

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
LabMD, Inc.,)
 a corporation,)
 Respondent.)
)
)
_____)

PUBLIC

Docket No. 9357

**COMPLAINT COUNSEL’S MOTION TO COMPEL RESPONSES
TO CERTAIN REQUESTS OF COMPLAINT COUNSEL’S FIRST
SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION**

Pursuant to Rule 3.38(a) of the Commission’s Rules of Practice, 16 C.F.R. § 3.38(a), Complaint Counsel respectfully moves the Court to compel Respondent LabMD, Inc., (“Respondent” or “LabMD”) to respond fully to several of Complaint Counsel’s discovery requests served October 24, 2013. Respondent has completely refused to respond to four of Complaint Counsel’s requests, citing specious and unsupported objections. LabMD has also limited its responses to five additional requests to the period 2007 to 2009, in contravention of the Court’s November 22, 2013 Order on Respondent’s Motion for a Protective Order. Each of the requests that Respondent refuses to answer is directly relevant to allegations that Respondent “failed to provide reasonable and appropriate security for personal information on its computer networks,” and that “Respondent could have corrected its security failures at relatively low cost using readily available security measures.” Compl. ¶¶ 10-11. LabMD has not satisfied its heavy burden of showing why the discovery requests at issue are improper. Complaint Counsel has conferred in good faith with Respondent in an effort to resolve the dispute, but has been unable to reach an agreement. *See* Meet & Confer Statement (attached as Exhibit A). Accordingly,

Complaint Counsel respectfully moves the Court for an Order requiring Respondent to respond fully to Complaint Counsel's Interrogatories 1, 2, and 9 and Document Requests 3, 4, 13, 21, 27, and 28 (collectively, the "Discovery Requests at Issue").

BACKGROUND

On October 24, 2013, Complaint Counsel served Respondent its First Set of Interrogatories (attached as Exhibit B) and First Set of Requests for Production of Documents (attached as Exhibit C), which seek information primarily for the period 2006 through 2010.¹ That same day, Complaint Counsel also served discovery on various third parties. LabMD moved for a protective order quashing the third party discovery, arguing, among other things, that discovery should be limited to the period 2005 through 2008—the period that LabMD contended was relevant to the Complaint. LabMD's Mot. Prot. Order at 7 (Nov. 5, 2013). On November 22, 2013, the Court entered its order denying, in large part, LabMD's motion ("November 22 Order"). The Court rejected Respondent's argument concerning the time period relevant to this action, upholding discovery seeking information from January 1, 2005 to present. *See* Nov. 22 Order at 7.

The deadline for Respondent's responses and objections to Complaint Counsel's First Set of Interrogatories and Requests for Production was three days later, on November 25, 2013. *See* 16 C.F.R. §§ 3.35(a)(2), 3.37(b). At LabMD's request, Complaint Counsel agreed to extend the deadline to November 27, 2013, the date on which LabMD served its written responses. *See*

¹ *See* Ex. B at 2, 7; Ex. C at 4, 12. The only exceptions are Interrogatory 9, which seeks information from May 2008 through December 2010, *see* Ex. B at 6, and Document Requests 12 and 13, which seek information from 2006 "through the present," Ex. C at 10.

LabMD's Resp. to Compl. Counsel's Interrogs. & Reqs. (attached as Exhibit D). In its written responses, LabMD refused to respond to several Interrogatories and Document Requests, including the Discovery Requests at Issue, objecting primarily on grounds that the requests were not reasonably calculated to lead to the discovery of admissible evidence.

Complaint Counsel conferred with Respondent's counsel on December 12, 17, 18, and 23, 2013 in an effort to resolve the disputes regarding Complaint Counsel's First Set of Interrogatories and Requests for Production. *See* Ex. A. During those conferences, LabMD agreed to respond to Interrogatories 1 and 2 and Document Requests 3, 4, and 27, but only for the period 2007 through 2009. *Id.* Respondent reiterated its refusal to respond to Interrogatory 9 and Document Requests 13, 21, and 28,² contending that they seek information not relevant to this action.

The Discovery Requests at Issue are directly relevant to the Complaint, which alleges that Respondent's information security practices were not reasonable and appropriate given the very sensitive information it maintained. Compl. ¶¶ 6-10. Respondent's information security practices included numerous fundamental security failures that put at risk consumers' sensitive personal information. Compl. ¶¶ 6-11, 17-21. Among other things, Respondent failed to:

- identify reasonably foreseeable risks to its networks, *id.* ¶ 10(b);
- adequately limit employees' access to only the personal information they needed to do their jobs, *id.* ¶ 10(c);

² During the parties' meet and confer sessions, Complaint Counsel proposed to narrow Document Request 21 as set forth in its December 19, 2013 letter (attached as Exhibit F). Complaint Counsel also proposed to narrow Document Request 28 to documents sufficient to show, on an annual basis, LabMD's revenues, profits, and IT-related expenditures. *See* Ex. A at 2. LabMD rejected these proposals and refused to respond to Document Requests 21 and 28.

- maintain and update computer operating systems, *id.* ¶ 10(f); and
- use readily available measures to prevent or detect unauthorized access to personal information on its networks, *id.* ¶ 10(g).

The Complaint further alleges that LabMD “could have corrected its security failures at relatively low cost using readily available security measures.” *Id.* ¶ 11. The security failures alleged in the Complaint created multiple avenues that could be exploited to obtain unauthorized access to personal information. One such avenue resulted in a LabMD file containing the sensitive personal information of approximately 9,300 consumers being shared to a public peer-to-peer (“P2P”) file sharing network, without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20. The security failures alleged in the Complaint began no later than 2005 and extended well after LabMD learned of its exposure of sensitive consumer data over P2P networks.

ARGUMENT

The Discovery Requests at Issue are “reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). The relevancy of a discovery request is determined by “laying the [request] along side the pleadings.” *In re Rambus Inc.*, No. 9302, 2002 WL 31868184, at *2 (F.T.C. Nov. 18, 2002) (internal quotation omitted). To object that discovery is outside the permissible scope, Respondent must “specifically detail the reasons why each interrogatory is irrelevant.” *Schaap v. Executive Indus., Inc.*, 130 F.R.D. 384, 386 (N.D. Ill. 1990). “Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at *2 (F.T.C. Jan. 2, 2009).

Respondent has failed to meet its burden of showing that the Discovery Requests at Issue seek information not relevant to this action. Further, LabMD is wrongfully withholding responsive materials in contravention of the Court's November 22 determination that discovery ranging from January 1, 2005 to the present is relevant to this action. The Court, therefore, should compel LabMD to respond fully to the Discovery Requests at Issue.

I. ASSESSMENTS OF LABMD'S SECURITY PRACTICES ARE RELEVANT TO THE REASONABLENESS OF THOSE PRACTICES AND DISCOVERABLE

In its November 22 Order, the Court ruled that "discovery into the nature of Respondent's computer network security . . . is relevant to whether Respondent failed to provide reasonable and appropriate security for personal information on its computer networks and thus is relevant to the allegations of the Complaint." Nov. 22 Order at 7. Document Request 13, to which LabMD refuses to respond, falls within that category: It seeks all internal and external assessments of LabMD's security practices. *See* Ex. C at 10. Such assessments may show the period over which particular vulnerabilities existed on Respondent's networks, when fixes were made available, and when the vulnerabilities were first identified to the IT industry, all of which are relevant to Paragraph 10 of the Complaint.

Nonetheless, Respondent objects that Document Request 13 seeks information irrelevant to the Complaint, without articulating any basis for its objection. *See* Ex. D at 9-10. It is the objecting party's burden to show that discovery is irrelevant, and LabMD has failed to do so. *See Schaap*, 130 F.R.D. at 386 (holding that objecting party must "specifically detail the reasons

why each interrogatory is irrelevant”). Accordingly, the Court should order LabMD to respond to Document Request 13.³

II. LABMD’S LIMITATION OF DISCOVERY RESPONSES TO 2007 TO 2009 DEFIES THE COURT’S NOVEMBER 22 ORDER

LabMD refuses to respond fully to Interrogatories 1 and 2 and Document Requests 3, 4, and 27, agreeing to respond only for the period 2007 through 2009. Because Interrogatories 1 and 2 and Document Requests 3, 4, and 27 seek information relevant to the Complaint, the Court should order LabMD to respond for the entire time period requested, 2006 through 2010.

Interrogatories 1 and 2 request identification of LabMD employees with access to personal information and the types of personal information to which each employee had access.⁴ This information is relevant to the allegation that LabMD failed to employ “adequate measures to prevent employees from accessing personal information not needed to perform their jobs.” Compl. ¶ 10(c). Document Requests 3 and 4 seek information relating to “purchasing, maintaining, servicing, updating, or replacing” software and hardware used on LabMD’s

³ To the extent Respondent argues that documents responsive to Document Request 13 are protected by a self-critical analysis privilege, Respondent has waived any such privilege as to Document Request 13 by not articulating a privilege objection. *See* 16 C.F.R. § 3.37(b); *Convertino v. U.S. Dep’t of Justice*, 565 F. Supp. 2d 10, 13 (D.D.C. 2008) (rejecting “general objections” incorporated by reference into document request responses). Even if such a privilege exists, it is not applicable here. *See, e.g., F.T.C. v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980) (rejecting application of self-evaluative privilege to documents sought by government agencies).

⁴ *See* Ex. B at 5. In its written response, Respondent objected to Interrogatories 1 and 2 as ambiguous and provided a nonresponsive answer. *See* Ex. D at 2-3. However, in subsequent meet and confers, Respondent agreed to answer both Interrogatories if Complaint Counsel clarified them, which Complaint Counsel did in a letter dated December 16, 2013 (attached as Exhibit E).

computer networks, *see* Ex. C at 9, which is relevant to the allegations in Paragraph 10 of the Complaint concerning LabMD's inadequate network security, particularly the allegation that LabMD failed to "maintain and update" computer operating systems. Compl. ¶ 10(f).

Document Request 27 seeks documents identifying "LabMD's expenditures for information technology products or services that relate to Security Practices." *See* Ex. C at 11. Such documents are relevant to the allegations concerning LabMD's inadequate network security, Compl. ¶ 10, as well as the allegation that LabMD "could have corrected its security failures at relatively low cost using readily available security measures," *id.* ¶ 11.

The Court's November 22 Order settled the question of the time period relevant to this action, and thus discovery: January 1, 2005 to the present. *See* Nov. 22 Order at 7. LabMD does not contest the relevancy of the subject matter of Interrogatories 1 and 2 and Document Requests 3, 4, and 27. Rather, it contends that any information outside the period 2007 through 2009 is irrelevant to this action, and that the November 22 Order applies only to the subpoenas that were the subject of LabMD's Motion for a Protective Order. This limitation is baseless and directly contrary to the November 22 Order. Accordingly, the Court should order LabMD to respond to Interrogatories 1 and 2 and Document Requests 3, 4, and 27 without limitation to the period 2007 through 2009.

III. THE COST OF SECURITY MEASURES IS RELEVANT

Interrogatory 9 and Document Request 28, as narrowed, seek information relevant to the Complaint's allegation that LabMD "could have corrected its security failures at relatively low cost using readily available security measures." Compl. ¶ 11. Specifically, Interrogatory 9 seeks, for each month from May 2008 through December 2010, the cost of any changes to

LabMD's Security Practices. *See* Ex. B at 6. Document Request 28, as narrowed, seeks documents sufficient to show LabMD's annual revenues, profits, and IT-related expenditures. *See* Ex. A at 2. This information is relevant to assessing the relative cost of available security measures that LabMD did not employ. *See* Compl. ¶ 11.

LabMD nonetheless refuses to respond to Interrogatory 9 and Document Request 28, contending, without support, that these requests seek information which is "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence." *See* Ex. D at 5, 14. Respondent has failed its burden of demonstrating why the discovery is not relevant. *See Schaap*, 130 F.R.D. at 386 (holding that objecting party must "specifically detail the reasons why each interrogatory is irrelevant"). Accordingly, the Court should order LabMD to respond to Interrogatory 9 and Document Request 28.

IV. FEDERAL RULE OF EVIDENCE 407 DOES NOT LIMIT DISCOVERY

LabMD further objects to Interrogatory 9—as well as Document Requests 3, 4, and 13—on grounds that they seek "inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct," citing Federal Rule of Evidence 407. Ex. D at 5-7, 9. This objection is meritless. Admissibility is not the standard for discoverability. To the contrary, the "admissibility of evidence is irrelevant in the discovery process so long as 'the information sought appears reasonably calculated to lead to the discovery of admissible evidence,'" as it does here. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1342 (5th Cir. 1978) (quoting Fed. R. Civ. P. 26(b)(1)). Moreover, Federal Rule of Evidence 407 has no analogue in the Commission's Rules of Practice, which feature a broad standard of admissibility. *See* 16 C.F.R. § 3.43(b) (admitting relevant, material, and reliable evidence, with no usage-based prohibitions such as character

evidence, settlement negotiations, subsequent remedial measures, liability insurance, etc.).

Accordingly, the Court should hold that Federal Rule of Evidence 407 does not limit discovery in this action and order LabMD to respond to Interrogatory 9 and Document Requests 3, 4, and 13.

V. CERTAIN LABMD PERSONNEL INFORMATION IS RELEVANT

Document Request 21, as narrowed, seeks the salaries, duties, and negative evaluations of the approximately 20 LabMD employees named on Complaint Counsel's Preliminary Witness List. *See* Ex. F at 1. Respondent, without support, objects that the requested information is irrelevant to this action. *See* Ex. D at 12. To the contrary, the employees' duties, salaries, and negative evaluations relate to the Complaint and LabMD's defenses. Duties relate to both the types of personal information that employees needed, and the skills that IT employees needed, to perform their jobs. *See* Compl. ¶ 10. Salaries relate to whether LabMD provided sufficient compensation to attract employees capable of performing their job duties. *See id.* And negative evaluations relate to Respondent's anticipated defense that employees who criticized LabMD's security practices were biased or poor performers. These are appropriate subjects for discovery. *See* 16 C.F.R. § 3.31(c)(1) (permitting discovery relevant to the complaint, proposed relief, or respondent's defenses). Thus, the Court should order LabMD to respond to Document Request 21.

CONCLUSION

For the foregoing reasons, the Court should grant Complaint Counsel's motion.

Dated: December 24, 2013

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
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Jarad Brown

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Complaint Counsel

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION TO COMPEL RESPONSES TO CERTAIN REQUESTS OF COMPLAINT COUNSEL’S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION

Upon consideration of Complaint Counsel’s Motion to Compel Responses to Certain Requests of Complaint Counsel’s First Set of Interrogatories and Requests for Production:

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent LabMD, Inc. (“Respondent”) shall provide full responses to Complaint Counsel’s Interrogatory 9 and Document Requests 3, 4, 13, and 27, within 10 days from issuance of this Order.

IT IS FURTHER ORDERED that Respondent shall provide full responses to Complaint Counsel’s Interrogatories 1 and 2, as clarified by Complaint Counsel’s letter dated December 16, 2013, within 10 days of issuance of this Order.

IT IS FURTHER ORDERED that Respondent shall produce all documents responsive to Complaint Counsel’s Document Request 21, as narrowed by Complaint Counsel’s letter dated December 19, 2013, within 10 days of issuance of this Order.

IT IS FURTHER ORDERED that Respondent shall produce, in response to Complaint Counsel's Document Request 28, documents sufficient to show, on an annual basis, LabMD's revenues, profits, and IT-related expenditures, within 10 days of issuance of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2013, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-113
Washington, DC 20580

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

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-110
Washington, DC 20580

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Respondent LabMD, Inc.

CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

December 24, 2013

By:



Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

**STATEMENT REGARDING MEET AND CONFER PURSUANT TO
RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Compel Responses to Certain Requests of Complaint Counsel’s First Set of Interrogatories and Requests for Production, Complaint Counsel met and conferred with counsel for Respondent, LabMD, Inc., (“Respondent” or “LabMD”) in a good faith effort to resolve by agreement the issues raised by the motion, and has been unable to reach an agreement.

Complaint Counsel conferred with counsel for Respondent by teleconference four times. First, on December 12, 2013 at 4 PM, Alain Sheer, Ryan Mehm, Jarad Brown, Laura Riposo VanDruff, and Megan Cox for Complaint Counsel conferred with William Sherman, II and Sunni Harris for Respondent. Next, on December 17, 2013 at 2 PM, Alain Sheer, Ryan Mehm, Margaret Lassack, Jarad Brown, and John Krebs for Complaint Counsel conferred with William Sherman, II and Sunni Harris for Respondent. Then on December 18, 2013 at 2 PM, Alain Sheer, Margaret Lassack, Laura Riposo VanDruff, Jarad Brown, and John Krebs conferred with William Sherman, II, Sunni Harris, and Reed Rubinstein for Respondent. Finally on December

23, 2013 at 1:30 PM, Alain Sheer, Margaret Lassack, Laura Riposo VanDruff, John Krebs, and Jarad Brown for Complaint Counsel conferred with William Sherman, II for Respondent.

At LabMD's request, Complaint Counsel agreed to clarify Interrogatories 1 and 2, and submitted its clarification in a letter dated December 16, 2013 (Exhibit E). Respondent replied in a December 17, 2013 letter (Exhibit G), agreeing to answer Interrogatories 1 and 2, as clarified, but stating that it would respond only "for the time period of 2007 through June 2009." Complaint Counsel did not agree to the time-period limitation.

Respondent informed Complaint Counsel that it intended to produce documents in response to Document Requests 3, 4, and 27, to which it had wholly objected in its November 27, 2013 written response, but that Respondent would limit its production to responsive documents for the period 2007 through 2009. Complaint Counsel did not agree to the time-period limitation.

Complaint Counsel and Respondent discussed narrowing Document Request 21, as proposed in Complaint Counsel's December 19, 2013 letter (Exhibit F), but were unable to reach agreement. Respondent stated that it intends to stand on its relevance objection. Complaint Counsel also proposed narrowing Document Requests 28 to "documents sufficient to show LabMD's annual revenue, profit, and IT expenditures," but counsel for Respondent rejected this proposal and stated that Respondent intends to stand on its relevance objection.

For all other Interrogatories and Document Requests, counsel for Respondent informed
Complaint Counsel that Respondent intends to stand on its objections.

Dated: December 24, 2013

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
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Complaint Counsel

Exhibit B

7. “Or” as well as “and” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any Interrogatory all information that otherwise might be construed to be outside the scope.
8. “Person” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity, including the Company.
9. “Personal Information” means individually identifiable information from or about a Consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
10. The terms “Relate” or “Relating to” mean in whole or in part discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
11. “Security Incident” means any instance of attempted or actual unauthorized access to or unauthorized disclosure of Personal Information maintained by or for LabMD.
12. “Security Practices” mean formal or informal policies, standards, guidelines, mechanisms, practices, defenses, or measures related to preventing or detecting Security Incidents, including: protecting Consumers’ Personal Information; assessing security risks on computer networks; preventing employees from accessing Personal Information not needed to perform their jobs; training employees to safeguard Personal Information; authenticating users to computer networks; maintaining and updating the operating systems of computers and other devices on computer networks; or employing measures to prevent or detect unauthorized access to Personal Information on computer networks.
13. “You” or “your” means LabMD.
14. The use of the singular includes the plural, and the plural includes the singular.
15. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
16. The spelling of a name shall be construed to include all similar variants thereof.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by an Interrogatory shall be limited to the period from **January 1, 2006 to December 31, 2010.**

2. **Interrogatory Responses:** Provide a separate and complete sworn response for each Interrogatory and subpart. Preceding each response, the Interrogatory shall be set forth in full.
3. **Available Information:** These Interrogatories seek answers based on information or knowledge in your possession, custody, or control, including information reasonably available to you and your agents, attorneys, or representatives.
4. **Referencing Documents in Interrogatory Responses:** To the extent that an Interrogatory may be answered by referencing a document, it is permissible to attach the document as an exhibit to the answer and refer to the document in the answer. If any such document contains more than one page, you must refer to the page and section where the relevant reference(s) can be found. 16 C.F.R. § 3.35(c).
5. **Interpreting Interrogatories:** If, in answering any of the Interrogatories, you claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in your response the language you consider to be ambiguous and state the interpretation you are using in responding.
6. **Incomplete Responses:** State if you are unable to answer any of the Interrogatories fully and completely and after exercising due diligence to secure the information necessary to make full and complete responses. Specify the reason(s) for your inability to answer any portion or aspect of such Interrogatory. For each Interrogatory that cannot be answered in full, describe the efforts made to locate information needed for such answer.
7. **Objections:** All objections to any Interrogatory must be raised in your initial response or will be waived. If you object to any Interrogatory or a part of any Interrogatory, state with specificity the precise grounds upon which you rely so that the Administrative Law Judge or other administrative or judicial entity may determine the legal sufficiency of your objection, and provide the most responsive information you are willing to provide without an order compelling response(s).
8. **Claims of Privilege:** If you object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged or immune from production based on any similar claim, provide, not later than the date set for responses, a schedule that describes the nature of the applicable privilege(s) or similar claim(s), including all information required by 16 C.F.R. §3.38A, in a manner that will enable Complaint Counsel to assess the claim(s).
9. **Continuing Nature of Requests:** These Interrogatories are continuing and require prompt amendment of any prior response if you learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. 16 C.F.R. § 3.31(e).

10. **Failure to Respond:** You are hereby advised that Complaint Counsel will move to preclude you from presenting evidence regarding responsive matters you fail to set forth in your answers to these Interrogatories.

11. **Questions:** Any questions you have relating to the scope or meaning of anything in these Interrogatories or suggestions for possible modifications thereto should be directed to Laura Riposo VanDruff at (202) 326-2999. Documents produced in conjunction with Interrogatory responses shall be addressed to the attention of Matthew Smith, Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, DC 20001, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission.

INTERROGATORIES

1. Identify by name and job title all Persons with authority from LabMD to access Personal Information regarding Consumers, including, but not limited to, Persons who performed tasks related to billing by LabMD for services provided.
2. For each Person identified in response to Interrogatory No. 1, state the types of Personal Information that the Person had authority to access.
3. Identify all file sharing applications downloaded to or installed on any LabMD computer, stating for each when the application was downloaded or installed, what version(s) were downloaded or installed, to which computer(s) the applications were downloaded or installed, and when the applications were updated.
4. Identify each inquiry or investigation by a state or federal agency regarding LabMD's Security Practices.
5. Describe each Security Incident not previously disclosed to the Commission or its staff. Include in your description the dates and circumstances of the Security Incident; the types and volumes of Personal Information accessed or disclosed; and the names and addresses of all Consumers whose Personal Information was accessed or disclosed.
6. For each each substantially different Communication from LabMD to Consumers relating to any Security Incident, describe how LabMD developed the list of Consumers to whom the Communication was directed.
7. State the names and addresses of all Consumers who requested credit monitoring services after receiving a Communication from LabMD related to any Security Incident.
8. State, as a percentage of the total number of Consumers whose samples LabMD has tested, the proportion of Consumers who:
 - a. Are uninsured;
 - b. Have commercial health insurance;
 - c. Have Medicare; and
 - d. Have Medicaid.

9. For each month beginning in May 2008, state the cost of any changes to made LabMD's Security Practices.

October 24, 2013

By: 

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

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CERTIFICATE OF SERVICE

This is to certify that on October 24, 2013, I served *via* electronic mail delivery a copy of the foregoing document to:

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Counsel for Respondent LabMD, Inc.

October 24, 2013

By:



Matthew Smith
Federal Trade Commission
Bureau of Consumer Protection

Exhibit C

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)		
)		
LabMD, Inc.,)	DOCKET NO. 9357	
a corporation.)		
)		
)		

**COMPLAINT COUNSEL’S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO RESPONDENT
(NUMBERS 1-28)**

Pursuant to the Federal Trade Commission’s Rule of Practice § 3.37, 16 C.F.R. § 3.37, and the Court’s Scheduling Order, dated October 22, 2013, Complaint Counsel requests that Respondent produce the documentary materials identified below for inspection and copying within thirty (30) days at the Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, DC 20001.

DEFINITIONS

1. “**All Documents**” means each Document, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all Documents possessed by: (a) you, including Documents stored in any personal or non-Corporate Respondent electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such Documents by request or which you have a legal right to bring within your possession by demand.
2. “**Communication**” includes any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished. Examples of Communications include all discussions, meetings, telephone conversations, letters, memoranda, and electronic mail.
3. “**Consumer**” means a natural person.
4. “**Containing**” means containing, describing, or interpreting in whole or in part.
5. “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of

every type and description, however and by whomever prepared, produced, disseminated or made, including any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, screen shot, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book, or label. **“Document”** shall also include electronically stored information (“ESI”). ESI means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

6. **“Documents Sufficient to Show”** means both Documents that are necessary and Documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying Documents.
7. **“Each,” “any,” and “all”** shall be construed to have the broadest meaning whenever necessary to bring within the scope of any request for production all Documents that might otherwise be construed to be outside its scope.
8. **“Includes” or “including”** means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any request for production.
9. **“LabMD,” “Company,” or “Respondent”** means Respondent LabMD, Inc., its directors, officers, employees, attorneys, accountants, independent contractors, consultants, agents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures.
10. **“LabMD IT Contractors”** means all contractors or vendors, consulted or retained by LabMD, providing products or services related to Security Practices, including the following: Automated PC Technologies, Inc.; Brian Bissel; Gary Clark; Cypress Communications, Inc.; Managed Data Solutions; ProviDyn, Inc.; Trend Micro Inc.; and Traincor.
11. **“LabMD IT Staff”** means all information technology employees of LabMD, including the following: Brandon Bradley, Matt Bureau, Jeremy Dooley, Nicole Elliott, Pat Howard, Robert Hyer, Curt Kaloustian, Chris Maire, Jeff Martin, Jennifer Parr, Alison Simmons, and Denise Vincent.

12. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any request for production all Documents that otherwise might be construed to be outside its scope.
13. “**P2P Application**” means any peer-to-peer file sharing application, including LimeWire and Napster.
14. “**P2P Network**” means computers using compatible P2P Applications.
15. “**Person**” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity, including the Company.
16. “**Personal Information**” means individually identifiable information from or about a Consumer including: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
17. “**Relate**” or “**Relating to**” means in whole or in part discussing, implementing, testing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.
18. “**Security Incident**” means any instance of attempted or actual unauthorized access to or unauthorized disclosure of Personal Information maintained by or for LabMD.
19. “**Security Practices**” mean formal or informal policies, standards, guidelines, mechanisms, practices, defenses, or measures related to preventing or detecting Security Incidents, including: protecting Consumers’ Personal Information; assessing security risks on computer networks; preventing employees from accessing Personal Information not needed to perform their jobs; training employees to safeguard Personal Information; authenticating users to computer networks; maintaining and updating the operating systems of computers and other devices on computer networks; or employing measures to prevent or detect unauthorized access to Personal Information on computer networks.
20. “**Tiversa**” means Tiversa Holding Corporation, and its wholly or partially owned subsidiaries, and all directors, officers, and employees of the foregoing.
21. “**You**” or “**your**” means LabMD.
22. The use of the singular includes the plural, and the plural includes the singular.
23. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by a request for production shall be limited to the period from **January 1, 2006 to December 31, 2010**.
2. **Prior Productions:** If any Documents responsive to a request previously have been supplied to the Commission, you may comply with the request by identifying the Document(s) previously provided by Bates number and the date(s) of submission.
3. **Document Identification:** Documents that may be responsive to more than one request need not be submitted more than once. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if Documents are removed from their original folder, binders, covers, containers, or electronic source in order to be produced, then the Documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such Documents came. In addition, number by page (or file, for those Documents produced in native electronic format) all Documents in your submissions with a unique Bates identifier, and indicate the total number of Documents in your submission.
4. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original Documents, provided that the originals are retained in their state at the time of receipt of this First Set of Requests for Production of Documents. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original Documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original Documents and produce them to Commission staff upon request. Copies of materials shall be produced in color if necessary to interpret them or render them intelligible.
5. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact Complaint Counsel before sending those materials to discuss ways to protect such information during production. For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental

health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

6. **Scope of Search:** These requests relate to Documents that are in your possession or under your actual or constructive custody or control, including Documents and information in the possession, custody, or control of your directors, officers, employees, attorneys, accountants, independent contractors, consultants, agents, predecessors, divisions, subsidiaries, affiliates, partnerships, and joint ventures, whether or not such Documents were received from or disseminated to any other person or entity.
7. **Claims of Privilege:** Pursuant to the Federal Trade Commission's Rule of Practice 3.38A, 16 C.F.R. § 3.38A, if any Documents are withheld from production based on a claim of privilege or any similar claim, Respondent shall provide, not later than the date set for production of materials, a schedule that describes the nature of the Documents, Communications, or tangible things not produced or disclosed in a manner that will enable Complaint Counsel to assess the claim of privilege. The schedule shall state individually for each item withheld: (a) the document control number(s); (b) the full title (if the withheld material is a Document) and the full file name (if the withheld material is in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the Document, from which and to which each Document was sent; (g) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; (j) the factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive Document is privileged, all non-privileged portions of the Document must be produced.
8. **Continuing Nature of Requests:** These requests for production shall be deemed continuing in nature so as to require production of all Documents responsive to any specification included in these requests promptly upon obtaining or discovering different, new, or further information prior to the close of discovery.
9. **Electronic Submission of Documents:** The following guidelines refer to the production of any Electronically Stored Information ("ESI") or digitally imaged hard copy Documents. Before submitting any electronic production, you must confirm with the Complaint Counsel named above that the proposed formats and media types will be

acceptable to the Commission. The FTC requests Concordance load-ready electronic productions, including DAT and OPT load files.

- (1) **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:
 - (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;
 - (b) All ESI other than those Documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (OCR) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (TIFF) or as color JPEG images (where color is necessary to interpret the contents);
 - (c) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.
- (2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These Documents should be true, correct, and complete copies of the original Documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:
 - (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original Document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible;

- (3) For each Document electronically submitted to the FTC, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) **For electronic mail:** begin Bates or unique document identification number (“DocID”), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (AttachIDs) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) **For email attachments:** begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) **For loose electronic Documents (as retrieved directly from network file stores, hard drives, etc.):** begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (d) **For imaged hard copy Documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the Document as maintained in the ordinary course of business.
- (4) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact the Complaint Counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to these requests.
- (5) Submit electronic productions as follows:
- (a) With passwords or other document-level encryption removed or otherwise provided to the FTC;
 - (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;
 - (c) All electronic media shall be scanned for and free of viruses;

- (d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC.
- (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA – DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

- (6) All electronic files and images shall be accompanied by a production transmittal letter which includes:
 - (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
 - (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's Documents and, if submitted in paper form, the box number containing such Documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that the Complaint Counsel named above determines prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Complaint Counsel named above will provide a sample index upon request.

We have included a Bureau of Consumer Protection Production Guide as Exhibit A. This guide provides detailed directions on how to comply fully with this instruction.

- 10. **Documents No Longer In Existence:** If Documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy but the Respondent has reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the Documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such Documents.
- 11. **Failure to Respond:** You are hereby advised that Complaint Counsel will move to preclude you from presenting evidence regarding responsive matters you fail to set forth in your answers to these Requests for Production.
- 12. **Questions:** Any questions you have relating to the scope or meaning of anything in these requests or suggestions for possible modifications thereto should be directed to Laura

Riposo VanDruff at (202) 326-2999. Documents responsive to the request shall be addressed to the attention of Matthew Smith, Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, DC 20001, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission.

REQUESTS

Produce the following:

1. All Documents LabMD received from Tiversa.
2. All Documents LabMD provided to Tiversa.
3. All Documents relating to purchasing, maintaining, servicing, updating, or replacing software used on LabMD's computer networks, including operating system software, data backup software, database software, billing and invoicing software, antivirus software, patching software, or software relating to computer security.
4. All Documents relating to purchasing, maintaining, servicing, updating, or replacing hardware used on LabMD's computer networks, including servers, computers, firewalls, routers, or switches.
5. All Documents relating to "walk around" or manual inspections, conducted by LabMD IT Staff, LabMD IT Contractors, or LabMD management, of computers and other hardware on or with access to LabMD's computer networks.
6. All Documents created by LabMD IT Staff or for LabMD that depict or otherwise represent LabMD's computer networks' architecture or topology, including detailed blueprints or schematics.
7. All emails between LabMD IT Staff and Michael Daugherty or John Boyle relating to Security Practices.
8. All Communications between Michael Daugherty or John Boyle and LabMD IT Contractors relating to Security Practices.
9. All Documents relating to LabMD's Security Practices regarding accessing LabMD's computer network from remote locations, including policies or procedures relating to the use of LabMD laptop computers.
10. All Documents relating to searches of P2P Networks for LabMD documents, including the results of such searches.
11. All Documents contained in folders for sharing on LabMD computers running one or more P2P Applications, including folders designated by the LimeWire or Napster applications installed on Rosalind Woodson's computer.

12. For the period from January 1, 2006 through the present, Documents Sufficient to Show the dates and circumstances of any Security Incident(s) not previously disclosed to the Commission or its staff, including Documents Sufficient to Show the types and volumes of Personal Information accessed or disclosed during the incident(s) and the identity of all individuals whose Personal Information was accessed or disclosed.
13. For the period from January 1, 2006 through the present, all internal and external assessments of LabMD's Security Practices, including formal and informal audits, evaluations, or reviews, and reports assessing whether the Security Practices comply with federal or state law.
14. All Documents related to information provided by LabMD to the Sandy Springs, Georgia Police Department, including Officer David Lapides.
15. All Documents related to LabMD's Security Practices provided by or for LabMD to Visa Inc., MasterCard Worldwide, U.S. Bank National Association, ND, Elavon, Inc., or any of their subsidiaries, or any other financial institution that provides services to LabMD relating to the processing of credit or debit card transactions, including PCI DSS self-assessment questionnaires, assessments by qualified security assessors, Attestations of Compliance with PCI DSS, or any Reports on Compliance.
16. All Documents relating to Communications with Consumers regarding any Security Incident(s), including each substantially different Communication from LabMD to Consumers, all records of calls received by LabMD's Notification Hotline, all emails received at the address NotificationHotline@labmd.org, and all letters received at LabMD's Letter Notification Department.
17. For each substantially different Communication from LabMD to Consumers relating to any Security Incident(s), Documents Sufficient to Show every Consumer to whom LabMD directed the Communication.
18. All Documents relating to Communications with LabMD's referring physicians or other health care professionals regarding any Security Incident(s), including each substantially different Communication from LabMD to LabMD's referring physicians or other health care professionals.
19. For each substantially different Communication from LabMD to referring physicians or other health care professionals, Documents Sufficient to Show every referring physician or health care professional to whom LabMD directed the Communication.
20. All Communications with the United States Department of Health and Human Services relating to LabMD's Security Practices, including all Communications relating to any Security Incidents.

21. All Documents, including personnel files, relating to the duties, compensation, performance, productivity, or compliance with LabMD policies of each current and former LabMD employee.
22. All confidentiality agreements executed by current and former LabMD employees.
23. All Statements of Understanding of and Compliance with LabMD's Ethics Policy and Employment Policy executed by LabMD current and former employees.
24. All contracts between LabMD and its referring physicians.
25. All contracts between LabMD and health insurance providers.
26. Documents Sufficient to Show the extent to which actual or allowable reimbursements to LabMD by government and private health insurance providers equal, exceed, or are less than charges submitted by LabMD to health insurance providers.
27. Documents Sufficient to Show all of LabMD's expenditures for information technology products or services that relate to Security Practices.
28. All financial statements, budgets, and other financial reports regularly prepared by or for LabMD, including operating statements, balance sheets, income statements, profit and loss statements, cost center reports, and statements of earnings.

October 24, 2013

By: 

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2999 (VanDruff)
Facsimile: (202) 326-3062
Electronic mail: lvandruff@ftc.gov

CERTIFICATE OF SERVICE

This is to certify that on October 24, 2013, I served *via* electronic mail delivery a copy of the foregoing document to:

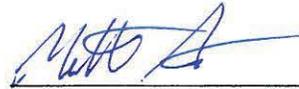
Michael D. Pepson
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Cause of Action
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michael.pepson@causeofaction.org

Reed Rubinstein
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801 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20004
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Counsel for Respondent LabMD, Inc.

October 24, 2013

By:



Matthew Smith
Federal Trade Commission
Bureau of Consumer Protection

Exhibit D

4. Respondent objects to the Discovery Requests to the extent they seek a legal conclusion.

5. Respondent objects to the Discovery Requests to the extent they seek information and/or documents that are contained in or are part of the public record and readily obtainable by Complaint Counsel.

6. Respondent reserves all rights to object to the competency, relevancy, materiality and/or admissibility of the information and/or documents disclosed in response to the Discovery Requests.

7. Respondent hereby incorporates these General Objections into each of the Responses herein, and failure to include each such General Objection in response to each Discovery Requests shall not waive LabMD's objections in this regard.

INTERROGATORIES

1. Identify by name and job title all Persons with authority from LabMD to access Personal Information regarding Consumers, including, but not limited to, Persons who performed tasks related to billing by LabMD for services provided.

Answer: Respondent objects to this Interrogatory to the extent that it is vague and ambiguous and seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Specifically, Complaint Counsel's use of the phrase "authority from LabMD to access" is ambiguous. Without waiving these objections and/or the foregoing General Objections, Respondent states that all LabMD employees could gain knowledge of Personal Information regarding Consumers to the extent it was necessary to the performance of their job duties.

2. For each Person identified in response to Interrogatory No. 1, state the types of Personal Information that the Person had authority to access.

Answer: Respondent objects to this Interrogatory to the extent that it is vague and ambiguous and seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Specifically, Complaint Counsel's use of the phrase "authority to access" is ambiguous. Without waiving these objections and/or the foregoing General Objections, Respondent states that all employees could gain knowledge of any Personal Information regarding Consumers to the extent it was necessary to the performance of their job duties.

3. Identify all file sharing applications downloaded to or installed on any LabMD computer, stating for each when the application was downloaded or installed, what version(s) were downloaded or installed, to which computer(s) the applications were downloaded or installed, and when the applications were updated.

Answer: Respondent objects to this Interrogatory to the extent that it seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states that upon information and belief that the LimeWire sharing application was the only file sharing application downloaded to one of LabMD's computers used by its billing manager in or about 2005. Respondent does not know what version of the Lime Wire sharing application was downloaded.

4. Identify each inquiry or investigation by a state or federal agency regarding LabMD's Security Practices.

Answer: Respondent objects to this Interrogatory to the extent that it seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. There is an ongoing FTC investigation and civil action involving Respondent's Security Practices. Respondent is not aware of any other inquiries or investigations.

5. Describe each Security Incident not previously disclosed to the Commission or its staff. Include in your description the dates and circumstances of the Security Incident; the types and volumes of Personal Information accessed or disclosed; and the names and addresses of all Consumers whose Personal Information was accessed or disclosed.

Answer: There are no undisclosed Security Incidents to report.

6. For each substantially different Communication from LabMD to Consumers relating to any Security Incident, describe how LabMD developed the list of Consumers to whom the Communication was directed.

Answer: Respondent objects to this Interrogatory to the extent that it is vague and ambiguous and seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Specifically, Complaint Counsel's use of the phrase "substantially different communication" is ambiguous and nonsensical as it lacks reference to a comparative communication. Without waiving these objections and/or the foregoing General Objections, and to the extent Respondent understands the interrogatory, Respondent states that it mailed two separate communications to Consumers regarding the Sacramento Incident. The consumers were identified by using the numbers located on the Daily Sheets and comparing that information with corresponding information in Respondent's possession.

7. State the names and addresses of all Consumers who requested credit monitoring services after receiving a Communication from LabMD related to any Security Incident.

Answer: Respondent objects to this Interrogatory to the extent that it seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, and pursuant to 16 C.F.R. 3.35(c), Respondent will produce a list responsive to this request in its document production.

8. State, as a percentage of the total number of Consumers whose samples LabMD has tested, the proportion of Consumers who:

- a. Are uninsured;
- b. Have commercial health insurance;
- c. Have Medicare; and
- d. Have Medicaid.

Answer: Respondent objects to this Interrogatory to the extent that it seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

9. For each month beginning in May 2008, state the cost of any changes to made LabMD's Security Practices.

Answer: Respondent objects to this Interrogatory to the extent that it seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this Interrogatory to the extent that it seeks inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct. *See Fed. R. Evid. 407*

DOCUMENT REQUESTS

To the extent LabMD has previously produced to Complaint Counsel documents

responsive to these document requests it will state so in its responses hereto. LabMD will not designate for Complaint Counsel those items previously produce by bates number as requested in the instruction to these document requests. There is no obligation under the Commission Rules or the Federal Rules of Civil Procedure that requires one party to create documents for the convenience of the other during discovery. The request that LabMD do so is unduly burdensome on the staff and resources of LabMD.

1. All Documents LabMD received from Tiversa.

Response: Respondent states it has previously produced the requested information in hard-copy form, but will further supplement its production by producing responsive e-mails in an electronic format.

2. All Documents LabMD provided to Tiversa.

Response: See Response to Request No. 1.

3. All Documents relating to purchasing, maintaining, servicing, updating, or replacing software used on LabMD's computer networks, including operating system software, data backup software, database software, billing and invoicing software, antivirus software, patching software, or software relating to computer security.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; not reasonably limited in time or scope; inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct pursuant to Fed. R. Evid. 407; overly broad, and unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent states that it has previously produced its data use policy procedures, handbooks, and sample scanbooks. Respondent further states that it will produce documents responsive to this

request related to its system software, limited to that which was in place at the time of the alleged security breach.

4. All Documents relating to purchasing, maintaining, servicing, updating, or replacing hardware used on LabMD's computer networks, including servers, computers, firewalls, routers, or switches.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; not reasonably limited in time or scope; inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct pursuant to Fed. R. Evid. 407; overly broad, and unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent states that it will produce documents responsive to this request limited to that which was in place at the time of the alleged security breach.

5. All Documents relating to "walk around" or manual inspections, conducted by LabMD IT Staff, LabMD IT Contractors, or LabMD management, of computers and other hardware on or with access to LabMD's computer networks.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct pursuant to Fed. R. Evid. 407; overly broad, and unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent states that it has previously produced the requested information.

6. All Documents created by LabMD IT Staff or for LabMD that depict or otherwise

represent LabMD's computer networks' architecture or topology, including detailed blueprints or schematics.

Response: See objections and Response to Request No. 5.

7. All emails between LabMD IT Staff and Michael Daugherty or John Boyle relating to Security Practices.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct pursuant to Fed. R. Evid. 407; protected by attorney-client privilege; protected by the work-product doctrine; overly broad, and unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent states that it has previously produced the requested information in hard copy form, but will further supplement its production by producing responsive e-mails in an electronic format.

8. All Communications between Michael Daugherty or John Boyle and LabMD IT Contractors relating to Security Practices.

Response: See objections and Response to Request No. 7.

9. All Documents relating to LabMD's Security Practices regarding accessing LabMD's computer network from remote locations, including policies or procedures relating to the use of LabMD laptop computers.

Response: See objections and Response to Request No. 5.

10. All Documents relating to searches of P2P Networks for LabMD documents, including the results of such searches.

Response: Respondent states that it does not possess any such documents.

11. All Documents contained in folders for sharing on LabMD computers running one or more P2P Applications, including folders designated by the LimeWire or Napster applications installed on Rosalind Woodson's computer.

Response: Respondent objects to this Request to the extent that it assumes that LabMD maintained documents in folders for sharing on its computers that were running P2P Applications and to the extent it suggests that LABMD was aware that any of its computers were running P2P Applications. Without waiving these objections and/or the foregoing General Objections, Respondent states that it has previously produced screenshots of all known shared documents.

12. For the period from January 1, 2006 through the present, Documents Sufficient to Show the dates and circumstances of any Security Incident(s) not previously disclosed to the Commission or its staff, including Documents Sufficient to Show the types and volumes of Personal Information accessed or disclosed during the incident(s) and the identity of all individuals whose Personal Information was accessed or disclosed.

Response: Respondent states that there are no such Security Incidents to report.

13. For the period from January 1, 2006 through the present, all internal and external assessments of LabMD's Security Practices, including formal and informal audits, evaluations, or reviews, and reports assessing whether the Security Practices comply with federal or state law.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; not reasonably limited in time or scope; inadmissible evidence of subsequent remedial measures to prove negligence or culpable conduct pursuant to Fed. R. Evid. 407, overly broad, and unduly

burdensome.

14. All Documents related to information provided by LabMD to the Sandy Springs, Georgia Police Department, including Officer David Lapidés.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent states that it has previously produced the requested information.

15. All Documents related to LabMD's Security Practices provided by or for LabMD to Visa Inc., MasterCard Worldwide, U.S. Bank National Association, ND, Elavon, Inc., or any of their subsidiaries, or any other financial institution that provides services to LabMD relating to the processing of credit or debit card transactions, including PCI DSS self- assessment questionnaires, assessments by qualified security assessors, Attestations of Compliance with PCI DSS, or any Reports on Compliance.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome. No such documents exist.

16. All Documents relating to Communications with Consumers regarding any Security Incident(s), including each substantially different Communication from LabMD to Consumers, all records of calls received by LabMD's Notification Hotline, all emails received at the address NotificationHotline@labmd.org, and all letters received at LabMD's Letter Notification Department.

Response: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence

and to the extent that the phrase, “substantially different communication” is nonsensical as it lacks reference to a comparative communication. Without waiving these objections and/or the foregoing General Objections, Respondent states that it will produce responsive documents to the extent that they exist.

17. For each substantially different Communication from LabMD to Consumers relating to any Security Incident(s), Documents Sufficient to Show every Consumer to whom LabMD directed the Communication.

Response: Respondent objects to this Request to the extent that the phrase, “substantially different communication” is nonsensical as it lacks reference to a comparative communication. Without waiving these objections and/or the foregoing General Objections, and to the extent Respondent understands this Request, Respondent will produce the letters referenced in Interrogatory No. 6.

18. All Documents relating to Communications with LabMD's referring physicians or other health care professionals regarding any Security Incident(s), including each substantially different Communication from LabMD to LabMD's referring physicians or other health care professionals.

Response: Respondent objects to this Request to the extent that the phrase, “substantially different communication” is nonsensical as it lacks reference to a comparative communication. Without waiving these objections and/or the foregoing General Objections, and to the extent Respondent understands this Request, Respondent will produce responsive documents.

19. For each substantially different Communication from LabMD to referring physicians or other health care professionals, Documents Sufficient to Show every referring

physician or health care professional to whom LabMD directed the Communication.

Response: See Response to Request No. 18.

20. All Communications with the United States Department of Health and Human Services relating to LabMD's Security Practices, including all Communications relating to any Security Incidents.

Response: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states that it will produce responsive documents to the extent that they exist.

21. All Documents, including personnel files, relating to the duties, compensation, performance, productivity, or compliance with LabMD policies of each current and former LabMD employee.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome and only seeks to harass and annoy Respondent and its current and former employees.

22. All confidentiality agreements executed by current and former LabMD employees.

Response: Respondent states that it has previously produced its employee handbooks and will produce all confidentiality agreements between LabMD and its current and former employees.

23. All Statements of Understanding of and Compliance with LabMD's Ethics Policy and Employment Policy executed by LabMD current and former employees.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent states that it has previously produced the requested information.

24. All contracts between LabMD and its referring physicians.

Response: Respondent objects to this Request to the extent that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome and only seeks to harass and annoy Respondent and its referring physicians. Without waiving these objections and/or the foregoing General Objections, Respondent states that no such documents exist.

25. All contracts between LabMD and health insurance providers.

Response: Respondent objects to this Request on the grounds that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome.

26. Documents Sufficient to Show the extent to which actual or allowable reimbursements to LabMD by government and private health insurance providers equal, exceed, or are less than charges submitted by LabMD to health insurance providers.

Response: Respondent objects to this Request on the grounds that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome and only seeks to harass and annoy Respondent.

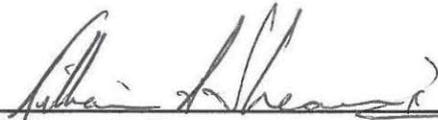
27. Documents Sufficient to Show all of LabMD's expenditures for information technology products or services that relate to Security Practices.

Response: Respondent objects to this Request on the grounds that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome and only seeks to harass and annoy Respondent.

28. All financial statements, budgets, and other financial reports regularly prepared by or for LabMD, including operating statements, balance sheets, income statements, profit and loss statements, cost center reports, and statements of earnings.

Response: Respondent objects to this Request on the grounds that it seeks information that is: neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; overly broad, and unduly burdensome and only seeks to harass and annoy Respondent.

Respectfully submitted,


William A. Sherman, II, Esq.
Reed D. Rubinstein, Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW Suite 610
Washington, DC 20004
Phone: (202) 372-9100
Facsimile: (202) 372-9141
Email: william.sherman@dinsmore.com
Counsel for Petitioner

Michael D. Pepson

Cause of Action
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Email: michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and
administrative proceedings before federal
agencies.

CERTIFICATE OF SERVICE

This is to certify that on November 27, 2013, I served via electronic mail delivery a copy of the foregoing document to:

Alain Sheer
Laura Riposo VanDruff
Megan Cox Margaret Lassack Ryan Melun
Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW Room NJ-8100
Washington, DC 20580
Tel: (202) 326-2999 (VanDruff) Facsimile: (202) 326-3062
Email: lvandruff@ftc.gov

By: 

544902v1

VERIFICATION

I, Michael J. Daugherty, hereby verify that the foregoing answers to the above interrogatories are true and accurate to the best of my knowledge and information.

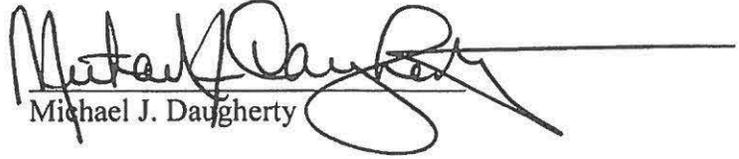

Michael J. Daugherty

Exhibit E



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

December 16, 2013

VIA EMAIL

William A. Sherman, II
Dinsmore & Shohl LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20004

Re: In the Matter of LabMD, Inc., FTC Docket No. 9357

Dear Mr. Sherman:

This letter follows our Meet and Confer of December 12, 2013 regarding objections and responses by LabMD, Inc. ("LabMD") to Complaint Counsel's First Set of Interrogatories, which was served on Thursday, October 24, 2013.

During our December 12 Meet and Confer, you offered to consider supplementing your response to Interrogatory Nos. 1 and 2 if Complaint Counsel provided a definition of the terms "authority from LabMD to access" and "authority to access." We agreed to do so in a follow-up letter.

Interrogatory No. 1 directs Respondent to identify all Persons, during the applicable time period, "with authority from LabMD to access Personal Information regarding Consumers" Interrogatory No. 2 directs Respondent to state, for each Person identified in response to Interrogatory No. 1, "the types of Personal Information that the Person had authority to access."

For the purposes of aiding LabMD in responding to Interrogatory Nos. 1 and 2, Complaint Counsel is willing to define the phrase "with authority from LabMD to access Personal Information regarding Consumers" in Interrogatory No. 1 to mean:

[P]ermitted through network, database, program, or other controls to access (*e.g.*, view, print, enter, or change) Personal Information regarding Consumers on LabMD's computer networks in the ordinary course of the Person's duties

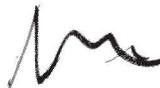
William A. Sherman, II
December 16, 2013
Page 2

Complaint Counsel is also willing to define the phrase “the types of Personal Information that the Person had authority to access” in Interrogatory No. 2 to mean:

[T]he types of Personal Information on LabMD’s computer networks that the Person is permitted through network, database, program, or other controls to access (*e.g.*, view, print, enter, or change) in the ordinary course of the Person’s duties.

We look forward to discussing these proposals and Respondent’s written responses to Complaint Counsel’s Requests for Production on Tuesday, December 17 at 2:00 PM. Please do not hesitate to call me with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alain Sheer', with a stylized, cursive-like flourish.

Alain Sheer

cc: Reed D. Rubinstein (*via email*)
Michael D. Pepson (*via email*)
Lorinda B. Harris (*via email*)
Hallee K. Morgan (*via email*)

Exhibit F



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

December 19, 2013

VIA EMAIL

William A. Sherman, II
Dinsmore & Shohl LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20004

Re: In the Matter of LabMD, Inc., FTC Docket No. 9357

Dear Mr. Sherman:

This letter follows our Meet and Confer of December 18, 2013 regarding objections by LabMD, Inc. ("LabMD") to Document Request No. 21 of Complaint Counsel's First Set of Requests for Production of Documents, which was served on Thursday, October 24, 2013.

During our previous, December 17th Meet and Confer, you indicated that you would consider producing documents responsive to Document Request No. 21 if Complaint Counsel narrowed the request. During our December 18th Meet and Confer, we offered to narrow the request to certain categories of information and to follow up with a letter proposing the new specification.

Document Request No. 21 requests "[a]ll documents, including personnel files, relating to the duties, compensation, performance, productivity, or compliance with LabMD policies of each current and former LabMD employee."

Complaint Counsel is willing to narrow Document Request No. 21 to the following:

21. For each current or former LabMD employee included on Complaint Counsel's preliminary witness list, provided to LabMD on December 19, 2013, provide (1) documents sufficient to show the employee's salary history; (2) documents sufficient to show the employee's duties and history of duties; and (3) all negative appraisals, reprimands, or performance evaluations of the employee or letters of termination concerning the employee.

William A. Sherman, II
December 19, 2013
Page 2

Please reply as soon as possible but no later than Friday, December 20, 2013 at 2 PM indicating whether or not you agree to the proposal and whether you would like to discuss it further. Complaint Counsel is available to Meet and Confer regarding this proposal Friday afternoon from 2–5 PM or Monday morning, December 23, from 9:30 AM–12 PM. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in cursive script, appearing to read "Maggie Lassack".

Maggie Lassack

cc: Reed D. Rubinstein (*via email*)
Michael D. Pepson (*via email*)
Lorinda B. Harris (*via email*)
Hallee K. Morgan (*via email*)

Exhibit G

William A. Sherman, II
202.372.9117
william.sherman@dinsmore.com

Admitted in D.C., Maryland and Ohio

December 17, 2013

Via Regular Mail and Electronic Mail (mlassak@ftc.gov)

Maggie Lassak
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8100
Washington, D.C. 20580

Re: LabMD, Inc. FTC Docket No. 9357

Dear Ms. Lassak:

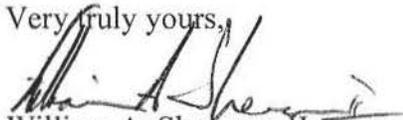
This is in response to Ms. Van Druff's letter dated December 11, 2013 and your email of December 16, 2013 concerning Respondent's responses to Complaint Counsel's discovery. We are in the process of making a second supplemental production of documents which you should receive on December 18, 2013.

As explained previously there were some technology issues regarding the production of the electronically stored information requested by your discovery. We believe we have those issues resolved and should be able to produce the electronically stored information that is responsive to the discovery requests by Friday, December 20, 2013 or the following Monday, December 23, 2013.

Additionally, I have reviewed the amended language and definitions you provided for interrogatories 1 and 2. Based upon the amended language we will identify the individuals for the time period of 2007 through June 2009.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



William A. Sherman, II

WAS/dmb

2615361v1