

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



)
In the Matter of)

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

DOCKET NO. 9357

PUBLIC DOCUMENT

ORIGINAL

**RESPONDENT LABMD, INC.’S FIRST AMENDED
ANSWER AND DEFENSES TO ADMINISTRATIVE COMPLAINT**

Pursuant to 16 C.F.R. § 3.12(b), Respondent LabMD, Inc. (“LabMD”), respectfully submits the following First Amended¹ Answer and Defenses to the allegations of the Complaint issued by the Federal Trade Commission (“Commission”) on August 28, 2013. Except to the extent specifically admitted herein, LabMD denies each and every allegation in the Complaint, including all allegations contained in headings or otherwise not contained in one of the Complaint’s 23 numbered paragraphs. Specifically, LabMD denies that it has engaged in conduct that violates Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, and denies that this proceeding is in any way in the public interest.

RESPONDENT’S BUSINESS

1. Admitted.
2. Denied to the extent legal conclusions require an answer.
3. LabMD admits that it is a clinical laboratory that conducts laboratory tests on specimen samples and reports test results to authorized physicians since at least 2001. The balance of the averment is denied.

¹ Adjectives “First” and “Amended” inserted for clarity as amendments by interlineation.

4. LabMD admits that it files insurance claims for charges related to the clinical laboratory tests with health insurance companies. LabMD admits that insured referring physicians' patients may pay the part of LabMD's charges not covered by insurance and that uninsured referring physicians' patients may be responsible for the full amount of the charges in some instances.

LabMD is without knowledge and information sufficient to form a belief as to whether referring physicians' patients in many instances pay with credit cards or personal checks, as "many" and "typically" are highly subjective terms, and therefore denies that allegation. LabMD denies the balance of the averment.

5. LabMD admits that it currently tests samples from referring physicians' patients in Georgia, which may be sent from six states outside of Georgia: Alabama, Mississippi, Florida, Missouri, Louisiana, and Arizona. LabMD denies the balance of the averment.

6. LabMD admits that, as a clinical laboratory that conducts laboratory tests and files insurance claims for charges related to the clinical laboratory tests with health insurance companies, LabMD may be provided with the following information about referring physicians' patients: names; addresses; dates of birth; gender; telephone numbers; Social Security numbers ("SSN"); referring health care provider names, addresses, and telephone numbers; laboratory tests and test codes; and health insurance company names and policy numbers. The balance of the averment is denied.

7. Denied.

8. LabMD admits that it currently has a computer network and uses a computer network in conducting its business. LabMD denies that it operates computer networks. The balance of the averment is vague and unclear and so it is denied.

9. LabMD admits that it currently uses a computer network to receive orders for tests from health care providers; report test results to health care providers; file insurance claims with health insurance companies; prepare bills and other correspondence to referring physicians' patients;

and prepare medical records. LabMD denies that it currently uses computer networks to obtain approvals for payments made by referring physicians' patients with credit cards. LabMD admits that LabMD's billing department currently accesses documents related to processing claims and payments using computers that are nodes of a computer network. The balance of the averment is vague and unclear and so it is denied.

- (a) LabMD admits that LabMD's billing department currently generates spreadsheets of insurance claims and payments, which may include information such as referring physicians' patients' names, dates of birth, and SSNs; the American Medical Association current procedural terminology ("CPT") codes for the laboratory tests conducted; and health insurance company names, addresses, and policy numbers. The balance of the averment is denied.
- (b) LabMD admits that LabMD's billing department currently uses computers to create spreadsheets of payments received from referring physicians' patients ("Day Sheets"), which may include personal information such as referring physicians' patients' names; SSNs; and methods, amounts, and dates of payments. The balance of the averment is denied.
- (c) Denied.

RESPONDENT'S SECURITY PRACTICES

- 10. Denied.
- 11. Denied.
- 12. LabMD lacks knowledge and information sufficient to form a belief as to the truth or falsity of the averment so it is denied.

PEER-TO-PEER FILE SHARING APPLICATIONS

- 13. Admitted.
- 14. LabMD lacks knowledge and information sufficient to form a belief as to whether peer-

to- peer (“P2P”) users can “designate files on the user’s computer that are available to others on a P2P network and search for and access designated files on other computers on the P2P network,” as it is unclear what is meant by “designate files,” “designated files,” “available,” and “P2P network,” and therefore denies the averment.

15. LabMD lacks information and knowledge sufficient to form a belief as to the truth or falsity of the averment so it is denied.

16. LabMD lacks information and knowledge sufficient to form a belief as to the truth or falsity of the averment so it is denied.

SECURITY INCIDENTS

17. LabMD admits that a third party, Tiversa, Inc. (“Tiversa”), contacted LabMD in May 2008 and claimed to have obtained a June 2007 insurance aging report from LabMD via Limewire, a P2P file sharing application. The balance of the averment is denied.

18. LabMD lacks knowledge and information sufficient to form a belief as to whether the “P2P insurance aging file” was “available” on Limewire. LabMD admits that Tiversa claimed that the “P2P insurance aging file” could be obtained via Limewire in May 2008.

LabMD denies the balance of the averment.

(a) LabMD admits that it believes that Limewire had been downloaded and installed on a computer used by LabMD’s billing department manager but denies the balance of the averment.

(b) LabMD admits that hundreds of music files were found on the billing computer and could be shared using Limewire. LabMD does not have information and knowledge sufficient to form a belief as to the truth or falsity of the allegations that the “P2P insurance aging file” and other files in the billing computer were “designated for sharing” and therefore denies the balance of the averment.

(c) LabMD admits that it believes that a version of Limewire may have been installed on the billing computer no later than 2006. LabMD lacks knowledge and information sufficient to form a belief as to the truth or falsity of the balance of the averment so it is denied.

19. LabMD admits that the P2P insurance aging file contained personal information about approximately 9,300 referring physicians' patients, including names, dates of birth, SSNs, CPT codes, and health insurance company names, addresses, and policy numbers. The balance of the averment is denied.

20. Admitted.

21. LabMD lacks information and knowledge sufficient to form a belief as to the truth or falsity of the averment so it is denied.

VIOLATION OF THE FTC ACT

22. Denied.

23. Denied.

DEFENSES

Without assuming any burden of proof that it would not otherwise bear, and reserving the right to assert additional defenses as this matter proceeds, pursuant to 16 C.F.R. § 3.12(b)(1)(i), LabMD asserts the following defenses:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Commission is without subject-matter jurisdiction over the claims asserted in this case.

THIRD DEFENSE

Section 5 of the FTC Act does not give the Commission the statutory authority to

regulate the acts or practices alleged in the Complaint and therefore the Commission's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

FOURTH DEFENSE

The acts or practices alleged in the Complaint do not cause, and are not likely to cause, substantial injury to consumers that is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition, as required by 15 U.S.C. § 45(n), and therefore the Commission has no authority under Section 5 of the FTC Act to declare unlawful the acts or practices alleged in the Complaint.

FIFTH DEFENSE

Even if the Commission had subject-matter jurisdiction over the claims asserted in this case, which it does not, because the Commission has not published any rules, regulations, or other guidelines clarifying and providing any notice, let alone constitutionally adequate notice, of what data-security practices the Commission believes Section 5 of the FTC Act forbids or requires and has not otherwise established any meaningful standards, this enforcement action against LabMD violates the due process requirements of fair notice and appropriate standards for enforcement guaranteed and protected by the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act.

SIXTH DEFENSE

The claims alleged in the Complaint are barred, in whole or in part, because this administrative proceeding violates Article II of the United States Constitution because the presiding Administrative Law Judge is an "inferior officer" for Article II's purposes but was not appointed by the Commissioners, the President, or the Judiciary.

CONCLUSION

WHEREFORE, LabMD respectfully requests that the Administrative Law Judge deny the Commission's requested relief and dismiss the Complaint in its entirety with prejudice.

Dated: July 31, 2015

Respectfully submitted,

/s/ Prashant K. Khetan

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Counsel for Respondent, LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015, I caused to be filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send an electronic notification of such filing to the Office of the Secretary:

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

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

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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Dated: July 31, 2015

By: /s/ Patrick J. Massari

CERTIFICATE OF ELECTRONIC FILING

I hereby 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: July 31, 2015

By: /s/ Patrick J. Massari

Notice of Electronic Service

I hereby certify that on July 31, 2015, I filed an electronic copy of the foregoing RESPONDENT LABMD, INC.'S FIRST AMENDED ANSWER AND DEFENSES TO ADMINISTRATIVE COMPLAINT, with:

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I hereby certify that on July 31, 2015, I served via E-Service an electronic copy of the foregoing RESPONDENT LABMD, INC.'S FIRST AMENDED ANSWER AND DEFENSES TO ADMINISTRATIVE COMPLAINT, upon:

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