

ORIGINAL



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.)	

COMPLAINT COUNSEL'S RESPONSE TO LABMD, INC.'S FIRST SET OF REQUESTS FOR ADMISSION (NUMBERS 1-20)

Pursuant to Sections 3.31 and 3.32 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings ("Rules of Practice"), Complaint Counsel hereby responds to Respondent LabMD, Inc.'s First Set of Requests for Admission ("Respondent's Requests").

Complaint Counsel has not completed its discovery or its preparation for trial. Complaint Counsel's answers to Respondent's Requests are given without prejudice to Complaint Counsel's right to produce information relating to any subsequently discovered facts. Complaint Counsel reserves the right to assert additional objections to Respondent's Requests, and to amend or supplement these objections and responses as necessary after the close of discovery.

General Objections

The following General Objections apply to each of Respondent's Requests and are hereby incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual Request does not waive any of Complaint Counsel's General Objections as to the other Requests.

1. Complaint Counsel objects to Respondent's definition of "Commission" and "FTC" as overly broad. The "Federal Trade Commission" (or "FTC") can act only by a majority vote

of a quorum of the five Commissioners. Therefore, Complaint Counsel cannot answer these Requests on behalf of the "Federal Trade Commission" or any individual Commissioner or employee. The objections and responses to these requests are submitted on behalf of Complaint Counsel in this matter, and not on behalf of the "Federal Trade Commission," its employees, staff, agents, or attorneys other than Complaint Counsel.

2. Complaint Counsel objects to Respondent's Requests to the extent the Requests seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any Request, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Requests to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of Respondent. By responding to Respondent's Requests, Complaint Counsel does not waive or intend to waive, but rather reserves and intends to reserve: (a) any objections to the competency, relevance, materiality, privilege, or admissibility as evidence, for any purpose, of any information produced in response to Respondent's Requests; (b) the right to object on any ground to the use of information produced in response to Respondent's Requests at any hearing or trial; and (c) the right to object on any ground at any time to a demand for a further answer to Respondent's Requests.
4. Complaint Counsel objects to Respondent's Requests to the extent they are overly broad, vague, ambiguous, or unduly burdensome.

5. Complaint Counsel objects to Respondent's Requests to the extent they seek information or admissions that are beyond the scope of permissible discovery under Rule 3.31(c) of the Rules of Practice. Complaint Counsel is limiting its responses to the scope of discovery set forth in Rule 3.31(c).
6. Complaint Counsel objects to Respondent's Requests to the extent they seek information that relates to expert testimony prior to the dates prescribed by the October 22, 2013 Revised Scheduling Order.
7. Complaint Counsel objects to Respondent's Requests to the extent they seek to require Complaint Counsel to admit any Request based on information that is not within Complaint Counsel's possession, custody, or control.
8. Complaint Counsel objects to Respondent's Requests to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the ten (10) days allotted for its responses and objections when such facts are known to Respondent and/or contained in the more than 15,000 pages of documents already produced by Respondent.
9. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to undertake legal research for Respondent.
10. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to analyze or organize information for Respondent.
11. The failure of Complaint Counsel to object to any Request on a particular ground may not be construed as a waiver of its right to object on any additional ground(s).

12. Complaint Counsel asserts that any admission contained in this response is for the purpose of the pending administrative proceeding only and is not an admission for any other purpose, nor may it be used in any other proceeding.

Each of the above-listed General Objections is incorporated by reference to each specific response and objection set forth below. Subject to and without waiving these objections, Complaint Counsel provides the following responses.

Specific Responses and Objections

Request for Admission No. 1

Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security, data security practices or data security standards for Protected Health Information (“PHI”) pursuant to its authority under 15 U.S.C. § 57a(a).

Response to Request for Admission No. 1

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission’s January 16, 2014 Order Denying Respondent LabMD’s Motion to Dismiss, Respondent’s Third and Fifth Defenses are no longer relevant to this administrative proceeding.

Request for Admission No. 2

Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security, data security practices or data security standards for PHI that defines what acts are prohibited or required under Section 5 of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 45 as related to PHI.

Response to Request for Admission No. 2

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission's January 16, 2014 Order Denying Respondent LabMD's Motion to Dismiss, Respondent's Third and Fifth Defenses are no longer relevant to this administrative proceeding.

Request for Admission No. 3

Admit that the FTC does not issue advisory opinions regarding data-security practices the FTC believes to be forbidden or required by Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Request for Admission No. 3

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "advisory opinions," "forbidden," and "required." For purposes of this response, Complaint Counsel understands the term "advisory opinions" to refer to advice or interpretation provided pursuant to Sections 1.1 through 1.4 of the Rules of Practice.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 3 to the extent that it suggests that "advisory opinions" are the only means the FTC uses to provide guidance regarding data security practices.

Request for Admission No. 4

Admit that the FTC has not accused LabMD of committing a “deceptive act or practice” under Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Request for Admission No. 4

Complaint Counsel objects to this Request to the extent it seeks to foreclose, limit, or preclude any cause of action. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “accused.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits that its Complaint does not allege that Respondent committed a “deceptive act or practice” in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Request for Admission No. 5

Admit that the FTC’s Complaint does not specifically reference any industry standards for data-security practices, hardware or software necessary to avoid a violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Request for Admission No. 5

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. *See* Order Denying Respondent LabMD’s Motion to Dismiss at 14, *In the Matter of LabMD, Inc.*, Docket No. 9357 (Jan. 16, 2014) (“information security is an ongoing process of assessing risk and vulnerabilities: no one static standard can assure appropriate security, as security threats and technology constantly evolve.”)

(citation omitted). Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “industry standards.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies the Request to the extent that it suggests that Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), requires Complaint Counsel to allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.

Request for Admission No. 6

Admit that the FTC has no evidence to dispute that LabMD has never been accused of violating either the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or the Health Information Technology for Economic and Clinical Health Act (HITECH) or any regulations implementing those statutes, including but not limited to as 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000) (HIPAA Privacy Rule); 68 Fed. Reg. 8,334, 8,334 (Feb. 20, 2003) (HIPAA Security Rule); 78 Fed. Reg. 5,566, 5,639 (Jan. 25, 2013) (HHS HITECH rule).

Response to Request for Admission No. 6

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission’s January 16, 2014 Order Denying Respondent LabMD’s Motion to Dismiss, Respondent’s Third Defense is no longer relevant to this administrative proceeding. Complaint Counsel further objects to this Request to the extent it seeks information protected from disclosure by the common interest, deliberative process, law enforcement, and work product privileges. Complaint Counsel further objects to this Request to the extent it seeks information outside its possession, custody or

control. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “accused.”

Request for Admission No. 7

Admit that the FTC has not accused LabMD of violating any rules or regulations not specifically referenced within the four corners of the FTC’s Complaint.

Response to Request for Admission No. 7

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission’s January 16, 2014 Order Denying Respondent LabMD’s Motion to Dismiss, Respondent’s Third Defense is no longer relevant to this administrative proceeding. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “accused.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 7.

Request for Admission No. 8

Admit that HIPAA, HITECH, and regulations implementing those statutes are not mentioned in the FTC’s Complaint.

Response to Request for Admission No. 8

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission’s January 16, 2014 Order Denying Respondent LabMD’s Motion to Dismiss, Respondent’s Third Defense is no longer relevant to this administrative proceeding.

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 8.

Request for Admission No. 9

Admit that the information contained in the “Day Sheets” and “P2P insurance aging file” referred to in paragraphs 20 and 21 of the Complaint constitute Protected Health Information (PHI), as that term is used in HIPAA, HITECH, and regulations implementing those statutes.

Response to Request for Admission No. 9

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request to the extent it seeks a legal conclusion regarding the application of HIPAA, HITECH and the regulations implementing those statutes.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits that the information contained in the “Day Sheets” and the “P2P insurance aging file” includes personal information, as defined in Respondent’s Requests, and PHI.

Request for Admission No. 10

Admit that the FTC’s consent orders are only legally binding upon the parties thereto.

Response to Request for Admission No. 10

Complaint Counsel objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “consent orders” and “legally binding.”

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 10.

Request for Admission No. 11

Admit that the SANS Institute does not have lawful authority to create enforceable data-security standards.

Response to Request for Admission No. 11

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “data-security standards,” “lawful authority,” and “enforceable.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 11 to the extent that it suggests that the “SANS Institute” is the only entity that provides guidance regarding data security practices.

Request for Admission No. 12

Admit that the FTC did not allege that a person’s data-security practices may constitute an “unfair act or practice” that violates Section 5 of the FTC Act, 15 U.S.C. § 45, until after Congress last amended Section 5 to add 15 U.S.C. § 45(n) in 1994.

Response to Request for Admission No. 12

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice.

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 12.

Request for Admission No. 13

Admit that the FTC's "Guides for Business" relating to data security, including but not limited to the FTC document entitled "Peer-to-Peer File Sharing: A Guide for Business" and "Protecting Personal Information: A Guide to Business," are not legally binding upon any U.S. company.

Response to Request for Admission No. 13

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "legally binding."

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits that the information available on the FTC's website related to data security provides guidance in assessing risk and vulnerabilities and complying with the law.

Request for Admission No. 14

Admit that none of the documents available on the Internet on the FTC's "Bureau of Consumer Protection Business Center's" self-described "Legal Resources" website, <http://business.ftc.gov/legal-resources/all/35>, including but not limited to consent orders and FTC "Guides for Business," establish specific data-security practices which any U.S. company must adopt to comply with 15 U.S.C. § 45(a), (n).

Response to Request for Admission No. 14

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to the form of this Request. Complaint Counsel further objects to this Request as overly broad. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “consent orders” and “adopt.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 14. A party subject to an order must comply with the specific requirements set forth in that order.

Request for Admission No. 15

Admit that the FTC has no complaining witness who says that his or her data was released or disclosed as the result of LabMD’s allegedly unlawful data-security practices.

Response to Request for Admission No. 15

Complaint Counsel objects to this Request to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the opinions of expert witness(es). Complaint Counsel further objects that this Request calls for expert opinions and is not an appropriate subject for this manner of discovery. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “released” and “disclosed.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 15

to the extent that it suggests that no consumers were harmed or likely to be harmed as a result of Respondent's unfair acts or practices.

Request for Admission No. 16

Admit that Complaint Counsel was aware of the trailer to Mr. Michael Daugherty's book, *The Devil Inside the Beltway*, available at website <http://michaeljdaugherty.com/2013/07/19/the-devil-inside-the-beltway-book-trailer/>, prior to July 23, 2013.

Response to Request for Admission No. 16

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. The suggestion that the FTC retaliated against Respondent in response to Respondent's speech is not relevant to this administrative proceeding. *See* Order Denying Respondent's Motion for a 3.36 Subpoena at 6, *In the Matter of LabMD, Inc.*, Docket No. 9357 (Feb. 21, 2014) ("Documents that may be reasonably expected to show whether or not 'the FTC violated Daugherty's First Amendment rights by retaliating against LabMD' in filing this Complaint are not relevant to the allegations of the Complaint, the proposed relief, or the defenses of Respondent."). Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "aware."

Request for Admission No. 17

Admit that a FTC document entitled "Peer-To-Peer File Sharing: A Guide For Business," available at <http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business>, was not made publicly available on the Internet or otherwise published until January 2010.

Response to Request for Admission No. 17

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice.

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 17 to the extent that it suggests that the first instance of public guidance related to Peer-To-Peer file sharing by the FTC was in January 2010.

Request for Admission No. 18

Admit that Complaint Counsel has no evidence to dispute that LabMD's "Day Sheets," which are referenced in paragraph 21 of the Complaint, did not exist in an electronic form that could be transmitted via the Internet in October 2012.

Response to Request for Admission No. 18

Complaint Counsel objects to this Request as premature because discovery and trial preparation are not complete. Complaint Counsel further objects to this Request to the extent it requires an extensive and complete investigation of all the evidence in this administrative proceeding. Complaint Counsel further objects that the Request requires Complaint Counsel to analyze the evidence for Respondents.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel, after reasonable inquiry, lacks sufficient information to admit or deny Request for Admission No. 18. LabMD's "Day Sheets" were in the possession of identity thieves in Sacramento, CA on October 5, 2012, and, prior to October 5, 2012, they were transferred from LabMD's possession into the identity thieves'

possession. Complaint Counsel has not yet established how the “Day Sheets” were transferred from LabMD’s possession to the identity thieves’ possession. LabMD implemented a data archive project to save paper documents in an electronic format. The “Day Sheets” may have been saved in an electronic form that could have been transmitted via the Internet.

Response to Request for Admission No. 19

Admit that the FTC cannot identify a single person it believes to be a “consumer” within the meaning of the Section 5 of the FTC Act who has experienced harm to their identity or finances as a result of LabMD's allegedly unlawful data-security practices.

Response to Request for Admission No. 19

Complaint Counsel objects to this Request to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the opinions of expert witness(es). Complaint Counsel further objects that this Request calls for expert opinions and is not an appropriate subject for this manner of discovery.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 19 to the extent that it suggests that no consumers were harmed or likely to be harmed as a result of Respondent’s unfair acts or practices.

Response to Request for Admission No. 20

Admit that the FTC obtained the 1,718 File from Tiversa, Inc.

Response to Request for Admission No. 20

Complaint Counsel objects to Respondent’s definition of the “1,718 File.” Respondent defines the “1,718 File” to mean “the 1,718 page file owned by LabMD that the Company claimed in 2008 to have obtained from LabMD via Limewire.” The definition of the “1,718

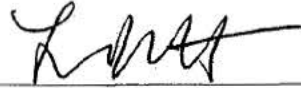
File” is vague and ambiguous as to “Company,” “obtained,” and “claimed.” Complaint Counsel further objects to Respondent’s characterization that the “1,718 File” was “obtained” from LabMD. The evidence in this administrative proceeding does not support this characterization. For purposes of this response, Complaint Counsel understands the term “1,718 File” to mean the 1,718 page file owned by LabMD that Tiversa Holding Corp. found at four different IP addresses. These documents have been produced by Tiversa Holding Corp. at TIVERSA-FTC_RESPONSE-000001 – 001719, TIVERSA-FTC_RESPONSE-001720 – 003438, TIVERSA-FTC_RESPONSE-003439 – 005157, and TIVERSA-FTC_RESPONSE-005158 – 006876.

Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “Tiversa, Inc.” and “obtained.” For purposes of this response, Complaint Counsel understands the term “Tiversa, Inc.” to refer to Tiversa, as defined in Respondent’s Requests.

Subject to and without waiving the General Objections, and to the extent further response is required, Complaint Counsel admits that: (1) as part of Complaint Counsel’s Part II investigation of LabMD, it issued a CID to the Privacy Institute and received the 1,718 file, which has been produced at FTC-PRI-000001 – FTC-PRI-001719; and (2) as part of this administrative proceeding, it issued a subpoena *duces tecum* to Tiversa Holding Corp. and received four 1,718 files downloaded from four different IP addresses. These documents have been produced at TIVERSA-FTC_RESPONSE-000001 – 001719, TIVERSA-FTC_RESPONSE-001720 – 003438, TIVERSA-FTC_RESPONSE-003439 – 005157, and TIVERSA-FTC_RESPONSE-005158 – 006876.

Dated: March 3, 2014

Respectfully submitted,



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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system.

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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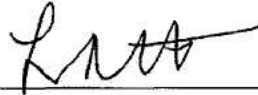
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CERTIFICATE FOR ELECTRONIC FILING

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.

March 3, 2014

By:



Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection