

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 MOTION TO QUASH SUBPOENA SERVED ON COMPLAINT COUNSEL AND FOR A PROTECTIVE ORDER

Pursuant to Commission Rules 3.22, 3.31, and 3.34(c), 16 C.F.R. §§ 3.22, 3.31, 3.34(c), Complaint Counsel respectfully moves for an Order quashing the subpoena *ad testificandum* Respondent LabMD, Inc. (“LabMD”) served on Senior Complaint Counsel Alain Sheer and for a Protective Order barring Respondent from serving subpoenas *ad testificandum* on Complaint Counsel.

This Court should quash the improper subpoena Respondent issued to Complaint Counsel because Respondent has not met its burden to overcome the strong presumption against deposing opposing counsel. Specifically, Respondent has failed to demonstrate that the information sought in its deposition of Complaint Counsel: (1) can only be obtained by deposing opposing counsel; (2) is both relevant and nonprivileged; and (3) is crucial to Respondent’s preparations for this case. Allowing the deposition to proceed would impose a heavy burden on Complaint Counsel, which would, in turn, undermine the adversarial process, jeopardize applicable privileges, and potentially result in the disqualification of Complaint Counsel who may be called

as a witness. Complaint Counsel conferred in good faith with Respondent in an effort to resolve the dispute, but was unable to reach an agreement. *See* Meet & Confer Statement (Exhibit A). Accordingly, this Court should quash the subpoena served on Senior Complaint Counsel (Exhibit B) and enter a protective order barring Respondent from issuing additional subpoenas *ad testificandum* to Complaint Counsel.

BACKGROUND

Commission staff opened a Part II investigation into the adequacy of LabMD's information security practices in January 2010. On August 28, 2013, the Commission voted to approve an administrative Complaint alleging LabMD engaged in unfair practices in violation of Section 5 of the FTC Act by failing to take reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Compl. ¶¶ 6-11, 17-21. One result of LabMD's failures is that a LabMD file containing the sensitive personal information of approximately 9,300 consumers was shared to a public peer-to-peer ("P2P") file sharing network without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20.

On September 9, 2013, Complaint Counsel entered a Notice of Appearance that identified Alain Sheer as Senior Complaint Counsel. On September 24, 2013, Complaint Counsel served its Initial Disclosures. These disclosures included third-party documents obtained during the Part II investigation, transcripts of all Part II investigational hearings, and a comprehensive list of individuals and entities likely to have discoverable information relevant to the allegations in the Complaint, proposed relief, or Respondent's defenses.¹ During discovery in this action,

¹ The list of individuals and entities, provided to Respondent as part of Complaint Counsel's Initial Disclosures, includes 101 names: (1) Current and Former LabMD Employees; (2) Current and Former Clients of LabMD; (3) Contractors and Other Individuals and Entities

Complaint Counsel has served Respondent with copies of all subpoenas and timely produced documents received from third parties. Additionally, on December 19, 2013, Complaint Counsel served its Preliminary Witness List, further updating Respondent about sources of information Complaint Counsel believes may be relevant. To date, Respondent has served only two document subpoenas (to Tiversa Holding Corp. and the Sacramento Police Department) and two subpoenas *ad testificandum* (to Tiversa Holding Corp. and Senior Complaint Counsel).

On December 24, 2013, Respondent served a subpoena *ad testificandum* on Senior Complaint Counsel (Exhibit B)² and its First Set of Interrogatories and First Requests for Production of Documents to Complaint Counsel.³ Respondent's blanket subpoena does not specify any topics, and Respondent is not willing to limit the subpoena's scope.⁴

Who Have Provided Services or Equipment to LabMD; (4) Other Individuals and Entities. The list also includes the names of 263 "Individuals Associated with 9-Digit Numbers Listed in the Day Sheets Referenced in Paragraph 21 of the Complaint Whose Names Are Not Listed in Those Day Sheets."

² The subpoena incorrectly states it was served on December 23, 2013. *See* Letter from L. VanDruff to W. Sherman (Dec. 24, 2013) (Exhibit C).

³ On January 2, 2014, Respondent served Complaint Counsel with its Preliminary Witness List, naming Senior Complaint Counsel as its first witness.

⁴ While Respondent refused to limit the scope of the deposition during the Meet and Confer, it orally identified the following topics for deposition: (1) the Commission's pre-complaint process related to bringing an action against LabMD; (2) communications with Tiversa, Inc., the company that identified LabMD's file on a P2P network; (3) communications with Dartmouth College; and (4) communications with the Sacramento Police Department and the related LabMD documents the police found in the possession of identity thieves. *See* Meet and Confer Statement (Exhibit A). Respondent's Preliminary Witness List includes these and other topics in the description of testimony expected from Senior Complaint Counsel.

ARGUMENT**I. RESPONDENT'S SUBPOENA SHOULD BE QUASHED BECAUSE IT DOES NOT MEET THE HIGH STANDARD REQUIRED FOR DEPOSING OPPOSING COUNSEL**

Respondent bears a heavy burden to overcome the presumption against deposing opposing counsel. *See Sterne Kessler Goldstein & Fox, PLLC v. Eastman Kodak Co.*, 276 F.R.D. 376, 379-81 (D.D.C. 2011). Specifically, Respondent must establish that “(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” *In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 WL 33944050, at *1 (F.T.C. Nov. 8, 2000) (quoting *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986)). The *Hoechst* test applies to Respondent’s subpoena, which seeks unbounded testimony of Complaint Counsel whose role in this litigation has consisted exclusively of legal responsibilities. *Cf. United States v. Philip Morris*, 209 F.R.D. 13, 17 (D.D.C. 2002) (permitting limited depositions of counsel only where the attorney’s role consisted of significant non-legal responsibilities, such as scientific and research and development). Respondent has failed to meet each of the three prongs required by the *Hoechst* test.

A. Respondent cannot establish information it seeks is otherwise unobtainable through other discovery.

To depose opposing counsel, a party must demonstrate that “no other means exist to obtain the information than to depose opposing counsel.” *Hoechst*, 2000 WL 33944050, at *1. Respondent can make no such showing. It seeks to depose opposing counsel to circumvent ordinary discovery. The sources from which Complaint Counsel learned facts relevant to this matter have already been disclosed to LabMD, and Respondent has not exhausted discovery of

these sources. For example, Respondent intends to elicit testimony about communications with Dartmouth College, but Respondent has conducted no discovery of Dartmouth College or any of its staff. Without having exhausted discovery from the sources Complaint Counsel has identified, Respondent cannot satisfy its obligation to show that the information it seeks is otherwise unobtainable. Accordingly, the Court should quash the subpoena.

B. Respondent cannot establish information it seeks is both relevant and nonprivileged.

A party seeking opposing counsel's deposition must also establish that the information sought is relevant and nonprivileged. *Hoechst*, 2000 WL 33944050, at *1. Respondent has established neither.

1. Respondent cannot demonstrate information sought is relevant to proceedings.

Information is not discoverable if it is not "reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1). For evidence to be admissible it must be "relevant, material, and reliable . . ." *Id.* § 3.43. Parties can generally "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint," proposed relief, or defenses. *Id.* § 3.31(c)(1). Respondent's proposed deposition of Complaint Counsel is not reasonably calculated to lead to the discovery of admissible evidence in that Respondent intends to elicit testimony about the Commission's pre-complaint process and decision to issue a Complaint against LabMD.⁵ The Commission has held that "[o]nce the Commission . . . issue[s] a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question

⁵ See Meet and Confer Statement (Exhibit A).

but whether the alleged violation has in fact occurred.” *In re Exxon Corp.*, No. 8934, 1974 FTC LEXIS 226, at *2-3 (June 4, 1974); *accord In re Basic Research*, No. 9318, 2006 FTC LEXIS 5, at *19-20 (Jan. 10, 2006) (finding evidence related to complaint counsel’s pre-complaint protocol and basis for issuing complaint irrelevant). The pre-complaint information Respondent orally identified as topics for Complaint Counsel’s deposition are not reasonably calculated to lead to the discovery of admissible evidence.

2. Privileges protect information known to Complaint Counsel.

Commission Rules require that this Court deny discovery in order to preserve applicable privileges. *See* 16 C.F.R. § 3.31(c). Any relevant information known to Complaint Counsel that is not obtainable from other sources is protected by the attorney client-privilege, work product protections, or the deliberative process privilege.

First, the attorney-client privilege applies to much of the information that is sought through Respondent’s subpoena,⁶ and no showing of need can overcome the attorney-client privilege, *see Moody v. IRS*, 654 F.2d 795, 798 n.10 (D.C. Cir. 1981). Further, “[d]epositions of opposing counsel undermine attorney-client communications . . .” *Coleman v. D.C.*, 284 F.R.D. 16, 18 (D.D.C. 2012). Attorney-client privilege protects the communications of the Commission and its staff. Complaint Counsel should not be subjected to a deposition that would undermine this privilege.

Second, the Court must deny discovery in order to preserve work product. Attorney work product is generally protected from discovery unless a substantial showing of necessity or

⁶ The attorney-client privilege protects “[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance.” *In re Dynamic Health of Florida*, No. 9317, 2004 WL 3199680, at *2 (F.T.C. Dec. 6, 2004) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

justification is made. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); *see also* 16 C.F.R. § 3.31(c)(5); *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, at *11 (F.T.C. Aug. 18, 2000) (denying in part Respondent's discovery requests on grounds of attorney work product). Respondent has made no showing of need for Complaint Counsel's testimony, much less a substantial need, nor has it identified any hardship that would enable it to overcome work product protection. Furthermore, any relevant factual information that may be known to Complaint Counsel cannot be disentangled from protected work product.

Third, a deposition of Complaint Counsel would undermine the deliberative process privilege. The deliberative process privilege exists to protect "communications that are part of the decision-making process of a governmental agency," including information that "reflect[s] advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated." *Id.* at *8-9 (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975)). This privilege may be pierced only if the need for the materials and accurate fact-finding override the government's interest in nondisclosure. *Id.* at *10. Information that is sought by a deposition of Complaint Counsel, such as information about the Commission's pre-complaint process and decision to issue a Complaint, implicates the deliberative process privilege.⁷ Accordingly, this Court should preserve the integrity of the Commission's deliberative communications by quashing the subpoena.

C. Information sought is not crucial to Respondent's case preparation.

When a party seeks to depose opposing counsel, it must show the information sought is crucial to the preparation of the case. *Hoechst*, 2000 WI. 33944050, at *1. Courts have found

⁷ *See* Meet and Confer Statement (Exhibit A).

depositions of opposing counsel to be “crucial” in cases where the attorney was a witness to the underlying facts at issue in the litigation. *See, e.g., DiLorenzo v. Costco Wholesale Corp.*, 243 F.R.D. 413, 415 (W.D. Wash. 2007) (finding attorney’s testimony to be “crucial” where attorney was *only* witness to an alleged admission); *Am. Cas. Co. of Reading v. Krieger*, 160 F.R.D. 582, 588-90 (S.D. Ca. 1995) (finding attorneys’ testimony to be “crucial” where they were fact witnesses to circumstances related to counterclaim). Even where the testimony of opposing counsel is found to be “crucial,” however, an attorney’s deposition is nonetheless barred where other elements of the test applied in *Hoechst* are not met. *See Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 637-38 (D. Kan. 2000) (quashing subpoena for counsel’s deposition where testimony was found to be relevant and crucial but party “failed to demonstrate that the attorney deposition at issue is the only reasonably practical means available for obtaining the information”) (internal quotation and citations omitted).

No information known to Complaint Counsel could possibly be crucial to Respondent’s preparation for this case, and even if it were, as discussed above, Respondent cannot satisfy the other elements of the *Hoechst* test. Complaint Counsel does not have unique personal knowledge of facts at issue in this litigation. The Commission’s processes and decisions prior to the Complaint being issued are outside the scope of this action and thus cannot possibly be crucial to Respondent’s preparation for an evidentiary hearing under Part III of the Commission’s Rules of Practice. *See Basic Research*, 2006 FTC LEXIS 5, at *19-20. If it were crucial to Respondent, it would be crucial to all respondents in Part III litigation, and allowing discovery of such information through the deposition of complaint counsel would undermine the well-established deliberative process privilege and other applicable privileges.

II. PROTECTIVE ORDER SHOULD BE ISSUED BARRING RESPONDENT FROM SERVING COMPLAINT COUNSEL SUBPOENAS AD TESTIFICANDUM

Pursuant to Rule 3.31(d), the Administrative Law Judge may issue an order to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense,” or as otherwise required. 16 C.F.R. § 3.31(d). Depositions of opposing counsel generally have been disallowed because they create inappropriate burdens and risk disclosure of privileged information. *See, e.g., Sterne Kessler*, 276 F.R.D. at 380-81 (barring deposition of opposing counsel even where the court held the test applied in *Hoechst* did not apply because the potential deponent was not litigating counsel); *Dunkin’ Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 210 (D.P.R. 1998) (holding that, where a party seeking to depose opposing counsel does not demonstrate the showing required by *Hoechst*, “[t]he mere request to depose an opposing counsel constitutes ‘good cause’ for obtaining a protective order”) (citations omitted). In addition, depositions of Complaint Counsel can lead to the counsel’s disqualification, as the attorney may be called as a fact witness. *See Sterne Kessler*, 276 F.R.D. at 380-81. In evaluating the hardships imposed by deposing opposing counsel, courts also consider the preservation of privileges and the disruption to counsel’s trial preparations. *See Coleman*, 284 F.R.D. at 18.

It is undisputed that Respondent seeks to convert Senior Complaint Counsel into a fact witness, as LabMD has noted Senior Complaint Counsel as a witness on its Preliminary Witness List. Even if there are narrow topics that could be relevant and are somehow not protected by applicable privileges, the burden on Complaint Counsel heavily outweighs any speculative benefit to Respondent. Thus, the Court should enter a protective order barring Respondent from serving subpoenas *ad testificandum* to Complaint Counsel.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion to Quash the Subpoena to Complaint Counsel and for a Protective Order.

Dated: January 6, 2014

Respectfully submitted,



Megan Cox
Federal Trade Commission
600 Pennsylvania Ave., NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2282 – Cox
Facsimile: (202) 326-3062
Electronic mail: mcox1@ftc.gov

Complaint Counsel

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

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

Docket No. 9357

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S
MOTION TO QUASH SUBPOENA SERVED ON COMPLAINT COUNSEL
AND FOR A PROTECTIVE ORDER**

Upon consideration of Complaint Counsel's Motion to Quash Respondent's Subpoena
Served on Complaint Counsel and for a Protective Order, it is hereby

ORDERED, that the subpoena *ad testificandum* served on Complaint Counsel is
QUASHED; and it is further

ORDERED, that Respondent shall not serve subpoenas *ad testificandum* on Complaint
Counsel.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, 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:

Michael Pepson
Lorinda Harris
Hallee Morgan
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006
michael.pepson@causeofaction.org
lorinda.harris@causeofaction.org
hallee.morgan@causeofaction.org

Reed Rubinstein
William A. Sherman, II
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW, Suite 610
Washington, DC 20004
reed.rubinstein@dinsmore.com
william.sherman@dinsmore.com
Counsel for Respondent LabMD, Inc.

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.

January 6, 2014

By: Megan Cox
Megan Cox
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 Quash Subpoena Served on Complaint Counsel and for a Protective Order, 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 on December 31, 2013. On that date, at 10:30 AM, Megan Cox, Laura Riposo VanDruff and Alain Sheer for Complaint Counsel conferred with William Sherman, II and Sunni Harris for Respondent. At Complaint Counsel’s request, Respondent articulated the information it would seek in the deposition of Complaint Counsel. Respondent stated it would seek to elicit testimony from Complaint Counsel on topics such as: (1) the Commission’s pre-complaint process related to the decision to bring an action against LabMD; (2) communications with Tiversa, Inc., the company that identified LabMD’s file on a peer-to-peer network; (3) communications with

Dartmouth College; and (4) communications with the Sacramento Police Department and the related LabMD documents found in the possession of identity thieves. When asked, Respondent informed Complaint Counsel that it was unwilling to limit its deposition questioning to these discrete topics. Complaint Counsel stated it did not believe seeking to elicit this testimony from Complaint Counsel was permissible. Complaint Counsel requested Respondent withdraw its subpoena and Respondent refused to do. Complaint Counsel then stated it would seek the appropriate relief from this Court.

Dated: January 6, 2013

Respectfully submitted,



Megan Cox
Federal Trade Commission
600 Pennsylvania Ave., NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2282 – Cox
Facsimile: (202) 326-3062
Electronic mail: mcox1@ftc.gov

Complaint Counsel

Exhibit B

December 23, 2013

VIA HAND DELIVERY

Alain Sheer
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W., NJ-8100
Washington, DC 20580

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

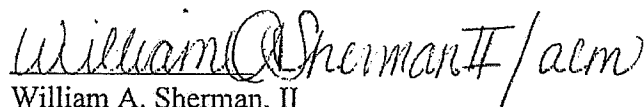
Dear Mr. Sheer:

This letter is to notify you that counsel for LabMD, Inc. ("LabMD"), has issued a subpoena to you, which is enclosed. The Federal Trade Commission's Rules of Practice state that "[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Federal Trade Commission], requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena...." 16 C.F.R. § 3.34(a). Please note that the date set forth in the enclosed documents for the time of your deposition is simply a placeholder. We look forward to working with you and Complaint Counsel to find a mutually convenient time for your deposition.

On August 29, 2013, the Federal Trade Commission, Office of Administrative Law Judges issued a Protective Order Governing Discovery Material (the "Protective Order") in the above-referenced action. The Protective Order protects confidential information produced in discovery in the case. A copy of the Protective Order signed by Chief Administrative Law Judge D. Michael Chappell is enclosed as an exhibit to the subpoena's schedule.

I would be pleased to discuss the scheduling of your deposition at your earliest convenience. You may reach me at (202) 372-9100.

Sincerely,



William A. Sherman, II
Dinsmore & Shohl
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: 202.372.9100
Fax: 202.372.9141
william.sherman@dinsmore.com

Enclosures:

- (1) Subpoena *Ad Testificandum*
- (2) Exhibit A: Protective Order Governing Discovery Material

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm



SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

1. TO Mr. Alain Sheer Division of Privacy and Identity Protection Federal Trade Commission 600 Penn. Ave., NW, NJ-8100 Washington, DC 20580	2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
--	---

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

3. PLACE OF DEPOSITION Dinsmore : Shohl LLP 801 Penn. Ave., NW Suite 610 Washington, DC 20004	4. YOUR APPEARANCE WILL BE BEFORE William A. Sherman, II
	5. DATE AND TIME OF DEPOSITION 2/7/2014 9:00 AM

6. SUBJECT OF PROCEEDING In the Matter of LabMD Docket No. 9357

7. ADMINISTRATIVE LAW JUDGE Chief ALJ, D. Michael Chappell Federal Trade Commission Washington, D.C. 20580	8. COUNSEL AND PARTY ISSUING SUBPOENA William A. Sherman, II (Respondent's Counsel) DINSMORE & SHOHL LLP 801 Penn. Ave., NW Suite 610 Washington, DC 20004 PHONE: (202) 372-9100
---	---

DATE SIGNED 12-23-2013	SIGNATURE OF COUNSEL ISSUING SUBPOENA
---------------------------	---

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

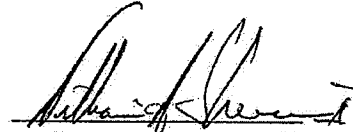
The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served by registered mail on the person named herein on: December 27, 2013.



William A. Sherman, II
Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that on December 23rd, 2013, I served via electronic delivery a copy of the foregoing document to:

Alain Sheer
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3321
Fax Number: 202-326-3062
Email: asheer@ftc.gov

Megan Cox
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2282
Fax Number: 202-326-3062

Laura Riposo VanDruff
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2999
Fax Number: 202-326-3062

Margaret Lassack
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

Ryan Mehm
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

December 23, 2013

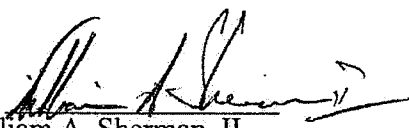
By: 
William A. Sherman, II

Exhibit A

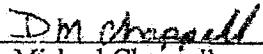
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 29, 2013

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL - FTC Docket No. 9357" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL - FTC Docket No. 9357" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Exhibit C



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

December 24, 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:

We are in receipt of Respondent's subpoena *ad testificandum* directed to Alain Sheer. It was delivered by courier to the Commission's headquarters building at approximately 11:50AM today. My colleague, Khouryanna DiPrima, signed for the package.

The purpose of this letter is to advise you that the Certificate of Service's statement that you effected service of the subpoena "via electronic delivery" on Complaint Counsel, including me, on Monday, December 23, 2013 is incorrect. We did not receive your subpoena until it was hand-delivered late this morning.

To the extent that Complaint Counsel may seek the Court's intervention, we will calculate our deadlines in accordance with Rule 4.3, 16 C.F.R. § 4.3, using today, December 24, 2013, as the date on which "the act, event, or development initiating such period of time shall have occurred."

In closing, I would note that this represents the second occasion on which counsel for LabMD has materially mischaracterized the date and manner of service. *See* Letter from L. VanDruff to W. Sherman (Nov. 8, 2013).

Sincerely,

A handwritten signature in black ink, appearing to read "L. VanDruff".

Laura Riposo VanDruff

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