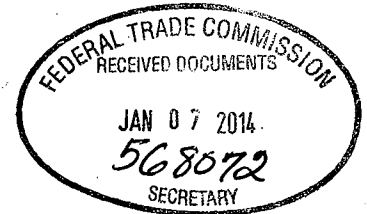


ORIGINAL



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

COMMISSIONERS: Edith Ramirez, Chairwoman  
Maureen K. Ohlhausen  
Joshua D. Wright

In the Matter of	)	DOCKET NO. 9357
	)	
LabMD, Inc.,	)	PUBLIC
a corporation.	)	
	)	ORAL ARGUMENT
	)	REQUESTED

**RESPONDENT'S OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION TO COMPEL**

Respondent submits its opposition to Complaint Counsel's Motion to Compel pursuant to Commission's Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a). Complaint Counsel bases its request for relief on the Commission's Rules of Practice, 16 C.F.R. § 3.31, which allows it to "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." However, this broad discovery rule is subject to limitations that Complaint Counsel conveniently ignores. LabMD has complied with Complaint Counsel's discovery requests substantiated by the Commission's discovery rules, but has legitimately denied responding to all other requests. Respondent requests that Complaint Counsel's motion to compel be denied based on LabMD's conformance with the Commission's discovery rules; alternatively, LabMD requests entry of an order protecting it from Complaint Counsel's requests.

## INTRODUCTION

The FTC began its investigation of LabMD in 2010. FTC's investigation began as a result of FTC coming into possession of a LabMD 2007 insurance aging report ("1718 file"), which a third party, Tiversa was able to download from a computer located in San Diego, California via a P2P network. The file was downloaded in May 2008.

FTC's complaint alleges that LabMD failed to provide reasonable and appropriate security for personal information on its computer networks. LabMD denies this allegation and further takes the position that what is reasonable and appropriate security depends on when such security measures were in place; what the standards for data security were at that time; and how the personal information got out of the possession of LabMD. Complaint Counsel's discovery requests are wide ranging and have no temporal relation to the incident which gave rise to FTC's investigation and the allegations in its complaint. Moreover, Complaint Counsel's discovery requests are irrelevant to its Complaint and are in conflict with the FTC's discovery rules. The FTC should not be permitted to file a complaint and conduct discovery based upon its own *ipse dixit*, that because the document was found outside of LabMD's possession, that LabMD at some point in time between 2005 and the present, failed to provide reasonable and appropriate security.

## ARGUMENT

- I. The relevant time-frame of this litigation is from May 1, 2008- March 31, 2009, and thus all discovery requests should be restricted likewise.**

Complaint Counsel erroneously states that this court held in its November 22, 2013 order that the time period relevant to this litigation is from January 1, 2005 to the present. (Mot. to Compel at 7). In actuality, this court's ruling was much more narrow, and only advised that

responses to the third-party subpoenas were limited to January 1, 2005 to the present. (Order, dated Nov. 22, 2013 )("Accordingly the **subpoenas shall be limited** to the period from January 1, 2005 to present")(emphasis added). However, to the extent this court is persuaded to rely on its previous order in determining the time period relevant to the discovery requests at issue, it is imperative to point out that Complaint Counsel has failed to carry its burden of proving the relevance of its discovery requests outside of the years 2008-2009.

For the FTC to prevail on the merits of its case against LabMD, it is required to prove that LabMD violated the Agency's standards regarding the data security of personal information. Data security standards have evolved over time, and for example, are markedly different now than they were in 2008. While much of LabMD's defense rests on the contention that the FTC failed to provide fair notice of its data security standards, the fact remains that for the FTC to be successful, it must identify a specific time frame and the relevant standards to prove that LabMD violated the FTC's rules. While the FTC conveniently contends that LabMD was in violation of its data security standards from 2005 until present, the allegations in its Complaint state otherwise.

Respondent and Complaint Counsel agree that "[t]he relevance of a discovery request is determined by laying the request along side the pleadings." (Mot. to Compel at 4)(*citing In re Rambus Inc.*, NO. 9302, 2002 WL 31868184). However, when one lays Complaint Counsel's discovery requests alongside its Complaint, it becomes apparent that Complaint Counsel has failed to carry its burden of proving the relevancy of discovery prior to May 1, 2008 and post March 31, 2009. Nowhere does Complaint Counsel allege that LabMD's alleged security failures began in 2005 and continued to the present. Rather, in relevant part, Complaint Counsel alleges that:

- In **May 2008**, a third party informed respondent that its June 2007 insurance aging report was available on a P2P network . . . (Complaint at ¶ 17)(emphasis added).
- After receiving the **May 2008** notice that the P2P insurance aging file was available . . . (Complaint at ¶ 18)(emphasis added).
- Respondent had no business need for Limewire and removed it from the billing computer in **May 2008** . . . (Complaint at ¶ 20)(emphasis added).
- In **October 2012**, the Sacramento, Police Department found more than 35 Day Sheets . . . (Complaint at ¶ 21)(emphasis added).

Notably, the only mention of the year 2005 in the entire Complaint was not an allegation towards LabMD, but a conclusory declaration that “since at least 2005, security professionals and others (including the Commission) have warned that P2P applications present risk . . .” (Complaint at ¶ 16). Thus, given Complaint Counsel’s allegations, the earliest date that discovery could be considered relevant to is May 2008.<sup>1</sup>

While Paragraph 21 of the Complaint would seem to suggest that LabMD committed an infraction in 2012: (1) the latest date contained on the Day Sheet is March 2009, and (2) the Day Sheets cannot be stored electronically and were found in hard copy form, thereby precluding a data security breach. (Deposition of Karen Jestes, dated Dec. 13, 2013, at 57-58, attached hereto as Exh. 1<sup>2</sup>; Declaration of Michael Daugherty, attached hereto as Exh. 2). Thus, the relevant time period concludes in 2009. Respondent respectfully requests that this court find that the relevant time period for the discovery requests at issue is May 1, 2008 to March 31, 2009.

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<sup>1</sup> Respondent agreed to produce information dated as early as 2007 in an attempt to amicably resolve the parties’ discovery dispute. Respondent’s production of information prior to May 2008 in no way indicates that such information is relevant to Complaint Counsel’s allegations.

<sup>2</sup> Attaching this deposition excerpt as an exhibit complies with the protective order as Complaint Counsel designated only questions or responses related to consumer-sensitive personal information confidential. (Exh. 1 at 9). This excerpt does not contain consumer-sensitive personal information.

**II. The Discovery Requests at issue are irrelevant and/or limited by the Commission's Rules, and thus should be barred.**

*A. Document Request No. 13.*<sup>3</sup>

Document Request No. 13 should also be barred because the information sought is in contravention of Commission Rules of Practice 3.31(c) and 3.43(b), as well as Fed. R. of Evid. 407 ("FRE 407"). Information may be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought [will not lead to the discovery of admissible evidence.] Commission Rules of Practice 3.31(c)(1), 16 C.F.R. § 3.31(c)(1). Here, Document Request No. 13 seeks "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." The information sought is not only inadmissible at a hearing, but also unlikely to lead to the discovery of other admissible evidence; thus, this request should be barred.

While Commission Rule of Practice 3.43(b), 16 C.F.R. § 3.43(b), governs the admissibility of evidence during an adjudicative hearing, "[t]he Federal Rules of Evidence are persuasive authority for FTC adjudicative proceedings." *In re Osf Healthcare Sys.*, 2012 FTC LEXIS 77, at \*4 n.4 (FTC 2012); *In re Herbert R. Gibson, Sr.*, No. 9016, 1978 FTC LEXIS 375, at \*2 n.1 (FTC 1978); *see also* Federal Trade Commission Litigation Operating Manual at 2-3 ("The Federal Rules of Evidence have not been adopted by the Commission, but can be extremely useful in persuading an ALJ in ruling on admissibility of evidence"). Thus, FRE 407 is considered persuasive authority regarding the admissibility of evidence, and states that "[w]hen measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a

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<sup>3</sup> Respondent maintains that this request, along with all other requests at issue, are also limited to the time period of May 1, 2008 through March 31, 2009 pursuant to Section I *supra*.

defect in a product or its design; or a need for a warning or instruction . . .” The purpose of FRE 407 is twofold: (1) to prevent prejudice to a defendant where subsequent remedial measures may be considered admission of fault,<sup>4</sup> and (2) to further the social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. FRE 407, Notes of Advisory Committee on Rules. Here, Complaint Counsel’s request for all internal and external assessments of LabMD’s security practices is in direct conflict with FRE 407. Complaint Counsel’s only logical use for this information post March 2009 is to prove LabMD’s alleged negligence and/or culpable conduct relating to its data security system, policies or procedures. Thus, the information sought will be inadmissible at the hearing. Moreover, receipt of this information by the FTC will not lead to the discovery of other admissible evidence. Respondent asks this Court to bar this request pursuant to Commission Rules 3.31 and 3.43, as well as FRE 407.<sup>5</sup>

*B. Interrogatory No. 9 and Document Request No. 28.*

Complaint Counsel states that Interrogatory No. 9 and Document Request No. 28 seek information relevant to its allegation that LabMD “could have corrected its security failures at a relatively low cost using readily available security measures” (Complaint at ¶ 11). Specifically, Interrogatory No. 9 requests “for each month beginning in May 2008, state the cost of any changes made to LabMD’s security practices.” This is a classic example of information sought in contravention of FRE 407, discussed *supra*. Given the beginning date of May 2008, Complaint Counsel is only interested in any remedial measures that LabMD may have taken with regard to

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<sup>4</sup> This prong directly correlates with Commission Rule of Practice 3.43(b), 16 C.F.R. § 3.43(b) which states “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of **unfair prejudice** . . .” The purpose of FRE 407, as stated by the Advisory Committee is to prohibit the admission of unfairly prejudicial information.

<sup>5</sup> Not only is the information sought in contravention of FRE 407, but also assessments of LabMD’s security practices should be barred because they are protected by the self-critical analysis privilege. *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff’d*, 479 F.2d 920 (D.C. Cir. 1973).

its data network security. Moreover, Complaint Counsel's stated purpose for the information sought in Document Request No. 28 (*i.e.* LabMD financial statements) is to compare the relative cost of available security measures to LabMD's gross income. These requests should also be barred.

*C. Document Request No. 21.*

Document Request No. 21 as narrowed seeks personnel information relating to all of LabMD's current and former employees identified in Complaints Counsel's Preliminary Witness List. The information sought is wholly irrelevant to the allegations in the Complaint. The crux of the Complaint hinges on LabMD's alleged "fail[ure] to provide reasonable and appropriate security for personal information on its computer networks." (Complaint at ¶ 10.) Respondent conceded to Complaint Counsel on December 19, 2013 that information related to the duties and performance evaluations of LabMD's IT staff may be reasonably related to whether LabMD provided appropriate security for personal information, and is willing to produce said information. (*See* Exhs. A and F to Complaint Counsel's Mot. to Compel.) However, personnel information related to persons employed outside of the IT department, as well as the salaries of employees, are immaterial to LabMD's alleged data security failure. As an example of the incredulity of Complaint Counsel's request, it seeks the salary, job description and negative evaluations of Lawrence Hudson, a former LabMD sales employee. Complaint counsel can present no cogent reason why this information is relevant to LabMD's alleged failure to provide adequate data security when Mr. Hudson worked in sales and had no knowledge, control, or interaction with LabMD's computer network or IT staff. To the extent they exist, Respondent agrees to produce the job descriptions and negative evaluations of those people listed on Complaint Counsel's Preliminary Witness List that were employed in the IT Department;

however, respondent respectfully requests that this Court find that all other personnel information is irrelevant, overly broad, and unduly burdensome.

### **III. Conclusion**

In conclusion, Respondent respectfully requests this Court deny Complaint Counsel's Motion to Compel. Alternatively, Respondent requests this Court to enter a protective order shielding LabMD from Complaint Counsel's discovery requests issued in contravention of the Commission's Rules of Practice. Lastly, Respondent respectfully requests an oral argument with regard to Complaint Counsel's pending motion to Compel.

Respectfully submitted,

*/s/ William A. Sherman, II*  
Reed D. Rubinstein, Esq.  
William A. Sherman, II, Esq.  
Dinsmore & Shohl, LLP  
801 Pennsylvania Ave., NW Suite 610  
Washington, DC 20004  
Phone: (202) 372-9100  
Fax: (202) 372-9141  
Email: [william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com)

Michael D. Pepson  
Cause of Action  
1919 Pennsylvania Ave., NW, Suite 650  
Washington, D.C. 20006  
Phone: (202) 499-4232  
Fax: (202) 330-5842  
Email: [michael.pepson@causeofaction.org](mailto:michael.pepson@causeofaction.org)  
Admitted only in Maryland.  
Practice limited to cases in federal court and  
administrative proceedings before federal  
agencies.  
*Counsel for LabMD, Inc.*



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

\_\_\_\_\_  
**In the Matter of**

**LabMD, Inc.,  
a corporation.**  
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**DOCKET NO. 9357**

**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S MOTION TO COMPEL**

Upon consideration of Complaint Counsel's Motion to Compel, and Respondent's Opposition thereto, IT IS HEREBY ORDERED that Complaint Counsel's Motion is DENIED.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on January 7, 2014, I hand-delivered the foregoing document to:

Donald S. Clark, Esq.  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

I also certify that on January 7, 2014 I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

I further certify that on January 7, 2014 I delivered via electronic mail and first-class mail a copy of the foregoing document to:

Alain Sheer, Esq.  
Laura Riposo VanDruff  
Megan Cox  
Margaret Lassack  
Ryan Mehm  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Mail Stop NJ-8122  
Washington, D.C. 20580

I certify that the copy hand-delivered 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.

Dated: January 7, 2014

By: /s/ William A. Sherman, II  
William A. Sherman, II

**In the Matter of:**

**LabMD, Inc.**

*December 17, 2013*  
*Detective Karina Jestes*

**Condensed Transcript with Word Index**



**For The Record, Inc.**  
**(301) 870-8025 - [www.ftrinc.net](http://www.ftrinc.net) - (800) 921-5555**



9	<p>1 protects confidential material including consumers' 2 sensitive personal information. 3 Later today we may discuss information that is 4 subject to the protection of the protective order that's 5 been marked as CX0016. 6 To the extent that my questions or your responses 7 relate to consumer-sensitive personal information, 8 complaint counsel designates such testimony as 9 confidential pursuant to the protective order. 10 Do you understand? 11 A Yes. 12 Q Similarly, certain documents that I may use as 13 exhibits include the designation 14 "CONFIDENTIAL - FTC Docket No. 9357" as described in 15 paragraph 6 of CX0016. Complaint counsel invokes the 16 continued protection of the protective order as it relates 17 to documents that include such a designation. 18 Do you understand? 19 A Yes. 20 Q So Detective Jestes, I'd like to talk about your 21 work history. 22 How long have you been a detective at the 23 Sacramento Police Department? 24 A For approximately five years. 25 Q What did you do before that?</p>	11	<p>1 A For the two years prior to that, I was assigned 2 to the problem-oriented policing team. 3 Q What was your title on the problem-oriented 4 policing team? 5 A I was still classified as a police officer but 6 specifically assigned as a POP -- problem oriented 7 policing -- POP officer. 8 Q This was with the Sacramento Police Department? 9 A Yes. 10 Q What did you do prior to serving as a POP 11 officer? 12 A I was a mounted police officer for approximately 13 two and a half years. 14 Q That means that you served on a horse? 15 A Yes. 16 Q That was where? The 17 Sacramento Police Department? 18 A Yes. 19 Q What did you do prior to serving as a mounted 20 police officer? 21 A I was a patrol officer. 22 Q How long did you serve as a patrol officer? 23 A That was when I graduated from the academy in 24 1990 till 1998 when I went into the mounted patrol. 25 Q How long have you served at the police</p>
10	<p>1 A Just prior to that I was a background 2 investigator. 3 Q For how long did you serve as a background 4 investigator? 5 A About two years. 6 Q What did you do -- as a background investigator, 7 were you serving with the Sacramento Police Department? 8 A Yes. 9 Q What did you do prior to serving as a background 10 investigator with the Sacramento Police Department? 11 A I was in the position called "field training 12 officer coordinator." 13 Q How long did you serve in that role? 14 A About three years. 15 Q Was that also with Sacramento Police Department? 16 A Yes. 17 Q What did you do prior to serving as the field 18 training officer coordinator? 19 A Just prior to that I spent approximately eight 20 months as a patrol officer. 21 Q Was that also with the 22 Sacramento Police Department? 23 A Yes. 24 Q What did you do prior to serving as a patrol 25 officer?</p>	12	<p>1 department? 2 A I've been sworn for between 23 and 24 years. 3 Q Do you have an area of specialty in the 4 Sacramento Police Department? 5 A Yes. 6 Q What is that? 7 A I'm temporarily assigned right now back into 8 backgrounds, but my specialty assignment is property 9 crimes investigations. 10 Q What are "property crimes investigations"? 11 A It encompasses several areas which can be home 12 burglaries, armed robberies, bank robberies, car jacking, 13 embezzlements, identify theft, petty theft, and basically 14 any kind of theft. 15 Q How did you develop that expertise? 16 A I was assigned to the officer of investigations. 17 They placed me in that unit and subsequently sent me to 18 different schools. 19 In addition to experience in the unit, I also 20 went to schools in specific areas to hone skill. 21 Q Correct me if I'm mistaken, but in addition to 22 investigating crimes that are related to property theft, 23 you've also had training that relates to the criminal 24 activity that you characterize; is that correct? 25 A Yes.</p>

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1 BY MS. HARRIS:  
 2 Q Detective, with respect to what complaint counsel  
 3 has marked as CX0085 --  
 4 MS. HARRIS: Does complaint counsel intend to  
 5 attach the exhibits mentioned this morning to the  
 6 deposition as exhibits?  
 7 MS. VANDRUFF: Every document that we have  
 8 marked, yes, we intend to have as deposition exhibits. I  
 9 don't intend to release them to the court reporter,  
 10 however, because of the extent of personal information.  
 11 MS. HARRIS: Okay.  
 12 BY MS. HARRIS:  
 13 Q Detective, with respect to what complaint counsel  
 14 has marked as CX0085, I'll ask you the same questions.  
 15 With respect to any of the persons identified on  
 16 CX0085, do you have any evidence that any of them have  
 17 been the victim of identity theft?  
 18 A No.  
 19 Q Okay. The documents that you obtained on  
 20 October 5th, 2012 related to LabMD -- again, those are the  
 21 exhibits we've just discussed which are CX0087, CX0088,  
 22 and CX0085 -- what is your understanding, if any, about  
 23 how those documents came to be in the house at  
 24 5661 Wilkinson Street in Sacramento on October 5th, 2012?  
 25 A I don't know how they got there.

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1 Q Were any of those LabMD documents that were  
 2 recovered at the house on Wilkinson Street on  
 3 October 5th, 2012 found on any -- in any electronic  
 4 format?  
 5 MS. VANDRUFF: Objection to form.  
 6 THE WITNESS: No.  
 7 BY MS. HARRIS:  
 8 Q Were any of the LabMD documents marked as CX0085,  
 9 CX0088, and CX0087 found on the two computers that were  
 10 subsequently retrieved from the house at  
 11 5661 Wilkinson Street?  
 12 A No.  
 13 MS. HARRIS: Perhaps, maybe for ease of  
 14 reference, if this is agreeable, Counsel, when I reference  
 15 the LabMD documents, rather than referring to the exhibits  
 16 every time, can we have an agreement that, when I refer to  
 17 the LabMD documents, I'm referring to CX0087, CX0088, and  
 18 CX0085 -- is that agreeable?  
 19 MS. VANDRUFF: That is.  
 20 BY MS. HARRIS:  
 21 Q With respect to what we've now defined as the  
 22 LabMD documents, to whom did you believe those documents  
 23 belonged?  
 24 A Well, in the big picture, they belonged to LabMD  
 25 was what I assumed.

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1 Was that your question?  
 2 Q Yes.  
 3 A Okay.  
 4 Q What are your are procedures -- back up a minute.  
 5 You mentioned that some of the crimes that you  
 6 work on are receiving-stolen-property crimes; is that  
 7 correct?  
 8 A Yes.  
 9 Q When you have recovered property that belongs to  
 10 someone else, do you make attempts to return that property  
 11 to them?  
 12 MS. VANDRUFF: Objection to form.  
 13 THE WITNESS: Eventually, yes. There's a couple  
 14 of different procedures. We can photograph it at the  
 15 scene. It has to be marked as evidence. In the ease of  
 16 things, they've made policies so that, if it's an item  
 17 that you can get back to the victim immediately, you can  
 18 photograph it and mark it and document it at the scene and  
 19 release it. Otherwise it gets booked into evidence. If  
 20 I, as the investigator, can't locate the victim there's,  
 21 other employees that attempt to do so.  
 22 BY MS. HARRIS:  
 23 Q So there is an attempt to return property that  
 24 has been stolen from another to the victim?  
 25 A Yes.

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1 Q At any time, has the Sacramento Police Department  
 2 returned the LabMD documents to LabMD?  
 3 A No.  
 4 Q Why not?  
 5 A Due to the ongoing investigation with the FTC.  
 6 Q Did anyone at the FTC communicate with you and  
 7 instruct you not to return the documents to LabMD?  
 8 A I don't think so, no.  
 9 Q Who made the determination not to return LabMD's  
 10 documents to LabMD?  
 11 A I guess that was me since it's an ongoing  
 12 investigation.  
 13 Q It's an ongoing investigation by the  
 14 Sacramento Police Department?  
 15 A No, by the FTC.  
 16 Q So you made the determination not to return  
 17 LabMD's documents to LabMD based on the FTC's  
 18 investigation of LabMD?  
 19 A Yes.  
 20 Q Okay. You testified this morning that -- I guess  
 21 it is still morning -- you testified this morning that you  
 22 turned over the LabMD documents to the FTC; is that  
 23 correct?  
 24 A I don't think I said "turned over," but yes, the  
 25 documents in question, yes, were transmitted to the FTC.

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

\_\_\_\_\_)  
In the Matter of )  
)  
LabMD, Inc. )  
)  
\_\_\_\_\_)  
Docket No. 9357

**DECLARATION OF MICHAEL J. DAUGHERTY**

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The Declarant, Michael J. Daugherty, having been duly sworn, hereby states and alleges as follows:

1. My name is Michael J. Daugherty, and I am the CEO of LabMD, Inc. ("LabMD"). I have personal knowledge of the matters discussed and alleged herein.
2. Pursuant to paragraph 21 of the Complaint, I have reviewed Day Sheets found by the Sacramento Police Department.
3. None of the Day Sheets found by the Sacramento Police Department contain dates after March 31, 2009.

FURTHER DECLARANT SAYETH NAUGHT.

  
MICHAEL J. DAUGHERTY