

ORIGINAL

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



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

PUBLIC

Docket No. 9357

**MOTION FOR DISCOVERY SANCTIONS AGAINST RESPONDENT LABMD, INC.  
FOR FAILING TO COMPLY WITH DISCOVERY OBLIGATIONS**

**INTRODUCTION**

Pursuant to Rule 3.38(b) of the Commission’s Rules of Practice, 16 C.F.R. § 3.38(b), Complaint Counsel respectfully moves for sanctions against Respondent LabMD, Inc., which has failed to comply with this Court’s January 10, 2014 Order. Complaint Counsel has conferred in good faith with Respondent, but has been unable to reach agreement. *See* Meet & Confer Statement (attached as Ex. A).

**BACKGROUND**

On January 10, 2014, this Court granted, in part, Complaint Counsel’s Motion to Compel discovery responses (“Jan. 10, 2014 Order”). Specifically, the Court ordered Respondent to:

- Respond to Interrogatories 1 and 2 as clarified by Complaint Counsel’s December 16, 2013 letter and Document Requests 3, 4, and 27, for the entire time period requested, 2006 to 2010. Jan. 10, 2014 Order at 4.

- Respond to Interrogatory 9, and Document Requests 13 and 28,<sup>1</sup> for the time period requested. *Id.* at 5.
- Respond to Document Request 21 by producing information, for the time period requested, on the duties and job descriptions and any negative evaluations of individuals listed on Complaint Counsel's Preliminary Witness List who were employed in the IT department or had any duties or responsibilities with LabMD's security practices. *Id.* at 6.

The Court ordered Respondent to produce responsive documents and information to Complaint Counsel no later than January 22, 2014, thereby giving Respondent 12 days to comply with its discovery obligations.

Complaint Counsel met and conferred with counsel for Respondent on January 14, 2014 on a number of Complaint Counsel's discovery requests. Complaint Counsel memorialized this discussion in a January 17, 2014 letter (attached as Ex. B). After receiving no production of documents or information pursuant to the January 10, 2014 Order, Complaint Counsel transmitted a second letter to counsel for Respondent on January 24, 2014 regarding Respondent's non-compliance with the January 10, 2014 Order (attached as Ex. C). In this letter, Complaint Counsel requested that counsel for Respondent advise Complaint Counsel on or before January 27, 2014 of when Respondent would produce the documents and information required by the January 10, 2014 Order. The letter also advised counsel for Respondent that if

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<sup>1</sup> During a December 23, 2013 meet-and-confer between Complaint Counsel and counsel for Respondent, Complaint Counsel proposed narrowing Document Request 28 to documents "sufficient to show LabMD's annual revenue, profit, and expenditures." The Court ordered Respondent to respond to Document Request 28, as narrowed by Complaint Counsel, in the January 10, 2014 Order.

Respondent did not fully comply with the January 10, 2014 Order, Complaint Counsel could seek relief from this Court.

On January 27, 2014, William A. Sherman, II, counsel for Respondent notified Complaint Counsel in a letter that Respondent would make its “best efforts” to produce documents pursuant to the January 10, 2014 Order on a rolling basis, and he informed Complaint Counsel that Respondent planned to produce additional documents by January 31, 2014 (attached as Ex. D). In this letter, Counsel for Respondent also noted that he “had not been made aware of the Administrative Law Judge’s January 10, 2014 Order” until days after it had been entered. *Id.* Finally, Respondent attached to this letter incomplete responses to Interrogatories 1 and 2 (attached as Ex. E).<sup>2</sup>

On January 29, 2014, Complaint Counsel again wrote counsel for Respondent regarding Respondent’s non-compliance with the January 10, 2014 Order (attached as Ex. F). In this letter, Complaint Counsel asked counsel for Respondent to cure Respondent’s deficient January 27, 2014 responses to Interrogatories 1 and 2. Complaint Counsel also informed counsel for Respondent that Complaint Counsel would seek relief from the Court if Respondent did not produce all documents and information required by the January 10, 2014 Order on or before February 5, 2014.

On January 31, 2014, Respondent produced 44 pages to Complaint Counsel, of which 20 pages are emails that Respondent redacted almost entirely. Of the remaining 24 unredacted

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<sup>2</sup> In response to these Interrogatories – which request identification of Respondent’s employees with access to personal information and the types of personal information to which each employee had access – Respondent produced a list of employees identified by first name only and provided only three general categories of personal information (i.e., “Billing,” “Medical,” and “Limited Medical”) to which those employees had access.

pages, only a few pages arguably relate to any of the discovery ordered by the Court's January 10, 2014 Order. In particular, no unredacted documents responsive to Document Requests 13, 21, and 28 were included in Respondent's January 31, 2014 production.

Complaint Counsel met and conferred with counsel for Respondent on February 7, 2014 and the parties were unable to reach agreement regarding the timeframe in which Respondent would comply with the Court's January 10, 2014 Order. Indeed, in response to Complaint Counsel's question, Respondent's counsel could not even provide an estimate of when it would complete its production. At the call's conclusion, Complaint Counsel advised counsel for Respondent that Complaint Counsel intended to seek relief from the Court regarding Respondent's violations of the January 10, 2014 Order.

#### **ARGUMENT**

Complaint Counsel's goal in its Motion to Compel and in this Motion has been and remains that Respondent comply with its discovery obligations. Faced with Respondent's ongoing pattern of delay, Complaint Counsel is left with no option but to reluctantly seek relief from this Court. Commission Rule 3.38(b) provides that if a party "fails to comply with any discovery obligation imposed" by the Commission Rules, "the Administrative Law Judge or the Commission, or both, may take such action in regard thereto as is just, including but not limited to" the range of sanctions specified in Rule 3.38(b)(1)-(6). 16 C.F.R. § 3.38(b). Under Rule 3.38(b), it must be established that a party (1) has an obligation under the discovery rules and (2) has failed to comply with that obligation. *See id.; In re ECM BioFilms, Inc.*, No. 9358 (Feb. 4, 2014 Order at 3-4) (attached as Ex. G). Once this is established, the Administrative Law

Judge may take any action in regard thereto "as is just," including imposing a range of sanctions outlined under 3.38(b).

Here, sanctions are "just" because of the extensive scope of Respondent's non-compliance and because Respondent's failure to produce the documents and information lacks any colorable justification. Respondent's non-compliance has prejudiced and continues to prejudice Complaint Counsel. Thus, sanctions are "reasonable in light of the material withheld and the purposes of Rule 3.38(b)." See *In re Int'l Tel. & Tel. Corp. [ITT]*, 1984 WL 565367, at \*127 (F.T.C. 1984), quoting *In re Grand Union Co.*, 1983 WL 486347, at \*208 (F.T.C. 1983).

**I. RESPONDENT HAS DISCOVERY OBLIGATIONS TO PROVIDE DOCUMENTS AND INFORMATION ADDRESSED IN JANUARY 10, 2014 ORDER**

Respondent has discovery obligations under the Commission Rules to provide the requested documents and information. Respondent's obligations in this regard are unambiguous in light of this Court's January 10, 2014 Order.

**II. RESPONDENT HAS FAILED TO COMPLY WITH DISCOVERY OBLIGATIONS ADDRESSED IN JANUARY 10, 2014 ORDER**

Respondent has failed to comply with its discovery obligations addressed in the January 10, 2014 Order. Since January 10, 2014, Respondent has produced no documents or information with respect to the following from the January 10, 2014 Order:

- Interrogatory 9: For each month from May 2008 through 2010, the cost of any changes to Respondent's security practices;
- Document Request 13: Internal and external assessments of Respondent's security practices;

- Document Request 21: Information on the duties and job descriptions and any negative evaluations of those listed on Complaint Counsel's Preliminary Witness List employed in IT Department, or had any duties or responsibilities with Respondent's security practices<sup>3</sup>; and
- Document Request 28: Documents sufficient to show Respondent's annual revenues, profits, and IT-related expenditures.<sup>4</sup>

Further, where Respondent has produced documents and information, the materials produced have been inadequate or incomplete:

- Interrogatories 1 and 2: The full names of Respondent's employees with access to personal information and the categories of Personal Information to which each employee had access.

To date, Respondent has made a limited production of invoices and emails that may be responsive to the Document Requests described below:

- Document Requests 3 and 4: Documents relating to purchasing, maintaining, servicing, updating or replacing software and hardware used on Respondent's computer networks.
- Document Request 27: Documents identifying Respondent's expenditures for information technology products or services that relate to security practices.

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<sup>3</sup> Complaint Counsel believes that this request would apply to the following individuals on Complaint Counsel's Preliminary Witness List: John Boyle; Brandon Bradley; Matt Bureau; Jeremy Dooley; Patrick Howard; Robert Hyer; Curt Kaloustian, Chris Maire; Jeff Martin; Jennifer Parr; and Alison Simmons.

<sup>4</sup> As outlined in footnote 1, the Court ordered Respondent to respond to Document Request 28, as narrowed by Complaint Counsel, in the January 10, 2014 Order.

If the documents produced are all of the responsive and discoverable documents in Respondent's possession, custody, or control, Complaint Counsel seeks certification of that fact by Respondent. If they are not all of the responsive and discoverable documents, Complaint Counsel seeks production of all outstanding responsive and discoverable documents not yet produced.

### **III. SANCTIONS ARE JUST UNDER RULE 3.38(B)**

Imposing sanctions is just because of the breadth of Respondent's failure to comply with its discovery obligations and no colorable justification warrants Respondent's non-compliance. Respondent's violations of the January 10, 2014 Order are many, and the information and materials required by the January 10, 2014 Order are highly relevant to the Complaint's allegations.<sup>5</sup> Indeed, Respondent's failure to comply with the Court's January 10, 2014 Order has forced Complaint Counsel to proceed with key third-party depositions without documents or information critical to this case. Complaint Counsel has been and continues to be prejudiced by Respondent's non-compliance with its discovery obligations (Ex. A). Given the scope of Respondent's non-compliance, sanctions are warranted to prohibit Respondent "from resting on its own concealment and to maintain the integrity of the administrative process." *See In re Grand Union Co.*, 1983 WL 486347, at \*208. The circumstances here are distinguishable from *In re ECM BioFilms, Inc.* since, here, Respondent's non-compliance extends to nearly every

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<sup>5</sup> For instance, information responsive to Document Request 13, which seeks all internal and external assessments of LabMD's security practices, may show the period over which particular vulnerabilities existed on Respondent's networks, when the vulnerabilities were first identified to the IT industry, and when fixes were made available, all of which are relevant to Paragraph 10 of the Complaint.

allegation of the Complaint whereas Respondent's non-compliance in *ECM BioFilms* was limited to one Interrogatory.

Respondent has provided two inadequate excuses for its non-compliance with its discovery obligations. First, Mr. Sherman cited his unawareness of the January 10, 2014 Order, even though the Office of Administrative Law Judges served a copy of the January 10, 2014 Order to Mr. Sherman's co-counsel, Michael Pepson and Reed Rubinstein, on January 10, 2014. *See* Ex. D ("I had not been made aware of the Administrative Law Judge's January 10, 2014 Order as of the date of our [January 14, 2014] teleconference."). A four-day lack of awareness of a properly served court order by one of several attorneys representing the Respondent does not justify 19 days of non-compliance with that order.<sup>6</sup> Second, Mr. Sherman cited Respondent's "limited activities" as a reason for its delay in complying with its discovery obligations (Ex. A). Respondent's apparent decision to change the scope of its business operations—changes that Respondent has not disclosed to the Court or Complaint Counsel in writing—does not excuse Respondent from its discovery obligations.

Rule 3.38(b) prescribes certain sanctions when a party fails to comply with its discovery obligation under the Commission Rules. Based on Respondent's non-compliance, the Court should (1) find that certain matters concerning which the January 10, 2014 Order was issued be taken as established adversely to Respondent,<sup>7</sup> (2) prohibit Respondent from moving into

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<sup>6</sup> Subsequent to the parties' January 14, 2014 meet-and-confer, Complaint Counsel sent three letters on the topic of Respondent's failure to comply with the Court's January 10, 2014 Order, on January 17, 2014 (Ex. B), January 24, 2014 (Ex. C), and January 29, 2014 (Ex. F), and engaged in good faith in a meet-and-confer with Respondent on February 7, 2014.

<sup>7</sup> The adverse inferences that Complaint Counsel seeks by this Motion are set forth in the proposed order.



evidence or otherwise relying upon any improperly withheld, undisclosed, or redacted documents or information, and (3) prohibit Respondent from objecting to the introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown. *See* 16 C.F.R. § 3.38(b)(3)-(b)(5).

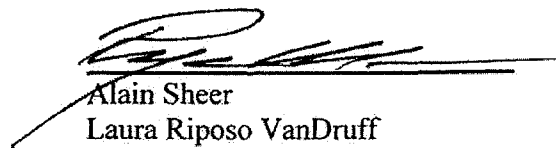
If Respondent complies fully with the January 10, 2014 Order, Complaint Counsel will withdraw this Motion because the “purpose of 3.38(b) is after all to induce parties to supply [requested] material.” *ITT*, 1984 WL 565367, at \*127. If Respondent continues its pattern of delay, however, the requested sanctions are appropriate and just.

CONCLUSION

For the foregoing reasons, the Court should impose sanctions upon Respondent for failing to comply with its discovery obligations.

Dated: February 10, 2014

Respectfully submitted,



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

Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room NJ-8100  
Washington, DC 20580  
Telephone: (202) 326-2918 – Mehm  
Facsimile: (202) 326-3062  
Electronic mail: [rmehm@ftc.gov](mailto:rmehm@ftc.gov)

*Complaint Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 10, 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:

Michael D. Pepson  
Lorinda Harris  
Hallee Morgan  
Kent Huntington  
Robyn Burrows  
Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650  
Washington, DC 20006  
michael.pepson@causeofaction.org  
lorinda.harris@causeofaction.org  
hallee.morgan@causeofaction.org  
kent.huntington@causeofaction.org  
robyn.burrows@causeofaction.org

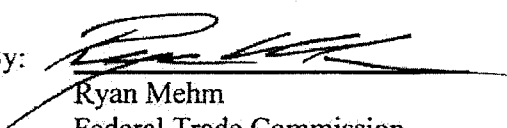
Reed Rubinstein  
William Sherman, II  
Sunni Harris  
Dinsmore & Shohl, LLP  
801 Pennsylvania Avenue, NW, Suite 610  
Washington, DC 20004  
reed.rubinstein@dinsmore.com  
william.sherman@dinsmore.com  
sunni.harris@dinsmore.com  
*Counsel for Respondent LabMD, Inc.*

## 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.

February 10, 2014

By:

  
Ryan Mehm  
Federal Trade Commission  
Bureau of Consumer Protection

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

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In the Matter of )

**PUBLIC**

LabMD, Inc., )  
a corporation, )  
Respondent. )

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Docket No. 9357

**PROPOSED ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR  
DISCOVERY SANCTIONS AGAINST RESPONDENT LABMD, INC. FOR  
FAILING TO COMPLY WITH DISCOVERY OBLIGATION**

Upon consideration of Complaint Counsel's Motion for Discovery Sanctions Against Respondent LabMD, Inc. for Failing to Comply with Discovery Obligation:

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

IT IS FURTHER ORDERED that the Court will make the following adverse inferences:

1. Respondent's failure to produce and/or identify internal and external assessments of Respondent's security practices establishes that Respondent's information security practices failed to provide reasonable and appropriate security for personal information on its computer networks. This failure also establishes that Respondent did not use readily available measures to identify commonly known or reasonably foreseeable security risks and vulnerabilities on its networks.
2. Respondent's failure to provide information about the cost of changes to its security practices (for the period May 2008 to 2010) establishes that Respondent did not correct its security failures at relatively low cost using readily available security measures.
3. Respondent's failure to fully specify the types of personal information that employees had access to establishes that Respondent did not use adequate measures to prevent employees from accessing personal information not needed to perform their jobs.

4. Respondent's failure to fully provide information about the purchasing, maintaining, servicing, updating or replacing of its hardware and software establishes that Respondent failed to maintain and update operating systems of computers and other devices on its networks.

IT IS FURTHER ORDERED that Respondent may not introduce into evidence or otherwise rely, in support of any claim or defense, upon the documents or other evidence, or upon any improperly withheld or undisclosed materials, witnesses, or other discovery.

IT IS FURTHER ORDERED that Respondent may not be heard to object to introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown.

Dated: February \_\_, 2014

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

# Exhibit A

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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

**STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)  
AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to F.T.C. Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion for Sanctions Against Respondent LabMD, Inc. for Failing to Comply with Discovery Obligation, Complaint Counsel met and conferred with counsel for Respondent, in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach an agreement.

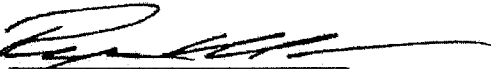
Complaint Counsel Laura Riposo VanDruff, Alain Sheer, Maggie Lassack, Jarad Brown, John Krebs, Megan Cox, and Ryan Mehm engaged in a meet-and-confer by phone with William Sherman and Sunni Harris, counsel for Respondent, on January 14, 2014 at approximately 3:00 p.m. regarding several of Complaint Counsel's outstanding discovery requests. Complaint Counsel also sent counsel for Respondent three letters — on January 17, 2014 (Ex. B), January 24, 2014 (Ex. C), and January 29, 2014 (Ex. F) — on this same topic and Respondent's compliance with the January 10, 2014 Order. Complaint Counsel Laura Riposo VanDruff, Maggie Lassack, Ryan Mehm, Jarad Brown, and Megan Cox engaged in another meet-and-confer by phone with William Sherman, Sunni Harris, and Lorinda Harris, counsel for



Respondent, on February 7, 2014 at approximately 3:00 pm. During this call, in response to Complaint Counsel's question, Mr. Sherman could not provide an estimate of when Respondent would complete its production. Mr. Sherman also cited Respondent's "limited activities" as a reason for its delay in complying with its discovery obligations.

Despite good faith efforts, Complaint Counsel has been unable to reach agreement with counsel for Respondent regarding Respondent's discovery obligation to produce documents and information addressed in the Court's January 10, 2014 Order in this matter. Complaint Counsel believes that further discussions with counsel for Respondent would not be fruitful and that it has exhausted its effort to reach an agreement.

Dated: February 10, 2014



Ryan M. Mehm  
Complaint Counsel

# Exhibit B



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

January 17, 2014

**VIA EMAIL**

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

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

Dear Mr. Sherman:

This letter follows the discussion during our telephonic conference on January 14, 2014 regarding outstanding issues from our December 2013 teleconferences concerning LabMD, Inc.'s ("LabMD's") written responses to Complaint Counsel's First Set of Interrogatories and Requests for Production ("December Teleconferences"). During that discussion, Complaint Counsel inquired: (1) when LabMD would provide responses to Interrogatories 1 and 2 for the time period 2007 through 2009, and (2) whether LabMD has possession, custody or control of any documents responsive to Requests for Production 11 and 14.<sup>1</sup>

From our discussion, we understand that you are working with your client to gather the information necessary to respond to Interrogatories 1 and 2 for the time period 2007 through 2009, and that you may be able to provide those responses on or before Monday, January 20, 2014. If that is not possible, we expect that LabMD will respond to Interrogatories 1 and 2 for the full time period requested on or before January 22, 2014, pursuant to the Court's January 10, 2014 Order on Complaint Counsel's Motion to Compel.

Regarding Request for Production 11, which seeks "[a]ll Documents contained in folders for sharing on LabMD computers running one or more P2P Applications," you explained that, according to your understanding:

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<sup>1</sup> As I noted in my letter dated December 20, 2013, during our December Teleconferences, LabMD agreed to provide responses to Interrogatories 1 and 2 (consistent with Alain Sheer's letter dated December 16, 2013) for the period 2007 through 2009. As I also noted in my December 20, 2013 letter, Complaint Counsel understood from our December Teleconferences that you would confirm whether your client has possession, custody, or control of documents responsive to Requests for Production 11 and 14.

- In 2008, after LabMD discovered that LimeWire was installed on the computer referenced in Paragraph 18 of the Complaint in this matter, LabMD took that computer out of service and removed LimeWire from it; and
- At a later date of which you are unaware, LabMD returned the computer to service, and the folders listed in the screenshots at FTC-LABMD-003753-54 “evolved” in the normal course of LabMD business.

Based on your explanation, we are uncertain whether LabMD has possession, custody, or control of any documents responsive to Request for Production 11. Although LimeWire was removed from the relevant computer, the documents contained in folders for sharing (including the documents listed in the screenshot at FTC-LABMD-003755) may have continued to be stored on the computer outside the LimeWire application, even as that computer “evolved” in the normal course of LabMD business. Please confirm in writing on or before Thursday, January 23, 2014, whether LabMD has possession, custody, or control, of any documents responsive to Request for Production 11.

Regarding Request for Production 14, which seeks “[a]ll Documents related to information provided by LabMD to the Sandy Springs, Georgia Police Department, including Officer David Lapidés,” we understand LabMD’s position to be that all documents provided by LabMD to Detective Lapidés have been produced to Complaint Counsel during discovery in this matter. We further understand that you will confirm whether your client has possession, custody, or control of any documents that LabMD may have provided to the Sandy Springs, Georgia Police Department through someone other than Detective Lapidés.

To the extent that this letter mischaracterizes in any respect our January 14, 2014 discussion regarding Interrogatories 1 and 2 and Requests for Production 11 and 14, please advise me by Thursday, January 23, 2014.

Sincerely,



Maggie Lassack

cc: Reed D. Rubinstein (via email)  
Michael D. Pepson (via email)  
Lorinda B. Harris (via email)  
Hallee K. Morgan (via email)  
Kent Huntington (via email)  
Sunni Harris (via email)  
Robyn Burrows (via email)

# Exhibit C



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

January 24, 2014

**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:

I write in regard to LabMD's production of documents pursuant to the Administrative Law Judge's January 10, 2014 Order on Complaint Counsel's Motion to Compel Responses to Certain Requests of Complaint Counsel's First Set of Interrogatories and Requests for Production ("January 10, 2014 Order"). That Order requires LabMD to produce, by January 22, 2014, all documents and information covered by the Order. As I noted in my email dated January 17, 2014, the Office of Administrative Law Judges served a copy of the January 10, 2014 Order on your co-counsel, Michael Pepson and Reed Rubinstein, on January 10, 2014.


To date, Complaint Counsel has received no production of documents or information pursuant to the January 10, 2014 Order. Your letter dated January 22, 2014 states that LabMD will "need additional time to produce documents and the privilege log covering the expanded timeframe set out in" the January 10, 2014 Order, and that you "anticipate producing" such a privilege log by Friday, January 31, 2014.

Your letter does not state when LabMD will be producing the documents and information required by the January 10, 2014 Order. As LabMD currently is in violation of the January 10, 2014 Order, we expect that you will provide the documents and information required by the Order as soon as possible and on a rolling basis.

William A. Sherman, II  
January 24, 2014  
Page 2

Please advise us on or before Monday January 27, 2014 of when LabMD will be producing the documents and information required by the January 10, 2014 Order. If LabMD does not promptly and fully comply with the January 10, 2014 Order, Complaint Counsel may be forced to seek further relief from the Administrative Law Judge.

Sincerely,

  
Maggie Lassack *hyla*

cc: Reed D. Rubinstein (*via email*)  
Michael D. Pepson (*via email*)  
Lorinda B. Harris (*via email*)  
Hallee K. Morgan (*via email*)  
Kent Huntington (*via email*)  
Sunni Harris (*via email*)  
Robyn Burrows (*via email*)

# Exhibit D



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

Admitted in D.C., Maryland and Ohio

January 27, 2014

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

Re: LabMD, Inc., FTC Docket No. 9357

Dear Ms. Lassack:

I am in receipt of your letter dated January 24, 2014. In that letter, it is my understanding that you will not agree to depose Mr. Daugherty in two 3-1/2 hour periods. Please do not mistake my letter as the final designation of Mr. Daugherty as the 30(b)(6) witness on behalf of LabMD. It was my intent to propose Mr. Daugherty could be designated in that capacity pursuant to the terms I proposed. Please know that LabMD has yet to make a final determination as to its 30(b)(6) designate.

This is also in response to your separate letter of January 24, 2014 with regard to the document production pursuant to the Administrative Law Judge's January 10, 2014 Order. I made it clear from our conversation during the meet and confer that I had not been made aware of the Administrative Law Judge's January 10, 2014 Order as of the date of our teleconference. LabMD will make its best efforts to produce the documents pursuant to the Administrative Law Judge's Order on a rolling basis as you suggest. We will submit privilege logs with each production. We plan to produce additional documents to you by Friday January 31, 2014, and continue to do so on a rolling basis until complete.

Lastly, attached hereto are LabMD's answers to interrogatories 1 and 2 as well as the privilege log for LabMD's production of documents thus far.

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

Very truly yours,


  
William A. Sherman, II

Exhibit D

# Exhibit E

First	Position	Information Access
Nena	Accessioning Mgr	Medical and Billing
Rose	Billing	Billing and *Limited Medical
Rosalind	Billing Mgr	Billing and *Limited Medical
Sandra	Billing Rep	Billing and *Limited Medical
Karalyn	Billing Rep	Billing and *Limited Medical
Nicotra	Billing Rep	Billing and *Limited Medical
Bianca	Billing Rep	Billing and *Limited Medical
Jamie	Billing Rep	Billing and *Limited Medical
Jani	Billing Rep	Billing and *Limited Medical
Liz	Billing/Client Services Mgr	Billing and *Limited Medical
Cindy	Exec Asst	
Tricia	Finance Mgr	Medical and Billing
Brandon	IT	Medical and Billing
Matt	IT	Medical and Billing
Nicole	IT	Medical and Billing
Pat	IT	Medical and Billing
Curt	IT	Medical and Billing
Christopher	IT	Medical and Billing
Jennifer	IT	Medical and Billing
Alison	IT	Medical and Billing
Bob	IT Mgr	Medical and Billing
Jeff	IT Mgr	Medical and Billing
Dean'na	Lab Asst	Medical and Billing
Chad	Lab Mgr	Medical and Billing
Connie	Lab Mgr	Medical and Billing
Mandana	Med Tech	Medical and Billing
Lindsey	Med Tech	Medical and Billing
Palak	Med Tech	Medical and Billing
Gerson	Pathologist	Medical and Billing
Marian	Pathologist	Medical and Billing
Alan	Pathologist	Medical and Billing
Adnan	Phlebotomist	Medical and Billing
Michael	President	Medical and Billing
Sherry	Transcriptionist	Medical and Billing
John	Vice Pres/GM	Medical and Billing

\*People employed in the billing department had limited access to medical information which allowed them to properly code the bill for services provided.

# Exhibit F



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

January 29, 2014

**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:

I have received your letter dated January 27, 2014, and the accompanying privilege log and answers to Complaint Counsel's Interrogatories 1 and 2. Complaint Counsel understands that LabMD has yet to make a final determination as to its corporate designee(s) who will testify pursuant to Complaint Counsel's Notice of Deposition of LabMD, Inc., served January 16, 2014. You have not proposed a date for the deposition of LabMD, as I requested on January 24, 2014. Therefore, Complaint Counsel proposes to conduct the deposition of LabMD on Thursday, February 20, 2014, at the FTC's Atlanta office or an alternate agreed-upon location in Atlanta, GA. Please confirm LabMD's availability for this date on or before Wednesday, February 5, 2014. If we do not hear differently from you by then, we will understand LabMD to have agreed to be deposed on Thursday, February 20, 2014.

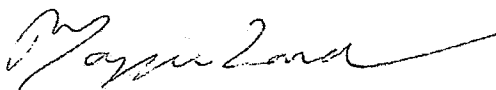
The Administrative Law Judge's January 10, 2014 Order provided Respondent 12 days to produce all of the documents and information required by the Order. Under the schedule set forth in your January 27, 2014 letter, LabMD will not produce any documents required by the January 10, 2014 Order until January 31, 2014, which is 16 days after our January 15, 2014 teleconference when you personally became aware of the Order, and 21 days after the Order was served on counsel for Respondent. Moreover, your January 27, 2014 letter does not identify a date certain by which LabMD will produce all documents and information required by the January 10, 2014 Order. The continued delay in production of the documents and information required by the January 10, 2014 Order—which Complaint Counsel first requested more than three months ago—likely will prejudice Complaint Counsel's discovery efforts in this matter. Therefore, if LabMD does not produce all documents and information required by the January 10, 2014 Order on or before Wednesday, February 5, 2014, Complaint Counsel will seek further relief from the Administrative Law Judge.

William A. Sherman, II  
January 29, 2014  
Page 2

With respect to LabMD's responses to Interrogatories 1 and 2, Complaint Counsel requests that you provide last names for each of the employees identified by first name only. We also request that LabMD identify the types of "Personal Information" included in each of the three categories identified in LabMD's answers to Interrogatories 1 and 2: "Billing," "Medical," and "Limited Medical." Interrogatory 2 requests the types of "Personal Information" that each Person identified in Response to Interrogatory 1 had "authority to access" (as defined in Alain Sheer's December 16, 2013 letter). We defined "Personal Information" on page two of Complaint Counsel's First Set of Interrogatories to Respondent as "individually identifiable information from or about a Consumer," and provided along with that definition more than ten examples of types of Personal Information.

If you would like to discuss any of the issues raised in this letter, please contact me to schedule a mutually convenient time for a conference call.

Sincerely,

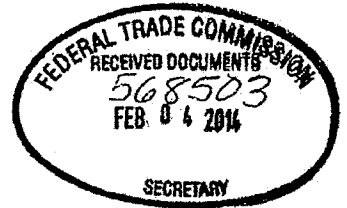


Maggie Lassack

cc: Reed D. Rubinstein (*via email*)  
Michael D. Pepson (*via email*)  
Lorinda B. Harris (*via email*)  
Hallee K. Morgan (*via email*)  
Kent Huntington (*via email*)  
Sunni Harris (*via email*)  
Robyn Burrows (*via email*)

# Exhibit G

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



In the Matter of )  
)  
)

ECM BioFilms, Inc., )  
a corporation, also d/b/a )  
Enviroplastics International, )  
Respondent. )  
)

DOCKET NO. 9358

**ORDER GRANTING IN PART AND DENYING IN PART  
COMPLAINT COUNSEL'S MOTION FOR SANCTIONS**

On January 22, 2014, Complaint Counsel filed a Motion for Sanctions Based on Respondent's Refusal to Comply with the Court's January 10, 2014 Order ("Motion"). Respondent ECM BioFilms, Inc. ("Respondent" or "ECM") filed an opposition to the Motion on January 28, 2014. As explained below, the Motion is GRANTED IN PART AND DENIED IN PART.

**I.**

The Complaint in this case charges that ECM engaged in deceptive trade practices in violation of Section 5 of the FTC Act by making false or unsubstantiated representations regarding the biodegradability of plastics treated with an additive manufactured by ECM ("ECM Additive"). The Complaint alleges, among other things, that Respondent distributes ECM Additives to its customers -- independent distributors and plastic products manufacturers (collectively, "customers") -- located throughout the United States who, in turn, treat plastics with ECM Additives and thereafter advertise and sell the treated plastic products to end-users as biodegradable. Complaint ¶ 2. The Complaint further alleges that ECM's representations to its customers were passed on to plastics end-users, and therefore, ECM provided its customers with the "means and instrumentalities" to deceive the end-users. Complaint ¶¶ 4, 14, 15. Respondent defends against the charge, in part, by asserting that it sells to sophisticated customers who would not interpret Respondent's representations in the manner alleged in the Complaint. Answer ¶ 4.

On January 10, 2014 an Order issued ("January 10 Order") granting Complaint Counsel's Motion to Compel Respondent to provide a complete customer list in response to Interrogatory 1 of Complaint Counsel's First Set of Interrogatories to Respondent. That Interrogatory requested:

Identify, by business name, individual contact, address, and telephone number, all customers who have purchased any ECM Additive, including customers who purchased any ECM Additive from distributors, in which case, also provide the



name, address, and telephone number of the distributor from whom the customer purchased the ECM Additive.

The January 10 Order also denied Respondent's Motion for a Protective Order, through which Respondent sought to avoid providing customer information requested by, among other discovery requests, Interrogatory 2 of Complaint Counsel's First Set of Interrogatories to Respondent. That Interrogatory requested:

For each customer or distributor identified in Interrogatory 1, list ECM's revenue per customer or distributor per year.

Based on the representations and supporting exhibits provided by the parties for the instant Motion, the record shows that on January 16, 2014, Respondent provided a list of its customers to Complaint Counsel, including the name of each customer, the customer's address and telephone number, and the names of the relevant contact persons for each customer. Motion CCX-A:1 (hereafter, "Customer List"). Further, on January 20, 2014, Respondent provided Complaint Counsel with an itemized listing of yearly revenues generated by individual customer numbers. Motion CCX-A:2 (hereafter, "Revenues List"). The Revenues List, however, does not identify revenue by customer name, and the Customer List does not contain customer numbers. Thus, there is no way to tie the revenues figures disclosed to particular identified customers.

## II.

Complaint Counsel contends that Respondent violated the January 10 Order by failing to provide a list of revenues by customer name. Complaint Counsel argues that Respondent's Revenues List is useless because the revenues are tied only to a customer number, and Respondent has not provided any way of determining which customer number belongs to which customer identified on the Customer List. Complaint Counsel accuses Respondent of "gamesmanship" in providing a "useless" list, and requests an order sanctioning Respondent for what Complaint Counsel argues is a violation of the January 10 Order. Complaint Counsel's requested sanctions include: barring ECM from arguing that any sample of information taken from ECM's customers is "unrepresentative"; barring ECM from making "any revenue-related argument" concerning potential remedies; and adjusting Complaint Counsel's deadline under the Scheduling Order for completing fact discovery, to compensate for the asserted delay in Respondent's compliance with the January 10 Order. Motion at 5.

Respondent denies violating the January 10 Order. Respondent states that, although the Order denied Respondent's Motion for a Protective Order, including with respect to Interrogatory 2, Complaint Counsel did not request an order compelling Respondent to respond to that Interrogatory. Rather, Respondent notes, Complaint Counsel only requested an order compelling production of the Customer List, which Respondent has provided. Therefore, Respondent argues, because the January 10 Order did not compel production of a list of revenues by customer name, there is no valid basis for imposing sanctions under Rule 3.38 for Respondent's failure to produce such a list. Respondent does not deny that the Revenues List fails to identify revenues by customer name, but contends that it is not obligated to create such a document for Complaint Counsel. Moreover, Respondent contends, under the January 10 Order, revenues are only relevant to damages and to "help identify customer-specific claims or the frequency of communication with customers." Opposition at 6. As to the latter purpose,

Respondent asserts, it has offered to produce a database of employee summaries of customer communications.

Finally, Respondent argues that the sanctions requested by Complaint Counsel are inappropriate because Complaint Counsel has reneged on a promise to “identify any subset of customers . . . that would lessen ECM’s burden” and because the requested sanctions are disproportionate to the discovery dispute presented. Opposition at 6.

### III.

#### A.

Rule 3.38(b), upon which Complaint Counsel relies, provides: “If a party . . . fails to comply with any discovery obligation imposed by these rules, upon motion by the aggrieved party, the Administrative Law Judge . . . may take such action in regard thereto as is just, including but not limited to” an order striking a pleading; directing that a matter be admitted or subjected to an adverse inference; or prohibiting certain objections to evidence; among other sanctions. 16 C.F.R. § 3.38(b). Contrary to the arguments of both parties, nothing in the language of Rule 3.38(b) requires, as a prerequisite to ordering relief, that a party violate a court order. Rather, as set forth above, it must be shown only that the party failed to comply “with any discovery obligation imposed by [the] rules.” *Id.*

Prior to 2009, Rule 3.38(b) read in pertinent part: “If a party or an officer or agent of a party fails to comply with . . . an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge . . ., the Administrative Law Judge . . . may take such action in regard thereto as is just” including the sanctions described above. However, as part of the 2009 Rule revisions, the Commission revised Rule 3.38(b) to remove the requirement of showing violation of a judicial order. Proposed Rule Amendments; Request for Public Comment, 73 Fed. Reg. 58832, 58839 (Oct. 7, 2008). Cases cited by the parties for the proposition that 3.38(b) sanctions cannot be imposed absent violation of a court order were decided under the former Rule 3.38(b) and do not govern the instant Motion. *See, e.g., In re Polypore Int’l, Inc.*, No. 9327 (filed September 10, 2008), 2009 FTC LEXIS 92, at \*5-6 (May 1, 2009).<sup>1</sup> Accordingly, based on applicable law, whether or not the January 10 Order affirmatively directed Respondent to answer Complaint Counsel’s Interrogatory 2 by disclosing revenues for each customer identified on the Customer List is not determinative. Rather, the issue is whether Respondent has failed to comply with a “discovery obligation” to answer Interrogatory 2.

Rule 3.35(a)(2), regarding interrogatories to parties, states in pertinent part: “Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to . . . in which event the reasons for objection shall be stated in lieu of an answer. . . . The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories.” 16 C.F.R. § 3.35(a)(2).

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<sup>1</sup> Respondent cites *In re OSF Healthcare Systems*, 2012 WL 665030 (Feb. 22, 2012); however, the cited document is the brief of a party, not an order of an Administrative Law Judge or of the Commission, and therefore does not constitute legal authority.

Respondent objected to Interrogatory 2, and, by filing its Motion for Protective Order, Respondent sought to avoid providing information in response Interrogatory 2. Although Respondent argued that revenue information for each customer was confidential and not relevant, the January 10 Order rejected those arguments as without merit. The Order stated: "Respondent has failed to meet its burden of demonstrating that the requested discovery should be barred as not relevant [and] . . . confidentiality . . . is no bar to disclosing" the requested revenue information. January 10 Order at 7. The Order concluded that "Respondent has failed to demonstrate that ECM's revenues by customer should not be disclosed in discovery." January 10 Order at 8. Thus, while the January 10 Order did not specifically order Respondent to answer Interrogatory 2, the Order clearly determined that Respondent is obligated to answer Interrogatory 2, by holding that the information sought by the Interrogatory was properly within the scope of discovery and by denying the requested protective order. Respondent's attempt in its Opposition to the instant Motion to "relitigate" the discoverability of customer-related revenue information is rejected.

### B.

Having concluded that Respondent had an obligation under the discovery rules to answer Interrogatory 2, the issue becomes whether Respondent has failed to comply with that obligation. It appears from the record presented on the Motion that, rather than answering Interrogatory 2 in a narrative format, Respondent opted instead to produce a document that reports ECM's revenues by customer number only. *See* Motion CCX-A:2. Rule 3.35(c) permits substitution of documents as response to an interrogatory, as follows:

(c) Option to produce records. Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records *from which the answer may be derived or ascertained* and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents *from which the answer may be ascertained*.

16 C.F.R. § 3.35(c) (emphasis added).

The document provided by Respondent does not sufficiently answer Interrogatory 2. Interrogatory 2 clearly directs Respondent to set forth, for each customer identified on its Customer List, the yearly revenues generated per customer per year. Respondent does not deny that the Revenues List provided to Complaint Counsel identifies customers only by number, but contends that "a document that supplies information tying each revenue generated to a named customer" does not exist and that it is not "obliged to create such a document." Opposition at 5.

Pursuant to Rule 3.35(a)(2), Respondent is required to answer Interrogatory 2 fully. If a party chooses to provide documents in lieu of a narrative answer, as Respondent chose here, such

response is sufficient only where the answer “may be derived or ascertained from” the documents provided. 16 C.F.R. § 3.35(c). In the instant case, it is not possible to derive the customer name from the Revenues List, and the Customer List provided does not identify customers by number. Thus, neither the Revenues List alone, nor the Revenues List in combination with the Customer List, is sufficient to derive the “revenue per customer . . . per year” “[f]or each customer . . . identified” on the Customer List, as requested in Interrogatory 2. Respondent’s assertion that it need not create a responsive document for Complaint Counsel is a “red herring” that fails to address the issue. Respondent is not required to produce any documents to respond to an Interrogatory; however, if Respondent chooses to do so, the documents must be sufficient to answer the Interrogatory. Because here the Revenues List fails to meet this requirement, Respondent remains obligated to answer Interrogatory 2.

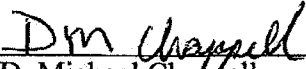
### C.

Complaint Counsel has demonstrated that Respondent failed to fulfill its obligation to answer fully Complaint Counsel’s Interrogatory 2. To this extent, Complaint Counsel’s Motion is GRANTED. It does not follow, however, that Complaint Counsel’s requested sanctions must be entered. Rather, Rule 3.38(b) grants the Administrative Law Judge the discretion to take whatever action in regard Respondent’s failure “as is just . . .” 16 C.F.R. § 3.38(b). The Motion fails to demonstrate that Complaint Counsel’s requested sanctions, at this stage of the proceedings, would be just. To this extent, Complaint Counsel’s Motion is DENIED. Based on the present record, a just order requires Respondent to promptly remedy its failure to fully answer Interrogatory 2, as detailed below.

### IV.

For all the foregoing reasons, Complaint Counsel’s Motion is GRANTED IN PART and it is hereby ORDERED that Respondent shall provide a complete answer to Complaint Counsel’s Interrogatory 2 no later than February 10, 2014, including without limitation, yearly revenues tied to customer names. If Respondent opts to produce records, the production must comply fully with Rule 3.35(c) so as to answer Interrogatory 2 fully, including without limitation, providing yearly revenues tied to customer names. Complaint Counsel’s Motion is otherwise DENIED.

ORDERED:

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

Date: February 4, 2014