U.S.C. § 45(n), while § 5(b)'s "has been" language also applies to "unfair methods of competition" and "deceptive" practices, *see* 15 U.S.C. § 45(b). Therefore, it cannot be mere surplusage, as it *still* serves a distinct function. This interpretation is further confirmed by statutory context and the legislative history of the Act. *See generally FDA v. Brown & Williamson*, 529 U.S. 120, 132-33 (2000) (subsequent legislation can shape statutory meaning). The "has been" language applicable to administrative proceedings has been in § 5 since before it

[2] The district court cases the FTC cites, *see* Op. 4, if anything, underscore the necessity of pleading current practices. *See FTC v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 320 & n.57 (S.D.N.Y. 2001) (noting injunction "may be warranted if future violations of law are likely"); *FTC v. Vemma Nutrition Co.*, No. CV-15-01578-PHX-JJT, 2015 U.S. Dist. LEXIS 179855, at *19-20 (D. Ariz. Sep. 18, 2015) (noting current advertisements). *But cf. U.S. v. ACB Sales & Serv., Inc.*, 683 F. Supp. 734, 741 (D. Ariz. 1987) (past violations outside § 13(b)'s purview).

was amended in 1938 to extend to "unfair" business practices. *See FTC v. Raladam Co.*, 283 U.S. 643, 646-49 (1931). Section 5(n) was added in 1994 *as a statutory limitation* on the FTC's "unfairness" authority, as the FTC notes, *see* Op. 8-9. The 1994 Congress was presumably aware of the "has been" language but wrote § 5(n) in the present tense.

B. Complaint Fails to Plead Actual or Likely Substantial Injury

The FTC does not dispute that the Complaint fails to allege an identifiable data breach, let alone one causing actual physical or monetary harm to an identifiable person. *Compare* Op. 1 ("These risks are real."), 4-6, *with* MTD 5-7. And although the FTC suggests otherwise, Op. 5 (citing Compl. ¶ 16), the Complaint does not allege that "DLS's devices are already part of botnets"—it alleges only unspecified "press" reports of this. *See* Compl. ¶ 16.[3]

Notably, the FTC claims it alleged actual harm here based on unspecified "press" reports about "botnets" and the like and other paragraphs of the Complaint that do not allege that anything *actually* happened to anyone ("could" does not mean "did"). *See* Op. 5 (citing Compl. ¶¶ 16-18). Because what the press has (or has not) reported is not central or integral to the FTC's claims, it is at best irrelevant and cannot be used to fill gaping holes in the Complaint. *See, e.g., Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 805-07 (E.D. Va. 2007) (noting limits on basing factual allegations in complaint on press reports using anonymous sources). This is particularly true where, as here, this material is cited without the qualification that it is based on unspecified press reports. *See* Op. 5 (stating: "Compl. ¶ 16 (observing that DLS's devices are already part of botnets)"). In any event, the unidentified "press" reports lack sufficient specificity and reliability. *Cf. City of Brockton Ret. Sys. v. Avon Prods.*, 11 Civ. 4665, 2014 U.S. Dist. LEXIS 137387, at *64-70 (S.D.N.Y. Sep. 28, 2014) (discussing use of identified press reports in Rule 9(b) context). As

[3] Paragraph 16 thus illustrates why the Complaint is inadequate, failing even to specify whether the alleged "press" report(s) involve a U.S. "botnet." D-Link Systems is aware of "press" reports of European "botnets" involving products manufactured and sold by other businesses in Europe. *See, e.g.*, John Leyden, "Sh... IoT just got real: Mirai botnet attacks targeting multiple ISPs," The Register (2 Dec 2016), at https://www.theregister.co.uk/2016/12/02/broadband_mirai_takedown_analysis/. But D-Link Systems is unaware of any "press" report of an alleged U.S. "botnet" involving products it sells here and has no way of addressing whether this or other unspecified "press" reports of alleged "compromise[s]," *cf.* Op. 1, 5, 10, exist (let alone are accurate).

for paragraphs 17-18, speculation about what *could* have happened in the past somewhere in the world does not equate to "is likely to cause substantial injury." *See* MTD 6; *see also* Compl. ¶ 17 ("The risk that attackers would exploit these vulnerabilities to harm consumers was significant.").

The FTC's claim that the Complaint "contemplates that the Commission will develop additional evidence of harm," Op. 5, does not substitute for well-pleaded factual allegations. *Cf*. Compl. ¶¶ 15-18 (word "likely" does not appear). Unspecified "press" reports—which the FTC still refuses to identity—about alleged unspecified "compromises" and "botnets" (presumably European) should not justify allowing the FTC to launch a staggeringly expensive and burdensome multinational fishing expedition, particularly where, as here, the FTC has not even identified whether or how such "press" reports relate to events purportedly occurring in or involving the U.S.

On the law, the FTC first argues that § 5(n) does not require it to plead actual harm because it states, in part, "is likely to cause substantial injury." Op. 5. But they can point to no case where an Article III Court has found "unfairness" absent actual harm, which is why they solely cite to a pre-§ 5(n) consent order from 1973 to support this claim. *See* Op. 5 (citing *Philip Morris*, 82 F.T.C. 16 (1973) (consent order)). *Cf*. *Beck v*. *McDonald*, Nos. 15-1395, 15-1715, 2017 U.S. App. LEXIS 2095, at *18-25 (4th Cir. Feb. 6, 2017) (nebulous risk of identity theft harm insufficient injury for Article III standing). As the FTC Chief ALJ explained: "[T]he parties do not cite, and research does not reveal, any case where unfair conduct liability has been imposed without proof of actual harm, on the basis of predicted 'likely' harm alone." *In re LabMD, Inc*., Initial Decision, F.T.C. Docket No. 9357, 2015 FTC LEXIS 272, at *114 (Nov. 13, 2015) ("LabMD Initial Decision"), *vacated by* Opinion of the Commission, 2016 FTC LEXIS 128 (July 29, 2016), *stayed sub nom*., *LabMD v*. *FTC*, No. 16-16270-D, 2016 U.S. App. LEXIS 23559 (11th Cir. Nov. 10, 2016).

The FTC also omits mention of the Eleventh Circuit's well-reasoned Order staying the LabMD case, as well as the Initial Decision dismissing that case in its entirety. *Compare* Op. 4-6, *with* MTD 5-6 & n.5. The FTC Chief ALJ's thorough explication of § 5(n)'s "causes or is likely to cause substantial injury" requirement for "unfairness" liability persuasively illustrates why the FTC failed to plead this element, *see* LabMD Initial Decision, 2015 FTC LEXIS 272, at *108-121, *185-201, particularly as buttressed and supplemented by the Eleventh Circuit's stay order, *see*

LabMD, Inc. v. FTC, No. 16-16270-D, 2016 U.S. App. LEXIS 23559, at *7-11 (11th Cir. Nov. 10, 2016).

The FTC is wrong when it says that "Courts routinely have found unfairness satisfied for substantial injuries other than physical or monetary harms." Op. 5. *All* of the cases the FTC cites in support, *see* Op. 5-6, involved actual monetary harm to identifiable people, as the FTC's Chief ALJ has explained in detail. *See* LabMD Initial Decision, 2015 FTC LEXIS 272, at *114-*116 (refuting this claim in detail for the specific cases the FTC cites). Furthermore, the Opposition makes no mention of the pre-§ 5(n) FTC decision to which the "Unfairness Statement" is appended, *Int'l Harvester Co*., 104 F.T.C. 949, 1984 FTC LEXIS 2 (1984), which involved a product defect causing serious injuries (and at least one death), *see id*. at *24-26, *255-56; MTD 7 n.6. Also, *contra* the FTC, Op. 5, speculative purported "non-physical, non-economic harms" are not substantial injury under § 5(n). *See also LabMD*, 2016 U.S. App. LEXIS 23559, at *8-10.

Contra the FTC, Op. 6, this Motion does not require resolution of factual disputes. *Cf*. Compl. ¶¶ 15-18 (word "likely" not used). And the FTC failed to substantively respond to D-Link Systems's legal arguments on the plain meaning of "likely." *Compare* Op. 6, *with* MTD 5-7.

In any event, the farther the FTC strays from § 5(n)'s plain-language "substantial injury" requirement, the greater the fair notice due process problems. *See, e.g.*, LabMD Initial Decision, 2015 FTC LEXIS 272, at *187-189 (recognizing this). If possible, § 5(n) should be construed to avoid such problems. *See Edward J. DeBartolo Corp. v. FGCBCTC,* 485 U.S. 568, 574-78 (1988) (if possible, statutes should be construed to avoid constitutional problems).

C. FTC Fails to Plead Cost-Benefit and Reasonable Avoidability Elements

The FTC does not seriously address D-Link Systems's argument that the Complaint contains no factual allegations regarding the monetary costs, let alone the time- and labor-related costs, of conducting whatever "software testing and remediation measures" the FTC now thinks necessary. *Compare* MTD 8, *with* Op. 7. Costly remedies may lead to huge increases in the price of products, harming consumers. *See also* Unfairness Statement, 104 F.T.C. 949, 1984 FTC LEXIS 2, *309. The FTC does not state how the Complaint specifies what the FTC considers adequately restricting, monitoring, and overseeing a "private key," nor how much money it would

cost. Nor do they explain where it alleges how the unspecified "free software" works; whether it is effective and, if so, why; and whether there are corresponding costs to consumers, *e.g.*, usability.

The FTC's citation to a factually inapposite district court decision, *see* Op.7 (citing *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008)), fails. In conducting a cost-benefit analysis, that court said: "Defendants' own records show millions of dollars of checks issued from Qchex accounts that were frozen for fraud. The amount of this injury is large…." *Neovi*, 598 F. Supp. 2d at 1116. This is not a routine fraud case. *See* FTC Chair Keynote, *supra* note 1, at 3 (less need for cost-benefit in fraud case than "for practices that generate both costs and benefits").

The FTC argues that it adequately pleaded reasonable avoidability, in part, because its Complaint alleged "DLS actively misrepresented the security of its devices." Op. 7 (citing Compl. ¶¶ 20-24, 31-35). Their own Complaint refutes this, as their "unfairness" count, as pled, is not based at all on those allegations. Compl. ¶ 30 (solely relying on paragraphs 15-18).[4]

D. The FTC's Opposition Confirms This Action Violates Due Process

The FTC does not seriously dispute the FTC's lack of data-security standards, *compare* MTD 10, *with* Op. 9-10, or that it cannot meet the fair notice standards set forth in the cases D-Link Systems cites, *cf.* Op. 10 n.2, effectively conceding the points, *cf. Ramirez v. Ghilotti Bros.*, 941 F. Supp. 2d 1197, 1210 n.8 (N.D. Cal. 2013). Nor does it meaningfully address the argument that the FTC's failure even to allege an identifiable data breach confirms that § 5's text, standing alone, cannot provide fair notice. *Compare* MTD 12, *with* Op. 9-10. Instead, in an attempt to artificially lower the standard, *see* Op. 9-10 & n.2, the FTC argues that the Complaint "does not seek monetary relief," Op. 2. Although the FTC should be held to this, § 13(b) also authorizes remedies such as disgorgement, *FTC v. Neovi, Inc.*, 604 F.3d 1150, 1159-60 (9th Cir. 2010), which "is monetary relief," FTC Chair Keynote, *supra* note 1, at 8. In any event, fair notice applies even absent monetary relief. *See, e.g., Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1333 (9th Cir. 1982) (nonfinal cease order); *U.S. v. AMC Entm't, Inc.*, 549 F.3d 760, 762 (9th Cir. 2008)

[4] To this point, the FTC does not cite the Complaint when they say "[t]he Complaint alleges facts that establish that consumers could not reasonably avoid the likely substantial injury both *before* and *after* their devices were hacked." Op. 7 (emphasis in original). Nor do they address the FTC's public statements about steps consumers can take to secure their routers. *See* MTD 8 n.8.

(remedial order); *U.S. v. Approx. 64,695 Pounds of Shark Fins*, 520 F.3d 976, 977-78 (9th Cir. 2008) (forfeiture); *Trinity Broad. v. FCC*, 211 F.3d 618, 619, 628 (D.C. Cir. 2000) (license renewal); *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1351, 1355-56 (D.C. Cir. 1998) (car recall).

Importantly, D-Link Systems is not arguing that § 5, on its face, is unconstitutionally vague in all cases; instead, D-Link Systems is arguing that the FTC's *interpretation* of § 5, *as applied in this particular case*, fails to give fair notice. *See* MTD 10-11. Case law the FTC cites regarding the void-for-vagueness standard for finding statutes unconstitutional, *see* Op. 9,[5] is irrelevant to this as-applied due process claim. Also, the FTC omits mention of *Fang Lin Ai*'s recognition of an alternate test: "[O]r whether a person of ordinary intelligence could understand that the scheme requires payment of FICA taxes[.]" 809 F.3d at 514 (citation omitted)).

The FTC's efforts to distinguish (without pin cites) D-Link Systems's fair notice cases, *see* Op. 10 n.2, fail. For instance, the FTC states: "*Montgomery Ward & Co. v. FTC,* 691 F.2d 1322 (9th Cir. 1982) (monetary penalty)[.]" Op. 10 n.2. Not so. *Montgomery Ward* involved a petition for review of a nonfinal FTC administrative cease-and-desist order. *See* 691 F.2d at 1333 ("a cease and desist order leads only to future sanctions"). Monetary penalties are only available for violations of final cease orders after any petition for review is denied. *See* 15 U.S.C. §§ 45(c), (g), (m)-(l). In any event, more severe sanctions (including imprisonment) are available for violations of § 13(b) injunctions. *See FTC v. Neovi, Inc.*, No. 06-CV-1952 JLS (JMA), 2012 U.S. Dist. LEXIS 96182, at *2-8, *36-42 (S.D. Cal. July 11, 2012) (noting availability of imprisonment; imposing $100,000-plus sanctions). *Cf. Ga. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1001, 1003-04 (11th Cir. 1994) (applying ascertainable certainty standard to $480 administrative citation).

The FTC's attempt to distinguish case law the FTC says involved "an abrupt change in the law," Op. 10 n.2, fails on the facts and law.[6] Tellingly, the FTC does not state *when* (*or how*) it

[5] *See Fang Lin Ai v. U.S.*, 809 F.3d 503, 514 (9th Cir. 2015) (rejecting argument that "because the IRS has not explained consistently why FICA taxes apply to them, *the statutory scheme is unconstitutionally vague*" (emphasis added)); *Boutilier v. INS*, 387 U.S. 118, 118-19, 123 (1967) (addressing void-for-vagueness challenge to statutory provision governing entry of aliens into the U.S. that "imposes neither regulation of nor sanction for conduct").

[6] It is unclear where and how, if at all, *U.S. v. AMC Entm't, Inc.*, 549 F.3d 760 (9th Cir. 2008), *U.S. v. Approx. 64,695 Pounds of Shark Fins*, 520 F.3d 976, 979-83 (9th Cir. 2008), and (continued…)

first informed IoT businesses like D-Link Systems that it interpreted § 5 to (1) apply to businesses that sell routers and IP cameras; and (2) prohibit or require the data-security practices alleged in the Complaint. *See* Op. 9-10. *Cf*. *United States v*. *Jimenez*, 191 F. Supp. 3d 1038, *7 (N.D. Cal. 2016) ("In light of this record, the Government's task is to show that Jimenez had fair notice…." (citation omitted)). Nor does the FTC explain when or how it purportedly provided notice that it interprets § 5 to impose liability even absent allegations of an identifiable data breach.[7]

Although the FTC still refuses to specify the relevant time period for this Complaint, it argues that "whether any of DLS's unfair business practices pre-dated the FTC's IoT-specific settlements and reports is irrelevant to fair notice." Op. 10. The FTC's apparent argument that § 5's text, standing alone, provides fair notice of the FTC's interpretation of § 5 in *this* case confirms that *this* action violates due process, particularly since the FTC does not allege an identifiable data breach or actual harm. *Cf*. LabMD Initial Decision, 2015 FTC LEXIS 272, at *187-189 (§ 5(n) does not give fair notice "unreasonable" security alone *in vacuo* "unfair"); *FTC v*. *Wyndham Worldwide Corp*., 799 F.3d 236, 256 (3d Cir. 2015) (*second* identifiable breach source of notice).

E. Either "Unreasonableness" is an Element or This is an Abrupt Change

The FTC does not substantively address D-Link Systems's arguments regarding the requirements of "reasonableness," *compare* Op. 8, *with* MTD 8-9, instead arguing that this is not an element. Op. 8. But the FTC's Chief ALJ has suggested the opposite, with respect to the exact "January 16 Order" the FTC cites. *See* Initial Decision, 2015 FTC LEXIS 272, at *186 (January 16 Order "hold[s] that unfair conduct liability in the area of data security requires proof of unreasonable data security *and* actual or likely resulting injury" (emphasis added by ALJ)); *id*. at *104. This is also contrary to the theory of this Complaint. *See* Compl. ¶ 28 (alleging defendants "failed to take reasonable steps to secure the software"), and even to the (now stayed) LabMD Commission Opinion. *See* 2016 FTC LEXIS 128, at *30-31. Regardless, even if the FTC's

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(…continued)
Gen. *Elec*. *Co*. *v*. *EPA*, 53 F.3d 1324 (1995), indicate there was an "abrupt change in the law," *see* Op. 10 n.2 (no pin cites), let alone how this meaningfully differs from this case.

[7] Instead, they apparently suggest that the recent settlement and report D-Link Systems argued cannot provide fair notice, *see* MTD 11, "do not undermine the adequacy of the constitutional notice supplied by" the statute's text, *see* Op. 10.

argument were accepted, this would be (another) abrupt interpretive change violating due process.

F. Section 5(a) Requires More than "Negligence"

Contra FTC, Op. 9, D-Link Systems did not argue that § 5(a) requires "unscrupulousness," *see* MTD 9, arguing instead that § 5(a) should require something more than "negligence" (e.g., recklessness). *See* MTD 9; *see also LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1200 (11th Cir. 2010); *In re TJX Cos. Retail Sec. Breach Litig.*, 564 F.3d 489, 496-97 (1st Cir. 2009) (analyzing unfairness under state consumer protection statute, which incorporates "FTC criteria"). The FTC does not specifically address that argument. Nor did the Third Circuit meaningfully address it, suggesting it would not make a difference in *that* case but the question may be open. *See Wyndham*, 799 F.3d at 244-45. Finally, the FTC suggests that since it layered on "deception" claims, it met any additional requirements of § 5(a). *See* Op. 9. Once again, not so. This is contrary to the FTC's theory of "unfairness" in this Complaint. *See* Compl. ¶ 30 (citing ¶¶ 15-18).

G. The FTC Lacks Authority Here

The FTC's argument that "[t]he only exceptions to the FTC Act are explicitly statutory exceptions," Op. 11 n.3, has been rejected, *see ABA v. FTC*, 430 F.3d 457, 468-69 (2005). The FTC's inability to point to evidence Congress affirmatively intended to delegate *IoT data-security* authority to them confirms they lack jurisdiction, as underscored by § 5(n)'s purpose. *Cf. La. Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 374 (1986). The FTC cites legislative history from 1914 relating to the FTC's "unfair competition" powers, Op. 11, which predates the 1938 amendments prohibiting "unfair" practices, *see Wyndham*, 799 F.3d at 243, and is irrelevant. The FTC also ignores the legislative history of § 5(n), added in 1994, which it agrees established "a statutory limitation" on the FTC's "unfairness" powers, *see* Op. 8-9 (quoting S. Rep. 103-130, 12 (1993)).

The FTC's demands for deference, Op. 11 n.4, also fail. The Commission's Opinion in LabMD is stayed. *LabMD, Inc. v. FTC*, 2016 U.S. App. LEXIS 23559. The Eleventh Circuit previously suggested that the Commission's January 16 Order is a litigating position not entitled to deference. *See LabMD, Inc. v. FTC*, 776 F.3d 1275, 1278-79 & n.1 (11th Cir. 2015). The FTC's interpretation also warrants no deference because it violates due process. *See DeBartolo*, 485 U.S. at 573-75. *Cf. Emplr. Sols. Staffing Grp. II v. OCAHO*, 833 F.3d 480, 487-90 (5th Cir. 2016).

H. The FTC's "Deception" Claims Fail

Rule 9(b) applies because D-Link Systems stands accused of deceiving consumers. *See* Compl. ¶¶ 20-24, 31-45; *see also* Op. 7 ("DLS actively misrepresented the security of its devices."). That sounds in fraud under this Circuit's law. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (noting three purposes of 9(b)). The FTC does not identify a single in-Circuit case holding Rule 9(b) inapplicable, *see* Op.12, and does not dispute that this District has applied it to "deception" claims, and this Court has applied Rule 9(b) to analogous state-law claims, *cf.* MTD 4.

As *Moore v. Kayport Package Express*, 885 F.2d 531, 540-42 (9th Cir. 1989), illustrates, the FTC failed to properly plead all deception counts here. To begin, D-Link Systems cannot prepare an adequate answer, in part because all "deception" counts rely on paragraphs 15-18 of the Complaint (including the unspecified "press" reports addressed above, *cf. Walker*, 517 F. Supp. 2d at 805-07). The FTC does not dispute its failure to allege *which* models of IP cameras and routers it claims were allegedly unsecure and *when*, and whether the alleged advertisements corresponded to those specific products. *See* Op. 13-14; *see also* Compl. ¶¶ 15-18, 35, 38, 41, 44. *Contra* the FTC, Op. 14, the word "material" is absent from the Complaint, as is any explanation as to how or why the alleged representations were likely to affect choice of or conduct regarding the purchase or use of the products. Contrary to the FTC's claim, Op. 14, the FTC's theory of *this* case, with *these* exhibits, is such that this Court may properly determine that the alleged representations would not likely mislead a reasonable consumer in material ways affecting purchasing or use decisions. *Cf. Frenzel v. Aliphcom*, 76 F. Supp. 3d 999, 1010-15 (N.D. Cal. 2014) (dismissing case).

III. CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

Dated: February 21, 2017

Respectfully submitted,
PILLSBURY WINTHROP SHAW PITTMAN LLP

By: /s/ Laura C. Hurtado
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