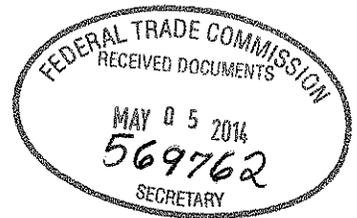


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of)

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

PUBLIC

Docket No. 9357

**COMPLAINT COUNSEL'S RESPONSE IN OPPOSITION
TO RESPONDENT'S MOTION FOR SUMMARY DECISION**

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INTRODUCTION

Respondent's filing, styled as a Motion for Summary Decision, is a perplexing document. Some of the facts that Respondent labels "undisputed," and upon which it appears to base its Motion, are clearly contradicted by evidence Complaint Counsel will introduce at trial. Others either fail to support Respondent's requested relief, or actually support Complaint Counsel's allegations that Respondent's data security practices were unfair and violated Section 5 of the Federal Trade Commission Act ("FTC Act"). Moreover, Respondent's legal arguments have no place in a Motion for Summary Decision and nearly all simply restate arguments the Commission rejected when it denied Respondent's Motion to Dismiss. Accordingly, Respondent has not met its burden of establishing that there are no disputed material facts and that it is entitled to summary decision in this case.

LEGAL STANDARD

Respondent filed its Motion for Summary Decision pursuant to Commission Rules 3.22 and 3.24. 16 C.F.R. §§ 3.22, 3.24. Rule 3.24(a)(1) allows a party to seek a summary decision on all or any part of the issues before the Commission. 16 C.F.R. § 3.24(a)(1). The Commission has recognized that the standard of review for summary decision is "virtually identical to Federal Rule of Civil Procedure 56." *In re McWane, Inc.*, FTC Dkt No. 9351, 2012 WL 4101793, at *5 (F.T.C. Sept. 14, 2012) (citing *In re Polygram Holding*, 136 F.T.C. 310, 2002 WL 31433923, at *1 (Feb. 26, 2002)). Accordingly, as the moving party, Respondent bears the initial burden of identifying those portions of the record that demonstrate there is no genuine dispute as to any material fact and that Respondent is entitled to a judgment as a matter of law. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). To be "material" a fact must be able to "affect the

outcome of the suit under the governing law.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

If Respondent is able to meet its initial burden, then Complaint Counsel must point to specific facts that demonstrate the existence of material facts for trial. Complaint Counsel cannot simply rely on the allegations or denials set forth in its pleadings. *In re McWane, Inc.*, at *5 (citing *Celotex*, 477 U.S. at 323; 16 C.F.R. § 3.24(a)(3)). However, as the party opposing the motion, Complaint Counsel is entitled to have all factual ambiguities and all justifiable inferences resolved in its favor. *Id.* (citing *Anderson*, 477 U.S. at 247; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

ARGUMENT

The legal standard for an unfairness case under Section 5 of the FTC Act is well settled. In order to show that Respondent’s data security practices were unfair, Complaint Counsel must establish that those practices: (1) caused, or are likely to cause, substantial injury to consumers; (2) that such injury is not reasonably avoidable by consumers; and (3) is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n). To support its Motion for Summary Decision, Respondent must establish that there is no dispute as to any facts that could affect the outcome of this case. In other words, Respondent must show that Complaint Counsel cannot prove that Respondent’s practices were unfair under the three-part Section 5 analysis.

Respondent has failed to make this threshold showing. Many of Respondent’s facts are in dispute or are immaterial to the allegations in this case. Others actually support Complaint Counsel’s assertion that Respondent’s data practices were unfair under Section 5 of the FTC Act. Further, even if Respondent’s facts supported its Motion for Summary Decision, Complaint

Counsel has identified its own disputed material facts, supported by evidence Complaint Counsel will introduce at trial, that pertain to the adequacy of Respondent's data security practices and the likelihood of consumer injury.¹ These facts go to the heart of whether Respondent's challenged practices were unfair under Section 5 and Complaint Counsel has therefore demonstrated the need for trial. *See Matsushita*, 475 U.S. at 586-87.

Although styled as a Motion for Summary Decision, Respondent's Motion is essentially nothing more than a cynical attempt to re-litigate the same arguments it made, and the Commission unequivocally rejected, in its earlier Motion to Dismiss. These arguments are no more persuasive now, in connection with a purported Motion for Summary Decision, than when Respondent first raised them in its Motion to Dismiss.

I. THE PURPORTED FACTS LISTED IN RESPONDENT'S MOTION DO NOT SUPPORT SUMMARY DECISION

Rule 3.24(a)(1) provides that where a party moves for a summary decision, "[t]he motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." 16 C.F.R. § 3.24(a)(1). Respondent did not file a separate statement of material facts but instead included a "Statement of Facts" section within its Motion for Summary Decision that sets forth facts that Respondent contends

¹ *See* Complaint Counsel's Separate and Concise Statement of Material Facts As To Which There Exist Genuine Issues For Trial ("Separate Statement") (filed confidentially on May 5, 2014). Complaint Counsel filed its Separate Statement pursuant to Rule 3.24(a)(2), 16 C.F.R. § 3.24(a)(2), which allows the party opposing a Motion for Summary Decision to "include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial."

are undisputed and upon which it presumably bases its Motion. Resp. Mot. at 4-8.² Contrary to Respondent's characterization, a number of these facts are in dispute. These include Respondent's statement that the company Tiversa "took possession" of a file containing health information of patients of Respondent's physician clients as well as its statement that the FTC has never promulgated data security guidance or standards. Resp. Mot. at 4, 7. As set forth in its Separate Statement, Complaint Counsel disputes these "facts." See, e.g., Separate Statement, Part II ¶¶ 2, 14 (asserting that facts are misleading, unsupported by evidence, and irrelevant and immaterial to request for summary decision).

Respondent's other facts, even if undisputed, are irrelevant or immaterial to Complaint Counsel's cause of action and thus cannot support the Motion for Summary Decision. For example, Complaint Counsel is not obligated to demonstrate that Respondent's conduct violated other laws in order to establish that Respondent's practices were unfair under Section 5. Accordingly, the fact that the Commission has not accused Respondent of violating the Health Insurance Portability and Accountability Act ("HIPAA"), Pub. L. 104-191, 110 Stat. 1936 (1996), or the Health Information Technology for Economic and Clinical Health Act ("HITECH"), Pub. L. 111-5, 123 Stat. 115 (2009) has no bearing on this case. Resp. Mot. at 6; Separate Statement, Part II ¶ 10. Similarly, statements that Respondent "is a HIPAA-covered entity," that "HIPAA's Security Rule establishes substantive data-security standards" for health information, and that the Department of Health and Human Services "exclusively enforces

² Respondent also appears to rely on the Expert Opinion Declaration of Cliff Baker. See Resp. Mot. 22, Exh. 12. Although Mr. Baker has submitted a declaration in an ancillary proceeding pending in federal district court in Georgia, *LabMD Inc. v. FTC*, No. 1:14-CV-810-WSD (N.D. Ga. Mar. 20, 2014), Respondent did not timely designate Mr. Baker in this proceeding and its use of his declaration contravenes the Scheduling Order. Accordingly, Complaint Counsel requests the Commission strike Mr. Baker's Declaration, which should not be considered in ruling on Respondent's Motion for Summary Decision.

HIPAA” also do not support Respondent’s Motion. Resp. Mot. at 5-6. Instead, these legal conclusions are immaterial to whether Respondent’s data security practices violated Section 5 of the FTC Act. Separate Statement, Part II ¶¶ 7-9.

Because Complaint Counsel is entitled to the benefit of “favorable inferences” the Commission should interpret some of Respondent’s facts as supporting the allegations that Respondent’s data security practices were inadequate and that they caused or are likely to cause unavoidable consumer injury. Respondent states that, in 2008, the company Tiversa obtained a LabMD “insurance aging file” and that the file contained sensitive health information on over 9,000 patients of LabMD’s physician clients. Resp. Mot. at 4. Respondent also states that in 2012, Sacramento police found documents that contained the sensitive information of patients of LabMD’s clients in the possession of suspected identity thieves. *Id.* at 5. Rather than supporting a summary decision for Respondent, these facts show that Respondent’s failure to protect consumer data caused, or was likely to cause, substantial injury that consumers could not reasonably avoid.

Respondent’s “undisputed facts” do not establish that Respondent’s data security practices reasonably or appropriately protected consumers’ personal information from unauthorized disclosure. They do not establish that consumers have not suffered substantial injury or are unlikely to suffer substantial injury in the future as a result of Respondent’s failures. They do not establish that any of the consumer injury is offset by countervailing benefits. And they do not establish that consumers could have reasonably avoided such injury. In short, the facts Respondent sets forth in its Motion for Summary Decision do not support the conclusion that Complaint Counsel is unable to show that Respondent’s practices were unfair under Section 5 of the FTC Act.

II. COMPLAINT COUNSEL HAS IDENTIFIED MATERIAL FACTS AS TO WHICH THERE ARE GENUINE ISSUES FOR TRIAL

In contrast to Respondent's Motion, Complaint Counsel's Separate Statement sets forth genuine issues of material fact, with citations to supporting evidence obtained during discovery, as to Respondent's data security practices and whether those practices caused or were likely to cause consumer injury. Complaint Counsel's facts demonstrate that Respondent failed to:

- (i) develop, implement, or maintain a comprehensive information security program to protect consumer data (Separate Statement, Part I ¶ 1);
- (ii) use readily available measures to identify commonly known or reasonably foreseeable security risks to and vulnerabilities on its computer networks (*id.* ¶ 2);
- (iii) use adequate measure to prevent employees from accessing personal information not needed to perform their jobs (*id.* ¶ 3);
- (iv) adequately train employees to safeguard personal information (*id.* ¶ 4);
- (v) require employees, or others with remote access to its computer networks, to use common authentication-related security measures (*id.* ¶ 5);
- (vi) maintain and update operating systems of computers and other devices on its network (*id.* ¶¶ 6, 7); and
- (vii) employ readily available measures to prevent or detect unauthorized access to personal information on its computer networks (*id.* ¶¶ 8, 9).

With respect to the issue of consumer injury, Complaint Counsel's Separate Statement also contains material facts that relate to the harm consumers have suffered, or are likely to suffer in the future as a result of Respondent's practices (*id.* ¶¶ 15-18); whether consumers could reasonably avoid such harm (*id.* ¶ 11); and whether the harm was outweighed by countervailing benefits, (*id.* ¶ 10).

The facts set forth in Complaint Counsel's Separate Statement are material because they relate to the necessary elements of an unfairness case under Section 5 of the FTC Act and their resolution will determine the outcome of this proceeding. Consequently, Complaint Counsel has

met its burden in opposing Respondent's Motion for Summary Decision and the Commission should allow this matter to proceed to trial.

III. THE COMMISSION HAS ALREADY REJECTED RESPONDENT'S LEGAL ARGUMENTS

The Commission has already considered and, by way of its Order Denying Respondent LabMD's Motion to Dismiss ("MTD Order") (Jan. 16, 2014), rejected the legal arguments Respondent attempts to reargue in this Motion. To the extent that Respondent has raised any new arguments, they are without merit.

A. Section 5 of the of the Federal Trade Commission Act Authorizes the Commission to Challenge Unfair Data Security Practices

Respondent's first line of argument is that the Commission wrongly denied Respondent's Motion to Dismiss because the Commission lacks Section 5 unfairness authority to "regulate data security generally" or protected health information specifically. Resp. Mot. at 9. Respondent asserts that, because Congress created "enforceable privacy rights" in health information through HIPAA, and because the Commission has acknowledged that it does not enforce HIPAA, consumers have no privacy interests in health information outside of those created by HIPAA. As a result, Respondent concludes that absent proof of deception, the Commission lacks authority over consumer health information. *Id.*

The Commission clearly rejected this argument. Specifically, it held that "Congress has never enacted any legislation that, expressly or by implication, forecloses the Commission from challenging data security measures that it has reason to believe are "unfair . . . acts or practices.'" MTD Order at 10. Then, addressing Respondent's argument that "HIPAA's comprehensive framework governing 'patient-information data-security practices' by HIPAA-regulated entities somehow trumps application of the FTC Act" the Commission held that

“HIPAA evinces no congressional intent to preserve anyone’s ability to engage in inadequate data security practices that unreasonably injured consumers in violation of the of the FTC Act and enforcement of that Act thus fully comports with congressional intent under HIPAA.” *Id.* at 11-12.

Adding a new wrinkle to this argument, Respondent now also asserts that the FTC has no authority to take action against LabMD to protect consumer privacy because the consumers at issue here voluntarily gave their personal information to their doctors who, in turn, voluntarily gave the data to Respondent. As a result, the data belonged to LabMD and consumers lost their privacy interests in the data.³

This argument also misses the mark for purposes of Respondent’s request for summary decision. Even if LabMD could be said to own the sensitive consumer information it received, the relevant issue here is not one of ownership. Instead, for purposes of a claim of unfairness under Section 5, the question is not who owned the data, but whether Respondent engaged in data security practices that did, or could, injure consumers who could not reasonably avoid harm that was not outweighed by countervailing benefits. As noted above, Respondent has failed to establish that there are no material facts in dispute regarding whether Respondent’s practices violated Section 5. Further, Complaint Counsel’s Separate Statement identifies numerous

³ The cases Respondent cites define the scope of reasonableness for governmental surveillance and searches in the Fourth Amendment context. *See United States v. Miller*, 425 U.S. 435 (1976) (defendant lacked the requisite Fourth Amendment interest to challenge the validity of the subpoenas); *Smith v. Maryland*, 442 U.S. 735 (1979) (petitioner had no legitimate expectation of privacy for purposes of the Fourth Amendment); *ACLU v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013) (dismissing declaratory judgment action challenging National Security Agency’s bulk collection of telephone metadata). Respondent’s argument is thus an improper attempt to conflate consumers’ expectations of privacy from governmental searches in a criminal context with the Commission’s authority to protect consumers from businesses that fail to adequately protect sensitive information, the disclosure of which is likely to cause substantial injury to consumers.

disputed material facts, supported by evidence outside of the pleadings, which pertain to each element of its case.

B. This Proceeding Does Not Violate Respondent's Due Process Rights

In reiterating its position that the Commission's case violates Respondent's due process rights, Respondent makes three separate arguments, each of which the Commission has already rejected.

Respondent first asserts that the FTC has violated the fair notice doctrine by enforcing Section 5 unfairness instead of promulgating data security standards through notice and comment rulemaking. Resp Mot. at 14.⁴ The Commission specifically rejected this argument and noted that Respondent's "position conflicts with longstanding case law confirming that administrative agencies may – indeed, must – enforce statutes that Congress has directed them to implement, regardless whether they have issued regulations addressing the specific conduct at issue." MTD Order at 14. Citing settled federal case law, the Commission concluded that "proceed[ing] through adjudication without first conducting a rulemaking . . . does not violate LabMD's constitutional due process rights." *Id.* at 15 (citations omitted).

As to Respondent's assertion that, in rejecting its argument, the Commission "has argued that it is not obligated to provide fair notice because it is not seeking 'criminal punishment or

⁴ Respondent's suggestion that Complaint Counsel's conduct during the deposition of the FTC's Bureau of Consumer Protection Rule 3.33 designee somehow supports its due process argument is unavailing. Complaint Counsel has already confirmed, subject to its objections, that the FTC has not promulgated rules or regulations or issued advisory opinions on data security standards for health information. *See* Complaint Counsel's Amended Response to LabMD, Inc.'s First Set of Requests for Admission, Response 2, 3, appended hereto as Attachment 1. Moreover, pursuant to the Chief Administrative Law Judge's recent Order Granting Respondent's Motion to Compel Testimony, *In re LabMD, Inc.*, FTC Dkt. 9357 (May 1, 2014), the Bureau of Consumer Protection will provide deposition testimony regarding any data security standards the Commission has published and on which Complaint Counsel intends to rely at trial.

civil penalties for past conduct,” Respondent mischaracterizes the Commission’s holding. *See* Resp. Mot. at 15 (citing MTD Order at 16). The Commission did not state that it is exempt from the fair notice doctrine. Instead, the Commission was simply pointing out the established rule that economic regulation is subject to a less stringent vagueness test than some other types of regulation. MTD Order at 16.⁵

Respondent next argues that the plain text of Section 5(n) fails to provide fair notice to a person of ordinary intelligence. The Commission has already squarely rejected this argument as well:

[T]he three-part statutory standard governing whether an act or practice is ‘unfair,’ set forth in Section 5(n), should dispel LabMD’s concern about whether the statutory prohibition of ‘unfair . . . acts or practices’ is sufficient to give fair notice of what conduct is prohibited. In enacting Section 5(n), Congress endorsed the Commission’s conclusion that ‘the unfairness standard is the result of an evolutionary process . . . [that] must be arrived at by . . . a gradual process of judicial inclusion and exclusion.

Id. (citing Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980) reprinted in *In re Int’l Harvester Co.*, 104 F.T.C. 949, 1070, 1073 (1984)).

Respondent’s final due process argument is that Commission consent decrees, public statements, articles, and other publicly available materials do not constitute fair notice of the standards the FTC seeks to enforce. This argument is without merit. It is unnecessary for such materials to constitute fair notice as the Commission has already determined that Section 5(n)’s unfairness, without more, provides sufficient notice and does not violate Respondent’s due process rights. *Cf. Wyndham*, 2014 WL 1349019, at *14 (rejecting defendant’s arguments that

⁵ Rejecting a similar argument in a case challenging the Commission’s authority to use its unfairness jurisdiction in the data security context, the District Court in *FTC v. Wyndham Worldwide Corp.*, No. 13-1887(ES), 2014 WL 1349019, at *16 (D.N.J. Apr. 7, 2014), recently held that the principles of fair notice and due process do not require the FTC to formally issue rules and regulations before it can file an unfairness action.

prior Commission consent decrees and business brochures fail to provide meaningful guidance for reasonableness).

C. The FTC Does Not Regulate all Areas Affecting Commerce

The relevance of Respondent's unsupported assertion that "there is no end to [*sic*] FTC's power and Section 5 . . . is instead a gateway to total regulatory authority" to this Motion is unclear. Resp. Mot. at 19. In any event, as the Commission indicated, Section 5 gives the FTC broad authority to challenge unfair acts and practices. MTD Order at 4. At the same time, however, the Commission also recognized Congress has exempted a number of businesses from Section 5(a)(2) including banks, savings and loans, credit unions, and others. *See* MTD Order at 3-4. Further, the Commission readily acknowledged that, in 1994, Congress "provided a sharper focus for the application of the Commission's 'unfairness' authority, by amending the FTC Act to incorporate three specific criteria governing the application of 'unfair . . . acts or practices' in adjudicatory and rulemaking proceedings." MTD Order at 4 (citing 15 U.S.C. § 45(n)). As such, while broad, the Commission's authority is not boundless and Respondent's argument that the Commission could overreach is unfounded.

D. HIPAA and the FTC Act are Compatible

In its final argument, Respondent makes another effort to articulate a direct conflict between HIPAA and Section 5. Respondent asserts that the application of the FTC's unfairness authority to data security establishes standards that are more prescriptive than, or inconsistent with, the Department of Health and Human Services' data security guidance. Citing *Credit Suisse Securities LLC v. Billings*, 551 U.S. 264 (2007), Respondent essentially argues that if

health care providers can be subject to the FTC's unfairness jurisdiction under Section 5, then the HIPAA data security standards are "null and void." Resp. Mot. at 19-22.⁶

Respondent's reliance on *Credit Suisse*, a case that involved a conflict between securities and antitrust laws remains misplaced. Indeed, in its denial of the Respondent's Motion to Dismiss, the Commission distinguished *Credit Suisse* noting that "nothing in the FTC Act compels LabMD to engage in practices forbidden by HIPAA, or vice versa." MTD Order at 12-13. The Commission went on to state:

LabMD and other companies may well be obligated to ensure their data security practices comply with both HIPAA and the FTC Act. But so long as the requirements of those statutes do not conflict with one another, a party cannot plausibly assert that, because it complies with one of these laws, it is free to violate the other.

Id. at 13. Even if the Commission had not already rejected the argument that the FTC Act and HIPAA are at odds, MTD Order at 12-13, assertions that the FTC's data security "standards" are not scalable or presume too high a level of technical knowledge for small health care providers should be addressed at trial and do not support a summary decision.⁷

⁶ Respondent also cites the Declaration of Cliff Baker. Resp. Mot. at 22. For the reasons discussed above, *supra* n.2, this declaration is impermissibly before the Commission and should be stricken.

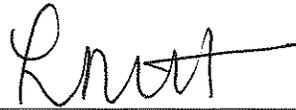
⁷ Because LabMD maintains personal information for some 750,000 consumers, it cannot accurately be described as "small." Resp't's Objs. & Resps. to Reqs. for Admission (Mar. 3, 2014), Resp. 23 (admitting that LabMD maintains information on its network about more than 750,000 consumers), appended hereto as Attachment 2. Further, to the extent Respondent suggests that the Commission has promulgated some sort of industry-wide data security rules or standards that conflict with the HIPAA's data-security standards, Respondent is incorrect. *See* Resp. Mot. at 13, 19-22. In the data security context, as in other contexts, the Commission applies its unfairness authority on a case-by-case basis and determines whether particular practices are unfair by evaluating the facts at issue and applying the three-part test set forth in the FTC Act. 15 U.S.C. § 45(a).

CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission deny Respondent's Motion for Summary Decision and deny Respondent's request that the Commission dismiss the Administrative Complaint with prejudice.

Dated: May 5, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system. The electronic copy sent to the Office of the Secretary is a true and correct copy of the paper original

I also certify that I caused a paper copy of the foregoing document with an original signature to be filed with the Office of the Secretary.

I also certify that I caused twelve (12) copies of the foregoing document to be delivered to the Office of the Secretary, Room H-113.

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

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May 5, 2014

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Attachment 1

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 AMENDED RESPONSE TO LABMD, INC.’S FIRST SET OF REQUESTS FOR ADMISSION (NUMBERS 1-20)

Pursuant to Sections 3.31 and 3.32 of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings (“Rules of Practice”), Complaint Counsel hereby amends its responses to Respondent LabMD, Inc.’s First Set of Requests for Admission (“Respondent’s Requests”).

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

General Objections

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

1. Complaint Counsel objects to Respondent's definition of "Commission" and "FTC" as overly broad. The "Federal Trade Commission" (or "FTC") can act only by a majority vote of a quorum of the five Commissioners. Therefore, Complaint Counsel cannot answer these Requests on behalf of the "Federal Trade Commission" or any individual Commissioner or employee. The objections and responses to these requests are submitted on behalf of Complaint Counsel in this matter, and not on behalf of the "Federal Trade Commission," its employees, staff, agents, or attorneys other than Complaint Counsel.
2. Complaint Counsel objects to Respondent's Requests to the extent the Requests seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any Request, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Requests to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of Respondent. By responding to Respondent's Requests, Complaint Counsel does not waive or intend to waive, but rather reserves and intends to reserve: (a) any objections to the competency, relevance, materiality, privilege, or admissibility as evidence, for any purpose, of any information produced in response to Respondent's Requests; (b) the right to object on any ground to the use of information produced in response to Respondent's Requests at any hearing or trial; and (c) the right to object on any ground at any time to a demand for a further answer to Respondent's Requests.

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

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

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

Specific Responses and Objections

Request for Admission No. 1

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

Response to Request for Admission No. 1

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

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 1.

Request for Admission No. 2

Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security, data security practices or data security

standards for PHI that defines what acts are prohibited or required under Section 5 of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 45 as related to PHI.

Response to Request for Admission No. 2

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

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 2.

Request for Admission No. 3

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

Response to Request for Admission No. 3

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

Complaint Counsel denies Request for Admission No. 3 to the extent that it suggests that “advisory opinions” are the only means the FTC uses to provide guidance regarding data security practices.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel otherwise admits Request for Admission No. 3.

Request for Admission No. 4

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

Response to Request for Admission No. 4

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

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

Request for Admission No. 5

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

Response to Request for Admission No. 5

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

Complaint Counsel denies the Request to the extent that it suggests that Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), requires Complaint Counsel to allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel otherwise admits Request for Admission No. 5.

Request for Admission No. 6

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

Response to Request for Admission No. 6

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

Request for Admission No. 7

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

Response to Request for Admission No. 7

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

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

Request for Admission No. 8

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

Response to Request for Admission No. 8

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

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

Request for Admission No. 9

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

Response to Request for Admission No. 9

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

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits that the information contained

in the “Day Sheets” and the “P2P insurance aging file” includes personal information, as defined in Respondent’s Requests, and PHI.

Request for Admission No. 10

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

Response to Request for Admission No. 10

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

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

Request for Admission No. 11

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

Response to Request for Admission No. 11

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

Complaint Counsel denies Request for Admission No. 11 to the extent that it suggests that the “SANS Institute” is the only entity that provides guidance regarding data security practices.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel otherwise admits Request for Admission No. 11.

Request for Admission No. 12

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

Response to Request for Admission No. 12

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

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

Request for Admission No. 13

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

Response to Request for Admission No. 13

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

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 13.
Request for Admission No. 14

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

Response to Request for Admission No. 14

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

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

Request for Admission No. 15

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

Response to Request for Admission No. 15

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

Complaint Counsel denies Request for Admission No. 15 to the extent that it suggests that no consumers were harmed or likely to be harmed as a result of Respondent’s unfair acts or practices.

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

Request for Admission No. 16

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

Response to Request for Admission No. 16

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. The suggestion that the FTC retaliated against Respondent in response to Respondent’s speech is not relevant to this administrative proceeding. *See* Order Denying Respondent’s Motion for a 3.36 Subpoena at 6, *In the Matter of*

LabMD, Inc., Docket No. 9357 (Feb. 21, 2014) (“Documents that may be reasonably expected to show whether or not ‘the FTC violated Daugherty’s First Amendment rights by retaliating against LabMD’ in filing this Complaint are not relevant to the allegations of the Complaint, the proposed relief, or the defenses of Respondent.”). Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “aware.”

Request for Admission No. 17

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

Response to Request for Admission No. 17

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

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 17.

Request for Admission No. 18

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

Response to Request for Admission No. 18

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

proceeding. Complaint Counsel further objects that the Request requires Complaint Counsel to analyze the evidence for Respondents.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel, after reasonable inquiry, lacks sufficient information to admit or deny Request for Admission No. 18. LabMD's "Day Sheets" were in the possession of identity thieves in Sacramento, CA on October 5, 2012, and, prior to October 5, 2012, they were transferred from LabMD's possession into the identity thieves' possession. Complaint Counsel has not yet established how the "Day Sheets" were transferred from LabMD's possession to the identity thieves' possession. LabMD implemented a data archive project to save paper documents in an electronic format. The "Day Sheets" may have been saved in an electronic form that could have been transmitted via the Internet.

Request for Admission No. 19

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

Response to Request for Admission No. 19

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

Complaint Counsel denies Request for Admission No. 19 to the extent that it suggests that no consumers were harmed or likely to be harmed as a result of Respondent's unfair acts or practices.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 19.

Request for Admission No. 20

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

Response to Request for Admission No. 20

Complaint Counsel objects to Respondent's definition of the "1,718 File." Respondent defines the "1,718 File" to mean "the 1,718 page file owned by LabMD that the Company claimed in 2008 to have obtained from LabMD via Limewire." The definition of the "1,718 File" is vague and ambiguous as to "Company," "obtained," and "claimed." Complaint Counsel further objects to Respondent's characterization that the "1,718 File" was "obtained" from LabMD. The evidence in this administrative proceeding does not support this characterization. For purposes of this response, Complaint Counsel understands the term "1,718 File" to mean the 1,718 page file owned by LabMD that Tiversa Holding Corp. found at four different IP addresses. These documents have been produced by Tiversa Holding Corp. at TIVERSA-FTC_RESPONSE-000001 – 001719, TIVERSA-FTC_RESPONSE-001720 – 003438, TIVERSA-FTC_RESPONSE-003439 – 005157, and TIVERSA-FTC_RESPONSE-005158 – 006876.

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

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

Attachment 2

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

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

**RESPONDENT'S OBJECTIONS AND RESPONSES TO
COMPLAINT COUNSEL'S REQUESTS FOR ADMISSION**

OBJECTIONS

Respondent hereby objects to Complaint Counsel's definition of "consumer". Complaint Counsel's definition of consumer, as "any natural person" is so broad as to render the term useless and outside of its common meaning. In response to the requests which use the term consumers, LabMD utilizes the term to mean its Physician Client's patients.

Respondent objects to Complaint Counsel's definition of Personal Information. LabMD receives Protected Health Information ("PHI") from its Physician Clients about their individual patients. This PHI was received from LabMD's Physician Clients in anticipation of and/or for the purpose of providing lab results as per the requests of the Physician Clients. The categories of information listed in subparts (a) through (k) of Complaint Counsel's definition as received by LabMD is PHI as that term is defined under HIPAA.

LabMD objects to the definition assigned to the term "collected" by the FTC and hereby states that in response to any request for admission that uses the term "collected", LabMD's answer will use the word received.

REQUESTS FOR ADMISSION

1. Admit that LabMD is a corporation organized under the laws of the State of Georgia.

Response Admit

2. Admit that Michael J. Daugherty is President and Chief Executive Officer of LabMD.

Response Admit

3. Admit that Michael J. Daugherty is the sole shareholder of LabMD.

Response Admit

4. Admit that, prior to April 2009, LabMD had its principal place of business at 1117 Perimeter Center West, Atlanta, Georgia 30338.

Response Admit

5. Admit that, between April 2009 and January 2014, LabMD had its principal place of business at 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339.

Response Admit

6. Admit that, since January 2014, LabMD has operated its business from two offices in the State of Georgia, one located in a condominium owned by Michael J. Daugherty, and the other located in the personal residence of Michael J. Daugherty.

Response Respondent denies that LabMD is operated out of two offices. LabMD admits that it operates out of 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339

7. Admit that, since at least 2001, LabMD has been in the business of conducting Clinical Laboratory Tests and providing Clinical Laboratory Test results to LabMD's Physician Clients.

Response Admit

8. Admit that LabMD has provided Clinical Laboratory Test results to Physician Clients whose offices are located in States other than Georgia.

Response Admit

9. Admit that LabMD has provided Clinical Laboratory Test results to Physician Clients whose offices are located in at least seven (7) different States.

Response Admit

10. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of Consumers who reside in States other than Georgia.

Response Admit

11. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of Consumers who reside in at least seven (7) different States.

Response Admit

12. Admit that LabMD files insurance claims for charges relating to Clinical Laboratory Tests that LabMD has conducted with health insurance companies whose offices are located in States other than Georgia.

Response Admit

13. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of more than 100,000 different Consumers.

Response Admit

14. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of fewer than 500,000 different Consumers.

Response Deny

15. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of fewer than 250,000 different Consumers.

Response Deny

16. Admit that LabMD has collected Consumers' Personal Information from its Physician Clients.

Response Admits that LabMD has received PHI from its Physician Clients

17. Admit that LabMD has used Respondent's Computer Network to collect Consumers' Personal Information from its Physician Clients.

Response Admits that LabMD has used its computer network to receive PHI from its Physician Clients

18. Admit that LabMD has Collected Personal Information about more than 500,000 different Consumers from its Physician Clients.

Response Admits that LabMD has received PHI from its Physician Clients about more than 500,000 different patients

19. Admit that LabMD has Collected Personal Information about more than 750,000 different Consumers from its Physician Clients.

Response Admits that LabMD has received PHI from its Physician Clients about more than 700,000 different patients

20. Admit that LabMD has Collected Personal Information about more than 1,000,000 different Consumers from its Physician Clients.

Response Denies that LabMD has received PHI from its Physician Clients about more than 1,000,000 different patients

21. Admit that LabMD Maintains Consumers' Personal Information on Respondent's Computer Network.

Response Admit

22. Admit that LabMD Maintains on Respondent's Computer Network Personal Information about more than 500,000 different Consumers.

Response Admit

23. Admit that LabMD Maintains on Respondent's Computer Network Personal Information about more than 750,000 different Consumers.

Response Admit

24. Admit that LabMD Maintains on Respondent's Computer Network Personal Information about more than 1,000,000 different Consumers.

Response Deny

25. Admit that LabMD Maintains on Respondent's Computer Network Consumers' specific diagnoses and laboratory results.

Response Admit

26. Admit that LabMD Maintains on Respondent's Computer Network specific diagnoses and laboratory results about more than 100,000 different Consumers.

Response Admit

27. Admit that LabMD Maintains on Respondent's Computer Network specific diagnoses and laboratory results about fewer than 500,000 different Consumers.

Response Deny

28. Admit that LabMD Maintains on Respondent's Computer Network specific diagnoses and laboratory results about fewer than 250,000 different Consumers.

Response Deny

29. Admit that LabMD receives personal checks from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD receives personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

30. Admit that LabMD makes paper copies of personal checks that it receives from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD receives personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

31. Admit that LabMD Maintains paper copies of personal checks that it receives from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD maintains paper copies of personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

32. Admit that LabMD Maintains paper copies of hundreds of personal checks that it has received from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD maintains paper copies of hundreds personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

33. Admit that LabMD Maintains paper copies of thousands of personal checks that it has received from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Denies that LabMD maintains paper copies of thousands personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

34. Admit that the copied checks and money orders included in the Sacramento Documents are copies of checks and money orders that LabMD received from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD conducted.

Response LabMD cannot admit or deny the request as LabMD outsourced to other laboratories some tests which LabMD did not conduct and those checks could be for payment for those tests.

35 Admit that LabMD's billing department has used computers on Respondent's Computer Network to generate spreadsheets of insurance claims and payments, which include Personal Information such as Consumers' names, dates of birth,

and SSNs; the American Medical Association current procedural terminology (“CPT”) codes for laboratory tests conducted; and health insurance company names, addresses, and policy numbers.

Response Admit

36. Admit that LabMD’s billing department has used computers on Respondent’s Computer Network to generate spreadsheets of payments received from Consumers titled “Day Sheets,” which include Personal Information such as Consumers’ names and SSNs; and information concerning methods, amounts, and dates of payments.

Response Admit

37. Admit that the 1,1718 File contains Personal Information about approximately 9,300 Consumers, including names; dates of birth; SSNs; the American Medical Association current procedural terminology (“CPT”) codes for laboratory tests conducted; and, in some instances, health insurance company names, addresses, and policy numbers.

Response Admit

38. Admit that the Documents titled “Day Sheets” included in the Sacramento Documents contain Personal Information about at least 500 Consumers, including: names; SSNs; and in some cases, diagnosis codes.

Response Admit

39. Admit that on May 13, 2008, LabMD received from Tiversa a copy of the 1,718 File.

Response Admit

40. Admit that LabMD determined that LimeWire had been downloaded to a computer used by Respondent’s billing department manager.

Response Admit

41. Admit that LabMD determined that LimeWire had been installed on a computer used by Respondent's billing department manager.

Response Admit

42. Admit that LabMD determined that a copy of the 1,718 File had been Maintained on a computer used by Respondent's billing department manager, on which Lime Wire had been installed.

Response Admit

43. Admit that, prior to May 2008, LabMD did not detect the installation of LimeWire on any LabMD computer.

Response Admit

44. Admit that, prior to May 2008, LabMD detected the installation of LimeWire on a LabMD computer.

Response Deny

45. Admit that, prior to May 2008, LabMD did not detect the use of LimeWire on any LabMD computer.

Response Admit

46. Admit that, prior to May 2008, LabMD detected the use of LimeWire on a LabMD computer.

Response Deny

47. Admit that the 1,718 File was created by or for LabMD.

Response Admit

48. Admit that the 1,718 File is the property of LabMD.

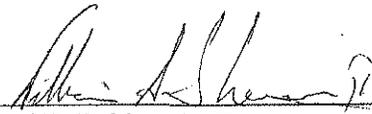
Response Admit

49. Admit that, prior to 2013, none of LabMD's Communications to Consumers included information about the measures Respondent has taken to protect Personal Information from unauthorized disclosure while the information is Maintained on Respondent's Computer Network or in transit to or from Respondent's Computer Network.

Response Admits that none of LabMD's Communications to patients of its Physician Clients included information about the measures Respondent has taken to protect Personal Information from unauthorized disclosure while the information is Maintained on Respondent's Computer Network or in transit to or from Respondent's Computer Network.

50. Admit that LabMD has not identified to its Physician Clients the measures Respondent has taken to protect Personal Information from unauthorized disclosure while the information is Maintained on Respondent's Computer Network or in transit to or from Respondent's Computer Network.

Response Admit



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Practice limited to cases in federal court and
administrative proceedings before federal
agencies.

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

Alain Sheer, Esq.
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CERTIFICATE OF ELECTRONIC FILING

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

Dated: March 3, 2014

By: 
William A. Sherman, II