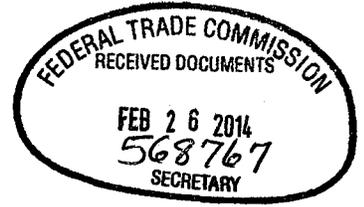


ORIGINAL



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., |) | Docket No. 9357 |
| a corporation, |) | |
| Respondent. |) | |
| |) | |
| |) | |

**RESPONDENT LabMD, INC.'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION FOR PROTECTIVE ORDER REGARDING RULE 3.33 NOTICE OF
DEPOSITION**

Respondent LabMD, Inc., ("LabMD") timely filed a proper Notice of Deposition on January 30, 2014 pursuant to Rule 3.33(c)(1) with the Bureau of Consumer Protection ("BOCP"). (Compl. Mot. Ex. B). The areas of examination jointly and severally describe with "reasonably particularity," topics that are reasonably expected to yield information relevant to the allegations of the complaint or LabMD's defenses. (*Id.* at 4). These topics are well within the scope of discovery Rules 3.31(c)(1), 3.33(a), and 3.33(c)(1). Therefore, LabMD respectfully requests that Complaint Counsel's Motion for Protective Order be denied in its entirety.

BACKGROUND

Throughout 2008 and 2009, and continuing into 2010, the Federal Trade Commission ("FTC") conducted an investigation into data security practices. During that investigation, FTC became aware that Tiversa Holding Corporation ("Tiversa") and Dartmouth College ("Dartmouth") possessed LabMD's property. The genesis of that improper possession, and its subsequent development by Tiversa, Dartmouth, and FTC, remains factually dubious. FTC officials had substantial interactions with individuals from Tiversa and Dartmouth. Dartmouth

and Tiversa, in turn, had substantial, ongoing communications and interactions with each other. Upon information importuned during that investigation, FTC formalized its proceedings against LabMD in January 2010. FTC also alleges that in October 2012 a criminal incident in Sacramento, California turned up Day Sheets and copied checks belonging to LabMD. In August 2013, FTC's ongoing investigation culminated in an Administrative Complaint against LabMD.

On January 30, 2014, LabMD served Complaint Counsel with a Notice of Deposition to the FTC's Bureau of Consumer Protection ("Notice"). (*Id.*). Pursuant to Rules 3.33(a) and (c)(1), LabMD stated with reasonable particularity the topics of that deposition, topics which are relevant to both the complaint and LabMD's defenses thereto. In an attempt to deny LabMD the discovery necessary to mount a proper defense and to conceal items that are properly within the scope of discovery and reasonably calculated to lead to the discovery of admissible evidence, Complaint Counsel filed the instant Motion for Protective Order Regarding Rule 3.33(c)(1) Notice of Deposition.¹

STANDARD OF REVIEW

Under Rule 3.33(c)(1), which mirrors Federal Rule of Civil Procedure 30(b)(6), Complaint Counsel bears the burden "to demonstrate that good cause exists for the entry of a protective order by making a 'particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *FDIC v. vs. FDC of Md.*, 2014 U.S. Dist. LEXIS 3039 at *6-7 (S.D. Ind. Jan. 10, 2014) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981) (quotation marks omitted). In addition, before restricting discovery, the Court should "consider the totality of the circumstances, weighing the value of the material sought against the burden of

¹ FTC's argument at section IV., pages 8-9 of its Motion, were unnecessary. Respondent does not seek to depose any "members of the Commission" pursuant to Rule 3.33(c)(1).

providing it and taking into account society's interest in furthering the truthseeking function.”
Id. A Court will “rarely grant a protective order which totally prohibits a deposition, unless extraordinary circumstances are present.” *CFTC v. Midland*, 1999 U.S. Dist. LEXIS 16939 at *10-11 (S.D. Fla. August 4, 1999) (internal citations omitted).

On the other hand, Rule 3.33, like Federal Rule of Civil Procedure 30(b)(6), permits a party to notice the deposition of “a governmental agency” and requires that the notice “describe with reasonable particularity the matters for examination.” *SEC v. Kramer*, 778 F.Supp.2d 1320, 1327-28 (M.D. Fla. 2011) (internal citations omitted). Neither the Court nor Compliant Counsel can use the “reasonable particularity” requirement “to limit what is asked of the designated witness at a deposition,” because the notice “establishes the **minimum** about which the witness must be prepared to testify, not the **maximum**.” *Kress v. Price Waterhouse Coopers*, 2013 U.S. Dist. LEXIS 77897 at *7 (E.D. Cal. June 3, 2013) (internal citations omitted) (emphasis supplied). Furthermore, it is “very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.” *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979).

ARGUMENT

- I. **Topics 1 Through 4 Are Described With Reasonable Particularity In Respondent's Notice Pursuant To Rule 3.33(c)(1) And Are Clearly Within The Scope Of Rule 3.31(c).**
 - A. **The 1718 File, Including The BOCP's Relationship With Tiversa, Dartmouth College, and Eric Johnson.**

Complaint Counsel's Motion objects to LabMD's Notice because (1) the Word “relationship” is not satisfactorily defined; and (2) the Topics “are overbroad and not stated with ‘reasonable particularity.’” (Compl. Mot. 5). These objections ignore common sense, applicable case law under Fed. R. Civ. P. 30(b)(6), and its FTC counterpart, Rule 3.33(c)(1).

“Relationship” is defined as the way two or more people or groups communicate with, behave toward, and deal with each other, or the way in which two or more people or things are connected.² Simply put, Respondent seeks to depose a proper FTC representative(s) regarding the 1718 file, including communications and/or dealings and interactions between BOCP and Tiversa, Dartmouth, and Eric Johnson, jointly and severally.³ It is entirely necessary and proper that LabMD does this.

First, Complaint Counsel must concede that the 1718 file is a topic necessary and worthy of a Rule 3.33(c)(1) deposition because it is reasonably relevant to FTC’s Complaint as well as LabMD’s defenses. (Compl. ¶¶ 11, 13-20; LabMD Ans. ¶¶ 11, 13-20; LabMD Def. pp. 6-7). Moreover, BOCP’s communications and interactions with Tiversa/Dartmouth/Eric Johnson are effectively defined and narrowed by the parameters of the 1718 file.

Second, Complaint Counsel misrepresents Rule 3.33(c)(1)’s reasonable particularity requirement. Complaint Counsel does not, because they cannot, assert ““particular and specific demonstration of fact[s], as distinguished from stereotyped and conclusory statements”” to argue that LabMD’s topics are not described with reasonable particularity. *FDIC v. FDC of Md.*, 2014 U.S. Dist. LEXIS 3039 at *6-7 (S.D. Ind. Jan. 10, 2014) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 [] (1981)). The connections between allegations contained within the FTC’s Complaint, LabMD’s defenses, and Tiversa, Dartmouth, and Eric Johnson are endemic to this case. These connections have been the subject of testimony at various discovery depositions. FTC’s “Part II” investigation was “opened” in January 2010. In positing that pre-January 2010

² Merriam-Webster Online, available at <http://www.merriam-webster.com/dictionary/relationship> (Merriam-Webster, Incorporated 2014).

³ Complaint Counsel’s interpretation of the request is illogical and overbroad in that it posits that LabMD could be asking about the BOCP’s personal friendships with Dartmouth employees. This Notice is the equivalent of a 30(b)(6) deposition where the BOCP is the “person” to be deposed. As an inhuman, federal agency, the Bureau cannot have personal friendships.

information is problematic as to discovery, Complaint Counsel invites the smoke of hypocrisy. The stink of pre-January 2010 communications with Tiversa and Dartmouth pervade the charges against LabMD. There is no bright line demarcation between these two supposedly separate investigations. The 1718 file would not be part of Johnson's article but for the concerted actions of Tiversa that formed the basis for their communications and interactions with FTC.

Additionally, Rule 3.33(c)(1)'s "reasonable particularity" requirement cannot be utilized to restrict relevant discovery under the Rules. *Cabot Corp. v. Yamulla*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) (citing *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla. 1995)). These FTC Rules cannot limit what may be asked of a designated witness at a Rule 3.33(c)(1) deposition, but rather, they "simply define[] [an agency's] obligations." *McGinnis v. Amer. Home Mortgage Serv., Inc.*, 2013 U.S. Dist. LEXIS 107038 at *4-5 (M.D. Ga. July 31, 2013). The FTC in its aggressive action is seeking to wholly preclude LabMD from receiving any discovery on the 1718 file. This is contrary to law and cannot stand.

B. All Data Security Standards That Have Been Used By The BOCP To Enforce Section 5 Of The [FTCA] Since 2005.

Complaint Counsel seeks to deny LabMD access to the evidence LabMD requires to respond to the complaint's allegations by arguing that prior orders preclude discovery of this material. LabMD disagrees. While this Court has ruled that LabMD's fair-notice argument and FTC's basis for commencing the action are not fair targets of discovery, its ruling does not preclude LabMD from understanding the standards that it purportedly violated.

FTC has never promulgated standards that apply to data security.⁴ "[T]he mere fact that [data] breaches occurred . . . would not necessarily establish that LabMD . . . failed to have reasonable security measures." (Mot. To Dismiss ("MTD") Order 18). Alluding to some form

of a negligence, FTC repeatedly characterized the standard as one of “reasonableness.” (*Id.* at 2, 9, 18, 19.) Reasonableness is a variant in this case that has yet to be defined by FTC.

FTC admits that in order to establish its case, it “will need to determine . . . whether LabMD’s data security procedures were ‘unreasonable.’” (MTD Order 18-19.) This determination is a central issue in this case and one of the elements that FTC must prove. Further, FTC recognizes that “[w]hether LabMD’s security practices were unreasonable is a factual question that can be addressed only on the basis of evidence to be adduced in this proceeding.” (MTD Order 19). Complaint Counsel attempts to sidestep the importance of this information by arguing that it “does not correspond to any permissible affirmative defense and is foreclosed.” (Compl. Mot. 7). Complaint Counsel misstates the scope of discovery. In addition to defenses, LabMD is permitted to “obtain discovery . . . relevant to the allegations of the complaint.” (16 C.F.R. § 3.31(c)(1)). The standard of reasonableness under FTC Rules—as is reasonably expected to be revealed in the noticed deposition—is central to the Complaint’s allegations and is within the scope of discovery. *See* Exhibit A, FTC’s Answers to LabMD’s Interrogatories # 19-21 and Request for Production # 10. Certainly Respondent is permitted to conduct discovery which may reveal defenses available to it that without discovery it may never know.

LabMD cannot respond to FTC’s allegations of unreasonableness without knowing what standard FTC uses to judge that reasonableness. Deposing a BOCP representative is reasonably expected to yield information about what FTC considers are reasonable data security measures.

Given that LabMD is defending itself against some as-of-yet unrevealed standard of reasonability, LabMD’s Notice Topic 2 seeks to answer a “factual question that can be addressed

only on the basis of evidence to be adduced in this proceeding,” as this Court has previously directed. (MTD Order 19). This information is within the scope of discovery.

C. Consumers That Have Been Harmed By Respondent’s Allegedly Inadequate Security Practices.

Complaint Counsel objects to LabMD’s Notice Topic 3 “because it demands testimony that Complaint Counsel will present through expert witnesses.” (Compl. Mot. 7-8). This is contrary to both the letter and spirit of discovery, causing extreme prejudice to LabMD and its ability to properly prepare for the adjudicative hearing in this matter.

FTC discovery provisions provide that “[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1); *In Re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *3-4 (July 6, 2001). Contrary to Complaint Counsel’s assertions, interrogatories and requests for production of documents are wholly distinct avenues of discovery under the Commission’s Rules, and do not replace or dislodge LabMD’s right to a proper Rule 3.33(c)(1) deposition of agency officials.

Nor is Complaint Counsel allowed to unilaterally restrict the scope of discovery by indicating its own choice of producing testimony. LabMD is clearly entitled to discover FTC’s position on facts regarding potential and/or actual harm to consumers in this case without regard to FTC’s expert witness list.

While the procedural due process and Constitutional issues arising with respect to FTC’s lack of standards or rulemaking regarding data security under Section 5 will ultimately be decided in the 11th Circuit, that does not mean LabMD is now prevented from asking relevant questions of a Rule 3.33(c)(1) witness at the adjudicative stage of the proceedings.

D. BOCP's Relationship With The Sacramento Police Department (SPD) Relating To Documents It Found At A Sacramento "Flop House" Belonging to LabMD.

The facts underlying this Notice Topic are obvious. FTC's complaint betrays its position on this point at paragraph twenty-one. In essence, FTC alleges that thirty-five LabMD Day Sheets and a small number of copied checks were in the possession of an identity thief arrested by the Sacramento Police Department ("SPD") in October 2012. (Compl. ¶ 21).

"A number of SSNs in the Day Sheets are being, or have been, used by people with different names, which *may indicate* that the SSNs have been used by identity thieves." (*Id.*) (emphasis supplied). It is important to note in this respect that FTC officials waited *four months* before contacting LabMD to inform them that the Day Sheets had been found by the SPD. (Ex. A).

Rule 3.33(c)(1) and its federal counterpart, Rule 30(b)(6), mandate that FTC designate one or more witnesses for testimony regarding the October 2012 SPD event, as well as FTC's post-October 2012 communications and/or interactions with SPD thereunder. There can be no serious objection to this requirement.

Complaint Counsel's obligations are clear. FTC has "voluntarily initiated" this action against LabMD. *SEC v. Kramer*, 778 F.Supp.2d 1320, 1327 (M.D. Fla. 2011). "Under [Rule 3.33(c)(1)] an entity has a duty to prepare its deponent to 'adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know.' ... The deponent's testimony reflects the knowledge, opinions, and beliefs of the entity and not of the deponent. ... This includes the entity's interpretation of events and documents." *FDIC v. vs. FDC of Md.*, 2014 U.S. Dist. LEXIS 3039 at *5-6 (S.D. Ind. Jan. 10, 2014).

Complaint Counsel's Motion states no reason why this Court should disallow Notice Topic 4.

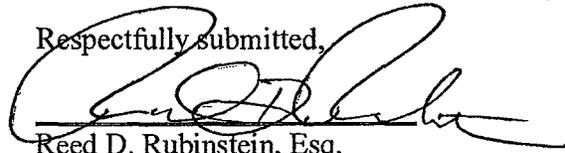
CONCLUSION

For the reasons stated above, this Court should deny Complaint Counsel's Motion for Protective Order.

FTC's obligations here are to designate one or more witnesses with institutional knowledge of how FTC came to possess the 1718 file and the October 2012 Sacramento Police Department incident, as well as the handling and/or dissemination of LabMD's property post-October 2012. LabMD seeks only "to discover the facts underlying the claims against [it]." *SEC v. Kramer*, 778 F.Supp.2d 1320, 1328 (M.D. Fla. 2011).

Dated: February 26, 2014

Respectfully submitted,



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Counsel for Respondent

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

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

DOCKET NO. 9357

**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR
PROTECTIVE ORDER REGARDING RULE 3.33 NOTICE OF DEPOSITION**

Upon consideration of Complaint Counsel's Motion for Protective Order Regarding Rule 3.33 Notice of Deposition, and Respondent's Opposition thereto, IT IS HEREBY ORDERED that Complaint Counsel's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 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:

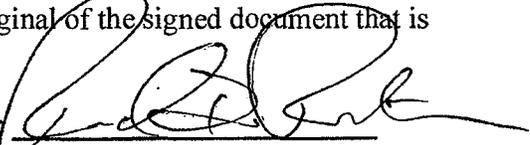
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Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

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: February 26, 2014

By



Reed D. Rubinstein

burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged information pursuant to Rule 3.35(c).

19. Identify all publications and documents relating to the data security standards, regulations and guidelines the FTC seeks to enforce against LabMD.

RESPONSE:

Subject to and without waiving any objections, Complaint Counsel refers Respondent to its response to Document Request 10.

20. Identify any and all changes in the data security standards, regulations and guidelines the FTC uses to enforce section 5 of the FTC Act.

RESPONSE:

Complaint Counsel objects to this Interrogatory as vague and ambiguous. Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

21. Identify all data security standards, regulations and guidelines the FTC will use to determine whether LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of

expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

22. Identify the time frame in which the FTC claims that LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

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

Complaint Counsel further objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory to the extent it seeks a legal conclusion.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome, as discovery relating to LabMD's security practices is ongoing.

Subject to and without waiving any General or Specific objections, Complaint Counsel identifies the time period of January 1, 2005 through the close of evidence at the Hearing in the above-captioned matter.

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

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

COMPLAINT COUNSEL’S ANSWER AND OBJECTIONS TO RESPONDENT’S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NUMBERS 1-17)

Pursuant to Sections 3.31 and 3.37 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent LabMD, Inc.’s First Set of Requests for the Production of Documents (“Respondent’s Requests”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

General Objections

The following General Objections apply to each request for documents in 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 Requests to the extent they seek to impose duties and obligations upon Complaint Counsel beyond those imposed by the Commission’s Rules of Practice for Adjudicative Proceedings, including seeking documents that are beyond the scope of permissible discovery under Rule 3.31(c)(2).

8. All documents sufficient to show what data-security standards are currently used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act.

Complaint Counsel refers Respondent to its response to Document Request 10.

9. All documents sufficient to show what changes occurred in the data-security standards used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act from 2005 to the present and the dates on which these standards changed.

Complaint Counsel objects to this Document Request as vague and ambiguous.

Complaint Counsel refers Respondent to its response to Document Request 10.

10. All documents sufficient to show the standards or criteria the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act from 2005 to the present.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the

possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request as vague and ambiguous.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-000685 to FTC-000893 and will produce responsive, discoverable, and non-privileged documents.

11. All documents provided to the FTC pursuant to any Civil Investigation Demand regarding its investigation of LabMD.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process