

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'S EMERGENCY MOTION TO REQUIRE COMPLAINT COUNSEL
TO DESIGNATE A 3.33 WITNESS**

This Court's March 10, 2014 Order denied in part Complaint Counsel's Motion for protective Order regarding Respondent's Rule 3.33 Notice of Deposition. Ultimately, this Order allows Respondent to proceed with a Rule 3.33 deposition of the Bureau of Consumer Protection ("BCP"). While this Rule 3.33 deposition has been scheduled for Friday, March 28, 2014, Complaint Counsel refuses to designate the person that it will present to testify on the BCP's behalf; thus Respondent respectfully requests this Court to require Complaint Counsel to properly designate its Rule 3.33 witness according to the Commission's Rules.

Respondent has repeatedly asked Complaint Counsel to designate the BCP's Rule 3.33 witness; however, Complaint Counsel refuses to do so. (*See* Affidavit of William A. Sherman, II and emails dated 3/14/14 and 3/18/14, attached as Exh. B thereto). On March 24, 2014, during a meet and confer teleconference with Complaint Counsel, Declarant asked Complaint Counsel Magee Lassack, Megan Cox and Ryan Mehm who the designee would be. Declarant was told that Complaint Counsel participating in the teleconference did not have that information. On March 25, 2014, Declarant sent an email to Complaint Counsel requesting to know the identity of the Bureau's designee. *See* Decl. Exh. C. In a teleconference with Complaint Counsel later on the morning of March 25, 2014, Declarant was informed

that Complaint Counsel would not disclose its rule 3.33 designee asserting that Rule 3.33 does not require such disclosure.

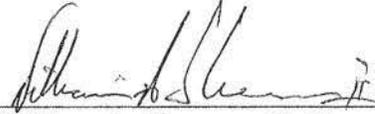
In pertinent part, Commission Rule 3.33 provides that “[t]he organization so named shall **designate** one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, **for each person designated**, the matters on which he or she will testify. **A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated** shall testify as to matters known or reasonably available to the organization.” (emphasis added). The dictionary defines the word “designate” as “1. to mark or point out; **indicate**; show; **specify**; 2. **to denote; indicate**; signify; 3. **to name**; entitle; style; 4. to nominate or select for a duty, office, purpose, etc.; appoint; assign.” See <http://dictionary.reference.com/browse/designate?s=t> (emphasis added). Complaint Counsel’s interpretation of Rule 3.33 is in stark contradiction of the plain reading of the rule, as well as ordinary meaning of the word “designate.” Pursuant to Rule 3.33, Complaint Counsel has a duty to Respondent to designate (or name) the person it will present as a Rule 3.33 witness.

Complaint Counsel’s failure to disclose its rule 3.33 designee prejudices Respondent in its preparation for the deposition. For example, the Rule 3.33 witness may have provided prior relevant sworn testimony in this case or other cases, or may be intimately familiar with particular relevant documents. However, because Respondent is unsure of who the designee is, it will be less prepared to question the witness regarding prior testimony and knowledge of relevant documents.

Respondent respectfully requests this Court for an Order requiring Complaint Counsel to properly designate its Rule 3.33 witness, so that Respondent may adequately prepare for the deposition. Respondent further requests this Court to grant additional time for Respondent to prepare for the deposition once the Bureau’s rule 3.33 witness is properly designated by Complaint Counsel.

Dated: March 25, 2014

Respectfully submitted,



William A. Sherman, II, Esq.
Reed D. Rubinstein, Esq.
Sunni R. Harris, Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: (202) 372-9100
Facsimile: (202) 372-9141
E-mail: william.sherman@dinsmore.com
Counsel for Petitioner

Michael D. Pepson
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1919 Pennsylvania Ave., NW, Suite 650
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Phone: (202) 499-4232
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E-mail: michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and
administrative proceedings before federal
agencies

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 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, D.C. 20580

I also certify that I delivered via electronic mail and hand delivery 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, D.C. 20580

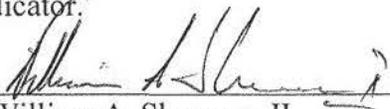
I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

CERTIFICATE FOR ELECTRONIC FILING

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

Dated: March 25, 2014

By: 
William A. Sherman, II

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

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

PUBLIC

Docket No. 9357

ORDER

It is hereby ORDERED, ADJUDGED, and DECREED that Respondent's Emergency Motion Requiring Complaint Counsel to properly designate a Rule 3.33 witness is GRANTED.

Dated: _____

By the Court:

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

In the Matter of

**LabMD, Inc.,
a corporation.**

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PUBLIC

Docket No. 9357

MEET AND CONFER STATEMENT PURSUANT TO 16 C.F.R. 3.22(g)

Respondent respectfully submits this Statement, pursuant to FTC Rule 3.22 (G) and Additional Provisions of the Scheduling Order. Prior to filing the attached Motion, Respondent met and conferred with Complaint Counsel in good faith to resolve by agreement the issue raised in the Motion, and has been unable to reach agreement.

On March 24, 2014, at approximately 2:00 pm during a meet and confer teleconference with Complaint Counsel (*i.e.* Magee Lassack, Megan Cox and Ryan Mehm), Respondent (*i.e.* William Sherman) asked Complaint Counsel who it planned to present as its Rule 3.33 designee on behalf of the Bureau of Competition. Respondent was told that Complaint Counsel participating in the teleconference did not have that information. On March 25, 2014, Respondent sent an e-mail to Complaint Counsel requesting to know the identity of Complaint Counsel's designee. On March 25, 2014 at approximately 10:00 a.m. during a meet and confer teleconference with Complaint Counsel (*i.e.* Magee Lassack, Megan Cox and Ryan Mehm), Respondent (*i.e.* William Sherman and Sunni Harris) was told that the Bureau would not disclose the identity of the designee because it had no duty to do so.

Dated: March 25, 2014

Respectfully submitted,



William A. Sherman, II

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

In the Matter of)	DOCKET NO. 9357
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LabMD, Inc., a corporation.)	Public
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**DECLARATION OF WILLIAM A. SHERMAN, II, IN SUPPORT OF
MOTION FOR ORDER REQUIRING COMPLAINT COUNSEL
TO DESIGNATE RULE 3.33 WITNESS**

- I, William A. Sherman, II, hereby declare as follows:
1. I am a partner in the law firm of Dinsmore & Shohl LLP and am counsel of record for Respondent in this matter
 2. I have personal knowledge of the matters stated in this declaration.
 3. I submit this declaration in support of Respondent’s Motion for an Order Requiring Complaint Counsel to designate a rule 3.33 witness
 4. On March 10, 2014 this Court denied in part Complaint Counsel’s motion for protective order regarding rule 3.33 notice of deposition
 5. As a result of the Order “The Bureau shall designate one or more persons to testify on its behalf about information known or reasonably available to it with regard to topics 1-4 of Respondent’s deposition notice, as modified within this Order.” See exhibit A attached hereto.

6. On several occasions since that date Declarant has requested verbally and in writing, to know the identity of Complaint Counsel's designee. See exhibit B attached hereto.
7. The deposition of the Bureau's rule 3.33 deposition is scheduled to take place on March 28, 2014 beginning at 9:00 am.
8. On March 24, 2014, during a meet and confer teleconference with Complaint Counsel, Declarant asked Complaint Counsel Magee Lassack, Megan Cox and Ryan Mehm who the designee would be.
9. Respondent was told that Complaint Counsel participating in the teleconference did not have that information.
10. On March 25, 2014 Declarant sent an e-mail to Complaint Counsel requesting to know the identity of Complaint Counsel's designee.
11. In a teleconference with Complaint Counsel later that morning, Declarant was told that the Bureau would not disclose the identity of the designee because it had no duty to do so.
12. Declarant will be prejudiced in its preparation for the rule 3.33 deposition in that Declarant will not have the benefit of researching prior sworn testimony of the designee, reviewing documents authored by or sent to the designee and otherwise be prevented from preparing an organized approach to the deposition of the designee.

Pursuant to 28 U.S.C. §1746, I do hereby declare under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge, and belief.

Executed in Washington, D.C. on this 25th day of March, 2014.



William A. Sherman, II

with the FTC. Motion at 1-2. Respondent further states that after Detective Jestes' deposition, the SPD produced documents containing communications between Detective Jestes and the FTC ("Recently Disclosed Documents").² According to the declaration of Respondent's attorney, after reviewing the Recently Disclosed Documents, Respondent's counsel called Detective Jestes, read her excerpts of some of her e-mail communications with the FTC, and asked her whether they refreshed her recollection as to certain of her communications with the FTC, to which Detective Jestes responded in the affirmative. (Declaration of Lorinda Harris, ¶ 4, Motion Exhibit E). Respondent thus requests an opportunity to redepose Detective Jestes on the subject matter of the FTC's communications with Detective Jestes regarding: the LabMD documents found in Sacramento; the FTC's requests of the SPD with respect to the LabMD documents; and the FTC's role in the SPD's treatment and handling of the LabMD documents, and other issues reflected in the recently disclosed e-mail communications between the FTC and Detective Jestes. Motion at 2-3. Respondent states that it does not intend to extend the scope of Detective Jestes' second deposition beyond those topics about which she was previously unable to remember. Motion at 4.

Complaint Counsel contends that the delay in Respondent's receipt of documents is attributable to Respondent's delay in serving discovery requests on the SPD. Complaint Counsel further asserts that Detective Jestes provided substantive testimony regarding the very topics upon which Respondent seeks to redepose her. Complaint Counsel argues that Detective Jestes had sufficient recollection of those topics, and LabMD had myriad opportunities to obtain the Recently Disclosed Documents before proceeding with the December 17, 2013 deposition. Opposition at 7-8. Lastly, Complaint Counsel argues that a second deposition of Detective Jestes would prejudice Complaint Counsel.

III.

Under the Scheduling Order issued in this case, depositions are limited to a "single, seven-hour day, unless agreed to by the parties or ordered by the Administrative Law Judge." Scheduling Order at 6, Add'l Prov. 12. In addition, the ALJ may limit discovery that is "unreasonably cumulative or duplicative," or where "[t]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought . . ." 16 C.F.R. § 3.31(c)(2)(i)-(ii).

According to the Declaration of Lorinda Harris, Sacramento Deputy City Attorney Mike Fry has consented to the taking of Detective Jestes' deposition for the limited purpose of examining Jestes concerning the documents the SPD produced in response to LabMD's subpoena that refreshed Jestes' recollection about her communications with the FTC. (Declaration of Lorinda Harris, ¶ 6, Motion Exhibit E). Respondent seeks to depose Detective Jestes on this narrow issue, based only upon the Recently Disclosed Documents. Thus, a second, limited deposition of Detective Jestes is not unreasonably cumulative or duplicative.

² For purposes of this Order, the term "Recently Disclosed Documents" means documents that Respondent received after the December 17, 2013 deposition of Detective Jestes and includes documents responsive to the FTC's subpoena *duces tecum* and documents responsive to Respondent's subpoena *duces tecum*.

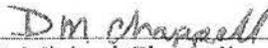
Complaint Counsel's claims that it would be prejudiced if a second deposition of Jestes were allowed are unpersuasive. To the extent that the time or cost of a second deposition presents a burden, Complaint Counsel may participate in the deposition by telephone. Under the Revised Scheduling Order, March 5, 2014, was the deadline for the close of discovery and March 18, 2014 is the deadline for Complaint Counsel to provide expert witness reports. Complaint Counsel contends that its expert witnesses will not have a meaningful opportunity to review the transcript of Detective Jestes' testimony before finalizing their reports. (Opposition at 8 n.8). To the extent that Complaint Counsel's experts need to revise their reports to reflect any additional information from a second deposition of Detective Jestes, Complaint Counsel may, within seven days from the receipt of the deposition transcript, submit a supplemental expert witness report(s) based solely on this issue. Respondent may, within five days from receipt of any supplemental expert witness report(s), submit any responses from its own expert(s) that address the same issue.

IV.

Respondent's Motion to Redepose Detective Jestes is GRANTED. The deposition is limited to the narrow issue of Detective Jestes' communications with the FTC based upon the Recently Disclosed Documents.

The fact discovery deadline of March 5, 2014 is hereby extended for an additional 20 days from the date of this Order for the purpose of allowing the deposition of Detective Jestes, as limited by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 12, 2014

From: Sherman, William
Sent: Tuesday, March 18, 2014 3:38 PM
To: VanDruff, Laura Riposo
Cc: Rubinstein, Reed; michael.pepson@causeofaction.org; lorinda.harris@causeofaction.org; hallee.morgan@causeofaction.org; kent.huntington@causeofaction.org; Harris, Sunni; robyn.burrows@causeofaction.org; daniel.epstein@causeofaction.org
Subject: RE: FTC Docket No. 9357 -- depositions of experts

Laura,

We agree to take the expert witness depositions of your experts here in D.C. I am verifying with my client as to whether our experts will be taken here as I personally have no objection to it but it does involve cost considerations. Secondly, your prior letter regarding the rule 3.33 deposition of the FTC designee; you proposed March 28, 2014 but that is not a convenient date. A more convenient date would be March 26. Again, who will be the FTC designee(s)?

William

Dinsmore

William A. Sherman, II
Partner

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T (202) 372-9117 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: VanDruff, Laura Riposo [<mailto:lvandruff@ftc.gov>]
Sent: Monday, March 17, 2014 9:54 AM
To: Sherman, William
Cc: Rubinstein, Reed; michael.pepson@causeofaction.org; lorinda.harris@causeofaction.org; hallee.morgan@causeofaction.org; kent.huntington@causeofaction.org; Harris, Sunni; robyn.burrows@causeofaction.org; daniel.epstein@causeofaction.org
Subject: FTC Docket No. 9357 -- depositions of experts

Good morning, counsel.

Attached is a letter that relates to the parties' depositions of expert witnesses.

Best regards,

Laura

Laura Riposo VanDruff
Federal Trade Commission
Division of Privacy and Identity Protection
600 Pennsylvania Avenue, N.W., NJ-8100
Washington, DC 20580
202.326.2999 (direct)
202.326.3062 (facsimile)
lvandruff@ftc.gov

From: Sherman, William
Sent: Friday, March 14, 2014 4:17 PM
To: VanDruff, Laura Riposo
Cc: Rubinstein, Reed; michael.pepson@causeofaction.org; lorinda.harris@causeofaction.org; hallee.morgan@causeofaction.org; kent.huntington@causeofaction.org; Harris, Sunni; robyn.burrows@causeofaction.org; daniel.epstein@causeofaction.org
Subject: RE: FTC Docket No. 9357 -- Rule 3.33 Deposition

Laura,

For avoidance of any doubt, please know that we intend to pursue the deposition of BCP's designee whether on March 28, 2014 or some other mutually convenient date. I will need to confirm whether March 28 is a workable date. Who is BCP's designee(s)?

William

Dinsmore

William A. Sherman, II
Partner

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From: VanDruff, Laura Riposo [<mailto:lvandruff@ftc.gov>]
Sent: Friday, March 14, 2014 3:27 PM
To: Sherman, William
Cc: Rubinstein, Reed; michael.pepson@causeofaction.org; lorinda.harris@causeofaction.org; hallee.morgan@causeofaction.org; kent.huntington@causeofaction.org; Harris, Sunni; robyn.burrows@causeofaction.org; daniel.epstein@causeofaction.org
Subject: FTC Docket No. 9357 -- Rule 3.33 Deposition

Good afternoon, William.

Attached is a letter that relates to the deposition of a designee of the Bureau of Consumer Protection.

Best regards,

Laura

Laura Riposo VonDruff
Federal Trade Commission
Division of Privacy and Identity Protection
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Washington, DC 20580
202.326.2999 (direct)
202.326.3062 (facsimile)
lvandruff@ftc.gov

From: Sherman, William
Sent: Tuesday, March 25, 2014 2:31 PM
To: Harris, Sunni
Subject: RE: FTC Docket No. 9357 -- Second Deposition of Detective Jestes

From: Sherman, William
Sent: Tuesday, March 25, 2014 9:29 AM
To: 'Cox, Megan'; 'Kent Huntington'; 'Sheer, Alain'; 'Lassack, Maggie'; 'Mehm, Ryan'
Cc: 'Mfry@cityofsacramento.org'; michael.pepson@causeofaction.org; Rubinstein, Reed; hallee.morgan@causeofaction.org; Harris, Sunni; 'lorinda.harris@causeofaction.org' (lorinda.harris@causeofaction.org); daniel.epstein@causeofaction.org; robyn.burrows@causeofaction.org
Subject: RE: FTC Docket No. 9357 -- Second Deposition of Detective Jestes

Counsel,

Once again the FTC is taking a position which places form over substance and unnecessarily increases costs by requiring Respondent to file a motion to conduct a deposition which the court has already given it permission to take. I could be wrong but it would surprise me if the court denies Respondent's motion for leave to take the deposition beyond the stated deadline because, through no fault of Respondent, the deponent is unavailable despite Respondent's attempts to accommodate that unavailability. This type of wasteful behavior is frowned upon in Article III courts. Maybe not so much here.

Your suggestion that the court was somehow misled by our prior motion is a topic more appropriate for your opposition to our motion for leave. Since absent Complaint Counsel's consent, Respondent could not have retaken Jestes' deposition without leave of court, your point concerning SPD's consent is irrelevant. However, this collusion between FTC and the SPD only highlights the need to retake Jestes' deposition and may suggest reasons why its scope should be expanded.

Please expect our motion for leave this afternoon should you choose not to modify your position on this issue.

Finally, I asked your colleague Maggie Lassack yesterday while we were all on the phone to identify the FTC's designated rule 3.33 witness, she indicated that she did not have that information. Does anyone at the FTC have that information and if so would they be willing to share that with me.

Regards,

William

The logo for Dinsmore & Shohl LLP, featuring the word "Dinsmore" in a serif font with a small crown-like symbol above the letter 'i'.

William A. Sherman, II
Partner

Dinsmore & Shohl LLP • Legal Counsel

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E william.sherman@dinsmore.com • dinsmore.com

From: Cox, Megan [<mailto:mcox1@ftc.gov>]
Sent: Monday, March 24, 2014 10:37 AM
To: 'Kent Huntington'
Cc: 'Mfry@cityofsacramento.org'; Sherman, William; michael.pepson@causeofaction.org; Rubinstein, Reed; hallee.morgan@causeofaction.org; Harris, Sunni; 'lorinda.harris@causeofaction.org' (lorinda.harris@causeofaction.org); daniel.epstein@causeofaction.org; robyn.burrows@causeofaction.org
Subject: FTC Docket No. 9357 -- Second Deposition of Detective Jestes

Counsel,

Please see attached a letter regarding the second deposition of Detective Jestes.

Best,
Megan

Megan Cox
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