

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



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

PUBLIC

Docket No. 9357

**RESPONDENT LabMD, Inc.’s MOTION TO HAVE REQUESTS FOR ADMISSION  
DEEMED ADMITTED**

Pursuant to Commission Rules 3.22, 3.31, 3.32, and 3.38(b), 16 C.F.R. §§ 3.22, 3.31, 3.32, and 3.38(b), Respondent LabMD, Inc. (“LabMD”) respectfully moves for an Order recognizing that due to improper objections and failure to provide good faith responses, Complaint Counsel has admitted LabMD’s Requests for Admission (“RFA”) 1, 2, 3, 5, 11, 13, 15, 17, and 19.

**BACKGROUND**

On February 19, 2014, LabMD sent RFAs asking Complaint Counsel to admit or deny a mere twenty statements. (Exhibit 1). On March 3, 2014, Complaint Counsel sent evasive responses inconsistent with previous statements. (Exhibit 2).

Commission Rule 3.32 mirrors Fed. R. Civ. P. 36 in that both rules allow parties to request admissions from other parties. “The purpose of [RFAs] is to narrow the issues for trial by relieving the parties of the need to prove facts that will not be disputed at trial and the truth of which can be easily ascertained.” *In re McWane, Inc.*, 2012 FTC LEXIS 124, at \*3 (July 5, 2012) (citation and quotation marks omitted). RFAs are not used for “extensive discovery of

facts but to reach agreement as to [undisputed] facts.” *In re Trans Union Corp.*, 1993 FTC LEXIS 116, at \* 2 (May 24, 1993).

The party responding to an RFA must provide an answer “fairly meet[ing] the substance of the [RFA].” Rule 3.32(b), 16 C.F.R. § 3.32(b). The responding party “may not evade[]” the RFA’s central point and must respond “to the essential truth of the proposition.” *In re General Motors Corp.*, 1977 FTC LEXIS 293, at \*11, 7 (Jan. 28, 1977). Unless “the answering party seriously intends to dispute the fact, the proper procedure is . . . to admit even if it lacks personal knowledge.” *Id.* at \*4.

Commission and Federal Rules detail that failure to provide answers meeting the RFA’s substance is, in legal effect, an admission. Rule 3.32(b), 3.38(b)(2), 16 C.F.R. §§ 3.32(b), 3.38(b)(2); Fed. R. Civ. P. 36(a); *see also Dulansky v. Iowa-Illinois Gas & Electric Co.*, 92 F. Supp. 118, 123-24 (S.D. Iowa 1950) (discussing the “peril of having [the] response construed to be in legal effect an admission.”); *Asea, Inc. v Southern Pacific Transp. Co.*, 669 F2d 1242, 33 FR Serv 2d 73 (1981, CA9 Cal) (Evasive denial, one that does not specifically deny matter, or response that does not set forth in detail reasons why answering party cannot truthfully admit or deny matter, may be deemed admission); *United States v Jefferson Trust & Sav. Bank*, 31 FRD 137, 6 FR Serv 2d 757 (1962, SD Ill) (Equivocal and evasive responses to requests for admissions do not comply with the requirements of this rule, and, consequently, material facts contained in requests for admissions were deemed admitted.).

This Court should recognize that by failing to meet this standard, Complaint Counsel has admitted RFAs 1, 2, 3, 5, 11, 13, 15, 17, and 19 as fact.

## ARGUMENT

### **I. Complaint Counsel Admitted RFAs 1 And 2 By Responding With Improper Objections.**

Complaint Counsel's objections to RFAs 1 and 2 are improper as they erroneously claim the requests are outside the scope of discovery. This Court has ruled these topics are within the scope of discovery. *See* Order Re: Compl. Counsel's Mot. for Protective Order (March 10, 2014) (Exhibit 3).<sup>1</sup>

**RFA 1:** Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security . . . for Protected Health Information (PHI) . . . under 15 U.S.C. § 57a(a).<sup>2</sup>

**Response 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).

**RFA 2:** Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security . . . for PHI that defines what acts are prohibited or required under Section 5 . . .

**Response 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).

These RFAs seek to establish the history of FTC's promulgated regulations on data security, facts "the truth of which can be easily ascertained." *In re McWane, Inc.*, 2012 FTC LEXIS 124, at \*3. Complaint Counsel's objections are improper because they claim FTC data-security regulations are outside the scope of discovery. The RFAs ask Complaint Counsel to admit or deny whether FTC has promulgated data-security regulations. As limited by this Court's order, these RFAs do not inquire into mental processes or the reasoning behind why the

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<sup>1</sup> Complaint Counsel asserts that the Commission's January 16, 2014 Order denying Respondent's Motion to Dismiss supports its contention that the information requested in RFA's 1 and 2 are irrelevant and outside of the scope of discovery; however, even the most liberal reading of the Commission's Order does not permit one to interpret that information relating to rules or regulations promulgated by the FTC regarding data-security is unrelated to this case.

<sup>2</sup> This motion quotes excerpts of RFAs and relevant portions of Complaint Counsel's responses. *See* Exhibit 2 for full responses.

FTC has not promulgated rules. This Court ordered the “basis for the contention that [LabMD’s] data security practices were not reasonable” is within the scope of discovery and a “valid line of inquiry.” Exh. 3 at 6. That “valid line of inquiry” logically begins with establishing whether FTC has rules defining reasonable data security.

Furthermore, Complaint Counsel Attorney Alain Sheer admitted to this Court that the FTC has not promulgated rules on data security applicable to LabMD.

Judge Chappell: “Is there rulemaking going on at this time or are there rules that have been issued in this area [of information disclosure]?”

Mr. Sheer: “There are no -- there is no rulemaking, and no rules have been issued [except for financial institutions].”

*In re LabMD, Inc.*, Initial Pretrial Conference, 10:8-16 (Sept. 25, 2013) (Exhibit 4). For some reason, Complaint Counsel has chosen to respond in a manner inconsistent with the statement quoted above, and is now evasive on this subject.

## **II. Complaint Counsel Admitted RFAs 3, 5, 11, 13, 15, 17, And 19 By Providing Evasive Answers And Responding To Questions That Were Not Asked.**

Commission Rule 3.32 and FTC case law require the party answering an RFA “not evade[]” the RFA’s central point. *In re General Motors Corp.*, 1977 FTC LEXIS 293, at \*11. It must respond “to the essential truth of the proposition.” *Id.* at \*7. It may not “respond[] to a question which was not asked.” *Id.* at \*11. Unless “the answering party seriously intends to dispute the fact, the proper procedure is for the answering party to admit [the fact].” *Id.* at \*4. If the answering party “intends to admit the essential truth of the basic proposition stated in the request” it “may not respond simply by stating a qualification of it.” *Id.* at \*6. If, however, “good faith requires that a party deny only a part or a qualification of a matter . . . [it] shall specify so much of it as is true and deny only the remainder.” *Dulansky*, 92 F. Supp. at 123-24.

Failure to follow these guidelines risks the “peril of having [the] response construed to be in legal effect an admission.” *Id.* at 124.

Complaint Counsel evaded responding to the essential truth of RFAs 3, 5, 11, 13, 15, 17, and 19, and provided responses to questions that were not asked.

**RFA 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 . . .

**Response 3:** Complaint Counsel denies [RFA] 3 to the extent that it suggests that “advisory opinions” are the only means the FTC uses to provide guidance regarding data security practices.

This answer is nonresponsive. The RFA asked whether FTC provides advisory opinions. Complaint Counsel was “evasive [and] non-responsive to the substance of [that] question,” *In re McWane, Inc.*, 2012 FTC LEXIS 124, at \*6, by conditioning the response with “to the extent that it suggests.” The RFA makes no such suggestion. The RFA did not ask whether advisory opinions are the “only means” by which FTC provides guidance; it asked whether FTC issues advisory opinions. The response does not address the statement.

Further, this response is inconsistent with statements FTC made to a federal judge. During oral argument in *FTC v. Wyndham Worldwide Corp.*, FTC Attorney Kevin Moriarty admitted: “as far as advisory opinions [on data-security practices], there are not advisory opinions.” Transcript of Oral Argument, Motion to Dismiss at 52:10-11 , No. 13-1887 (D.N.J. filed Dec. 23, 2013) (Exhibit 5). Complaint Counsel now resists and evades admitting this fact.

**RFA 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 . . .

**Response 5:** Complaint Counsel denies [RFA 5] to the extent that it suggests that Section 5(a) . . . requires Complaint Counsel to allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.

This answer is nonresponsive. The RFA asks for a response about the contents of FTC's complaint, "the truth of which can be easily ascertained." *In re Aspen Technology, Inc.*, 2003 FTC LEXIS 178, at \*3 (Dec. 2, 2003). Complaint Counsel was evasive by conditioning the response with "to the extent that it suggests." The RFA makes no suggestion about what FTC is *required* to allege; it simply asks what FTC *did not specifically* allege. This Court ordered that LabMD is entitled to discover "the basis for the allegations of the Complaint." (Exhibit 3 at 4).

**RFA 11:** Admit that the SANS Institute does not have lawful authority to create enforceable data-security standards.

**Response 11:** Complaint Counsel denies [RFA 11] to the extent that it suggests that the "SANS Institute" is the only entity that provides guidance regarding data security practices.

This response is nonresponsive. Complaint Counsel attempts to avoid the essential point of the proposition by inserting a qualifying statement and then responding to it. An RFA "may not be evaded by responding to a question that was not asked." *In re McWane, Inc.*, 2012 FTC LEXIS 124, at \*7. LabMD did not ask whether the SANS Institute was "the only entity that provides guidance," but whether the SANS Institute has "legal authority to create enforceable data-security standards." Complaint Counsel has "denied the request, but the qualification has not fairly met the substance of the requested admission, and is logically inconsistent with the denial." *In re Beatrice Foods Co.*, 1797 FTC LEXIS 597, at \* 10 (Oct. 15, 1979). By failing to "specify so much of [the RFA] as is true and deny only the remainder . . . [Complaint Counsel is in] peril of having [the] response construed to be in legal effect an admission." *Dulansky*, 92 F. Supp. at 123-24.

**RFA 13:** Admit that the FTC's "Guides for Business" . . . are not legally binding upon any U.S. company.

**Response 13:** Complaint Counsel admits that the information available on the FTC’s website related to data security provides guidance in assessing risk and vulnerabilities and complying with the law.

This is an incoherent and inadequate response. Once again, Complaint Counsel “respond[ed] to a question which was not asked.” *In re McWane, Inc.*, 2012 FTC LEXIS 124, at \*7. LabMD did not ask whether Guides “provide guidance,” but whether they have binding legal effect. If Complaint Counsel “intends to admit the essential truth of the basic proposition stated in the request,” it “may not respond simply by stating a qualification.” *In re General Motors Corp.*, 1977 FTC LEXIS 293, at \*6.

**RFA 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 15:** Complaint Counsel objects to [RFA 15 because] . . . it seeks the identity and opinions rendered by non-testifying experts and . . . opinions of expert witness(es) . . . . Complaint Counsel denies [RFA] 15 to the extent that it suggests that no consumers were harmed or likely to be harmed.

This answer is nonresponsive. The RFA did not ask for *expert* witnesses, but for “*complaining* witness[es].” This is an “easily ascertain[ed]” truth. *In re McWane, Inc.*, 2012 FTC LEXIS 124, at \*3. This Court ordered that “[s]imply because Complaint Counsel intends to present expert opinion testimony . . . does not relieve [it] from its obligation to provide fact discovery on the topic.” (Exhibit 3 at 8).

Further, in initial pretrial conference Mr. Alain Sheer admitted to this Court that FTC does not have complaining witnesses.

Judge Chappell: “Do you have any complaining witnesses who say their data was released or disclosed?”

Mr. Sheer: “Not at this time. . . . We will develop that.”

(Exhibit 4 at 33:3-7). RFA 15 asked whether FTC has “developed” complaining witnesses. As this Court ruled, “inquiry into the facts underlying the allegation of consumer injury is clearly relevant” and LabMD’s “right to inquire into the factual bases for these allegations cannot credibly be disputed.” (Exhibit 3 at 6-7).

**RFA 17:** Admit that a FTC document entitled “Peer-To-Peer File Sharing: A Guide For Business” . . . was not made publicly available on the Internet or otherwise published until January 2010.

**Response 17:** Complaint Counsel denies [RFA] 17 to the extent that it suggests that the first instance of public guidance related to Peer-To-Peer file sharing by the FTC was in January 2010.

This answer is nonresponsive. The RFA did not ask about the “first instance of public guidance,” but about the publication history of one specific document. If Complaint Counsel wishes to deny the truth of the RFA, it may. It cannot, however, “respond[] to a question which was not asked.” *In re General Motors Corp.*, 1977 FTC LEXIS 293, at \*11. Furthermore, FTC Commissioner Edith Ramirez admitted to Congress the file in question was published in January 2010.<sup>3</sup> (Exhibit 6 at 10 n.33). Complaint Counsel refuses to admit this fact.

**RFA 19:** Admit that the FTC cannot identify a single person it believes to be a “consumer” . . . who has experienced harm to their identity or finances as a result of LabMD’s allegedly unlawful data-security practices.

**Response 19:** Complaint Counsel objects to [RFA 19] 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 denies [RFA 19] to the extent that it suggests that no consumers were harmed or likely to be harmed . . .

This answer is nonresponsive. The RFA did not ask about expert testimony, but whether FTC has identified a “consumer” who has experienced actual harm. Section 5 limits FTC to matters that “cause[] or [are] likely to cause substantial injury to consumers.” 15 U.S.C. § 45(n).

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<sup>3</sup> See *Protecting Consumer Information: Can Data Breaches Be Prevented?: Hearing Before the Subcomm. on Commerce, Mfg., and Trade of the H. Comm. on Energy and Commerce*, 113th Cong. 10 n.33 (2014) (statement of Edith Ramirez, Comm’r, Fed. Trade Comm’n), available at <http://1.usa.gov/110vSkh>.

RFA 19 seeks to establish whether FTC has evidence going to fully one-half of that standard. This Court has ordered that “inquiry into the facts underlying the allegation of consumer injury is clearly relevant” and LabMD’s “right to inquire into the factual bases for these allegations cannot credibly be disputed.” (Exhibit 3 at 6-7).

**CONCLUSION**

For the reasons stated above, this Court should recognize that Complaint Counsel admitted LabMD’s RFAs 1, 2, 3, 5, 11, 13, 15, 17, and 19 as fact.

Respectfully Submitted,

Dated: March 25, 2014



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**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**

Upon consideration of Respondent LabMD, Inc.'s (LabMD) Motion to Have Requests for Admission Deemed Admitted, and Complaint Counsel's Opposition thereto, IT IS HEREBY ORDERED that LabMD's Motion is GRANTED. Requests for Admission 1, 2, 3, 5, 11, 13, 15, 17, and 19 in LabMD's First Set of Requests for Admission are admitted as fact In the Matter of LabMD, Inc.

ORDERED:

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

Date:

**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, DC 20580

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

Alain Sheer, Esq.  
Laura Riposo VanDruff, Esq.  
Megan Cox, Esq.  
Margaret Lassack, Esq.  
Ryan Mehm, Esq.  
John Krebs, Esq.  
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: March 25, 2014

By:   
William A. Sherman, II

# EXHIBIT

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

DOCKET NO. 9357

PUBLIC DOCUMENT

**RESPONDENT LABMD, INC.'S FIRST SET OF REQUESTS FOR ADMISSION  
TO COMPLAINANT FEDERAL TRADE COMMISSION**

Pursuant to Rule 3.32 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.32, Respondent LabMD, Inc. (LabMD) hereby requests that Complainant Federal Trade Commission (“FTC” or “Commission”) admit the truth of the following statements or opinions of fact or opinions of the application of fact to law within ten (10) days from the date of service thereof.

**INSTRUCTIONS**

- A. Provide separate and complete sworn responses for each Request for Admission (“Request”).
- B. The Request will be deemed admitted unless, within ten days of service of this request, the FTC serves a sworn written answer to the Request.
- C. The FTC’s answer should specifically admit or deny the Request or set forth in detail the reasons why it cannot truthfully admit or deny it after exercising due diligence to secure the information necessary to make full and complete answers, including a description of all efforts the FTC made to obtain the information necessary to answer the Request fully.
- D. When good faith requires that the FTC qualify its answer or deny only a part of the matter of which an admission is requested, specify the portion that is true and qualify or deny the remainder.
- E. If the FTC considers that a matter of which an admission has been requested presents a genuine issue for trial, it may not, on that ground alone, object to the request. Instead, the FTC must deny the matter or set forth reasons why it cannot admit or deny it.
- F. Answer each Request fully and completely based on the information and knowledge currently available to the FTC, regardless of whether the FTC intends to supplement its response upon the completion of discovery.

- G. The FTC's answers to any Request herein must include all information within its possession, custody or control, including information reasonably available to the FTC and its agents, attorneys, or representatives. The FTC may not give lack of information or knowledge as a reason for failure to admit or deny unless the FTC states that it has made reasonable inquiry and that the information known or readily obtainable by the FTC is insufficient to enable it to admit or deny the matter.
- H. If in answering any of the Requests the FTC claims any ambiguity either the Request or any applicable definition or instruction, identify in its response the language it considers ambiguous and state the interpretation the FTC is using in responding.
- I. Each Request herein is continuing and requires prompt amendment of any prior response if the FTC learns, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect *See* 16 C.F.R. § 3.31(e).
- J. If the FTC objects to any Request or any portion of any Request on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine you claim and provide all other information as required by 16 C.F.R. § 3.38A. Any ground not stated in an objection shall be waived. All objections must be made with particularity and must set forth all information upon which Complaint Counsel intends to rely in response to any motion to compel.
- K. For each natural person the FTC refers to in its answers, state (a) that person's full name; (b) the person's last known business address and business phone number, or where that person's business address and phone number is unavailable, that person's home address and home phone number; (c) the person's business affiliation and title during the time period of the matter at issue; and (d) the person's current business affiliation and title.
- L. Whenever necessary to bring within the scope of a RFA a response that might otherwise be construed to be outside its scope, the following constructions should be applied:
  - 1. Construing the terms "and" and "or" in the disjunctive or conjunctive, as necessary, to make the RFA more inclusive;
  - 2. Construing the singular form of any word to include the plural and the plural form to include the singular;
  - 3. Construing the past tense of the verb to include the present tense and the present tense to include the past tense;

4. Construing the term "Date" to mean exact day, month, and year if ascertainable; if not, the closest approximation that can be made by means of relationship to other events, locations, or matters; and
  5. Construing the negative terms to include the positive and vice versa.
- M. An answer should not be supplied by reference to an answer to another RFA unless the information provided is intended to be identical in all respects.

#### DEFINITIONS

- A. The term "**communication**" includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
- B. The term "**containing**" means containing, describing, or interpreting in whole or in part.
- C. "**Document**" means any written, recorded, graphic, electronic, or other material, however produced or reproduced, irrespective of whether it is in the possession, custody, or control of the Company, and irrespective of whether it is claimed to be privileged against discovery on any grounds, including, but not limited to, material in the form of books, reports, witness statements, studies, records, agreements, lists, memoranda, diagrams, checks, sketches, charts, diaries, correspondence, notebooks, facsimiles, telegrams, schedules, bills, invoices, notes, photographs, videotapes, sound recordings, appointment calendars, films, worksheets, computer printouts, computer discs, information stored in computer memory drives of any kind, bookkeeping entries, or any other documents of any kind whatsoever, irrespective of the form, including any draft or working copy. The term "document" does not include the Commission's January 16, 2014, Order Denying Respondent LabMD's Motion to Dismiss and the statutory text of 15 U.S.C. § 45, standing alone.
- D. The terms "**each**," "**any**," and "**all**" shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope.
- E. "**Includes**" or "**including**" means "including, but not limited to," so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.

PUBLIC

- F. “**LabMD**” means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
- G. “**Commission**” or “**FTC**” means the Federal Trade Commission, and its current and former officers, contractors, affiliates, and employees.
- H. “**Consumer**” means “consumer” within the meaning of 15 U.S.C. § 45.
- I. “**You**” or “**Complaint Counsel**” means counsel for Complainant FTC in the above-captioned action.
- J. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
- K. The term “**person**” means any natural person or any entity other than a natural person, including, but not limited to, includes an individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, incorporated association, limited liability partnership, limited liability company, the State, an agency or political subdivision of the State, a court, and any other governmental entity.
- L. “**Personal information**” means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
- M. The terms “**relate**” or “**relating to**” or “**referring or relating to**” or “**concerning**” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
- N. “**You**” or “**your**” means Complaint Counsel, the Commission, or the FTC.
- O. “**HIPAA**” means the the Health Insurance Portability and Accountability Act of 1996.

- P. **“HITECH”** means the Health Information Technology for Economic and Clinical Health Act.
- Q. **“Patient-information” or “PHI”** means information that is subject to HIPAA and/or HITECH.
- R. **“1,718 File”** means the 1,718 page file owned by LabMD that the Company claimed in 2008 to have obtained from LabMD via Limewire.
- S. **“Tiversa”** means Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
- T. The use of the singular includes the plural, and the plural includes the singular.
- U. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
- V. Words in the masculine, feminine, or neuter form shall include each of the other genders

**REQUESTS FOR ADMISSIONS**

- 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).
- 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.
- 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.
- 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.
- 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.

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).

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.

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

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.

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

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

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.

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.

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).

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.

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.

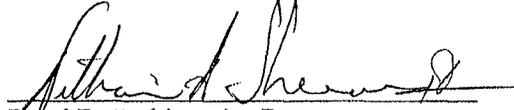
17. Admit that a FTC document entitled "Peer-To-Peer File Sharing: A Guide For Business," available at <http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business>, was not made publicly available on the Internet or otherwise published until January 2010.

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.

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.

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

Respectfully submitted,



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*Counsel to Cause of Action*

**CERTIFICATE OF SERVICE**

I hereby certify that on February 19, 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 on February 19, 2014, and on February 20, 2014, by 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 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., N.W.  
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: February 19, 2014

By: /s/ Michael D. Pepson

# EXHIBIT

2

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

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

**COMPLAINT COUNSEL’S 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 responds 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 within the ten (10) days allotted 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.

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.

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.

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. 3 to the extent that it suggests that "advisory opinions" are the only means the FTC uses to provide guidance regarding data security practices.

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.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, 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.

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.”

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. 11 to the extent that it suggests that the “SANS Institute” is the only entity that provides guidance regarding data security practices.

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 that the information available on the FTC's website related to data security provides guidance in assessing risk and vulnerabilities and complying with the law.

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.”

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. 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.

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 denies Request for Admission No. 17 to the extent that it suggests that the first instance of public guidance related to Peer-To-Peer file sharing by the FTC was in January 2010.

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.

Response to 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.

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. 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.

Response to 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.

PUBLIC

Dated: March 3, 2014

Respectfully submitted,



---

Laura Riposo VanDruff  
Federal Trade Commission  
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*Complaint Counsel*

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system.

I also certify that I caused a copy of the foregoing document to be delivered *via* electronic mail and by hand to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-110  
Washington, DC 20580

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

Michael D. Pepson  
Lorinda Harris  
Kent Huntington  
Hallee Morgan  
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*Counsel for Respondent LabMD, Inc.*

**CERTIFICATE FOR ELECTRONIC FILING**

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

March 3, 2014

By:   
\_\_\_\_\_  
Laura Riposo VanDruff  
Federal Trade Commission  
Bureau of Consumer Protection

# EXHIBIT

3

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

In the Matter of	)	
	)	
LabMD, Inc.,	)	DOCKET NO. 9357
a corporation,	)	
Respondent.	)	

**ORDER GRANTING IN PART AND DENYING IN PART  
COMPLAINT COUNSEL’S MOTION FOR PROTECTIVE ORDER  
REGARDING RULE 3.33 NOTICE OF DEPOSITION**

On February 14, 2014, Complaint Counsel filed a Motion for Protective Order Regarding Rule 3.33 Notice of Deposition (“Motion”). Complaint Counsel seeks to prevent Respondent from proceeding with a deposition of designee(s) of the Bureau of Consumer Protection of the Federal Trade Commission (“Bureau” or “BCP”). On February 26, 2014, Respondent LabMD, Inc., (“Respondent” or “LabMD”) filed an opposition to the Motion (“Opposition”).

Having fully reviewed the Motion and the Opposition, and having considered all arguments and contentions raised therein, the Motion is GRANTED IN PART AND DENIED IN PART, as explained below.

**I. Introduction**

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, engaged in an unfair trade practice in violation of Section 5(a) of the Federal Trade Commission (“FTC”) Act by failing to take “reasonable and appropriate” measures to prevent unauthorized access to consumers’ personal information, which conduct caused, or is likely to cause, substantial injury to consumers. Complaint ¶¶ 6-11, 17-23. Specifically, the Complaint alleges that Respondent failed to maintain adequate network security to protect confidential patient information, including by making certain “insurance aging reports,” allegedly containing confidential patient information, available on a peer-to-peer, or “P2P” file sharing application (“the 1,718 file”). Complaint ¶¶ 17, 19. The Complaint further avers that in October 2012, the Sacramento, California Police Department (“SPD”) found more than 35 LabMD “Day Sheets,”

allegedly containing confidential patient information (“Day Sheets”)<sup>1</sup>, and a small number of copied checks, in the possession of individuals who subsequently pleaded no contest to state charges of identity theft (the “Sacramento Incident”). Complaint ¶ 21.

Respondent’s Answer admits that an alleged third party, Tiversa Holding Corporation (“Tiversa”), contacted Respondent in May 2008 and claimed to have obtained the P2P insurance aging file via Limewire, but denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23. Respondent’s answer also includes a number of affirmative defenses, including among others, denial of due process and fair notice, and that the actions of the FTC are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with applicable law. Answer at pp. 6-7.

On January 30, 2014, Respondent served a “Notice of Deposition of the Bureau of Consumer Protection,” pursuant to Rule 3.33(a) and 3.33(c)(1) of the Commission’s Rules of Practice. Respondent’s Notice seeks a Bureau designee(s) to testify regarding matters known or reasonably available to the Bureau concerning the following topics:

- (1) The 1,718 file, including the Bureau’s relationship with Tiversa, Dartmouth College, and Eric Johnson;
- (2) All data-security standards that have been used by the Bureau to enforce the law under Section 5 of the Federal Trade Commission Act since 2005;
- (3) Consumers that have been harmed by LabMD’s allegedly inadequate security practices; and
- (4) The Bureau’s relationship with the Sacramento Police Department [SPD] relating to [LabMD] documents [that SPD] found at a Sacramento “flop house.”

(“Topics”) (Motion Exhibit B at 4).

## **II. Relevant Rules of Practice**

Rule 3.33(c)(1) of the Commission’s Rules of Practice authorizes Respondent to notice the deposition of the BCP, and requires BCP to “designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf.”<sup>2</sup> The rule also requires that the deposition notice “describe with reasonable particularity the matters on which examination is requested,” so as to facilitate designation of those persons with applicable knowledge. 16 C.F.R. 3.33(c)(1).

---

<sup>1</sup> As alleged in the Complaint, Day Sheets are spreadsheets of payments received from consumers, which may include personal information such as consumer names, Social Security Numbers, and methods, amounts, and dates of payments. Complaint ¶ 9.

<sup>2</sup> Complaint Counsel objects that Respondent’s Notice, in defining “Bureau” as “[t]he Federal Trade Commission’s Bureau of Consumer Protection, and its directors, officers, and employees,” improperly attempts to reach the members of the Commission. Motion at 8-9. Respondent’s Notice properly mirrors the language of Rule 3.33(c)(1) and Respondent makes clear in its Opposition that it is not seeking to depose any members of the Commission pursuant to Rule 3.33(c)(1). Opposition at 2 n.1.

Rule 3.33(c)(1) depositions are also subject to the discovery limits of Rule 3.31(c)(1): “[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). If it is determined that “such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b),”<sup>3</sup> the Administrative Law Judge may rule that a deposition shall not be taken. 16 C.F.R. § 3.33(b). Finally, as with any discovery, the Administrative Law Judge may disallow, or limit, a deposition by way of a protective order under Rule 3.31(d) (“The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.”).

In the instant case, Complaint Counsel seeks an order disallowing the noticed deposition in its entirety, pursuant to Rule 3.33(b) and 3.31(d). The burden of demonstrating an entitlement to this protective order is on Complaint Counsel. *In re LabMD Inc.*, 2014 FTC LEXIS 22, at \*20 (Jan. 30, 2014). In the context of a Rule 30(b)(6) deposition sought from a government employee, one court has stated: “The burden is on the party seeking the protective order to demonstrate that good cause exists for the entry of [the protective] order by making a ‘particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Integra Bank Corp. v. FDIC*, 2014 U.S. Dist. LEXIS 3039, \*6-7 (S.D. Ind. Jan. 10, 2014) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16, (1981)).<sup>4</sup> “In addition, ‘[b]efore restricting discovery, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it and taking into account society’s interest in furthering the truthseeking function.’” *Id.* at \*7 (citation omitted). Thus, the burden is on Complaint Counsel to demonstrate that the deposition is not reasonably likely to lead to the discovery of relevant information, or that notwithstanding any such relevance, BCP should nevertheless be protected from deposition by Respondent.

### III. Analysis

The Orders issued previously in this case hold that the Commission’s reasons for issuing a complaint and the information the Commissioners evaluated and considered prior to filing a complaint, including the standards that the Commissioners used in determining whether to issue a complaint, are outside the scope of discovery, absent extraordinary circumstances, which circumstances Respondent failed to demonstrate. *See* February 25, 2014 Order Granting Complaint Counsel’s Motion to Quash and to Limit Deposition Subpoenas Served on Commission Attorneys (February 25 Order); February 21, 2014 Order Denying Respondent’s Motion for a Rule 3.36 Subpoena (February 21 Order); January 30, 2014 Order on Complaint

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<sup>3</sup> Rule 3.43(b) states “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(b).

<sup>4</sup> Commission Rule 3.33(c)(1) mirrors Rule 30(b)(6) of the Federal Rules of Civil Procedure. Where the Federal Rules of Civil Procedure are similar to the Commission’s Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating disputes. *In re Pom Wonderful LLC*, 2011 FTC LEXIS 42, \*9 n.3 (March 16, 2011) (citations omitted).

Counsel's Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order (January 30 Order). Any "attempt to probe the mental processes of this agency in investigating respondents and the decision leading up to the complaint in this matter . . . is ordinarily privileged since [such information relates] to an integral part of the decision-making process of this agency." *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, \*5 (June 16, 1967) (citation omitted) (denying respondent's application for depositions from the Secretary of the Commission, the Director of the Bureau of Deceptive Practices, and an attorney of the Commission).

Although Respondent is not entitled to discovery on the decision making process of the agency, it is entitled to discovery of facts that form the basis for the allegations of the Complaint. *FTC v. Cyberspy Software LLC*, 2009 U.S. Dist. LEXIS 132299, at \*4 (M.D. Fla. May 26, 2009) ("A party is entitled to the facts relevant to the litigation."). *See also* 16 C.F.R. § 3.31(c)(1) ("Parties 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."). With these precepts in mind, the analysis turns to the four topics listed in Respondent's Rule 3.33 Notice of Deposition.

#### **A. Deposition Notice Topics 1 and 4**

Complaint Counsel argues that Respondent's Notice Topic 1 is improper because the "subjects on which Respondent seeks testimony regarding the 1,718 file," i.e., the Bureau's "relationships" with Tiversa, Dartmouth College, and Eric Johnson regarding the 1,718 file, are not stated with "reasonable particularity," as required by Rule 3.33(c). Complaint Counsel makes the substantially identical argument as to Topic 4 -- the Bureau's "relationship" with the SPD relating to certain LabMD documents found by SPD during the Sacramento Incident (hereafter, "LabMD Documents"). Motion at 4-5. According to Complaint Counsel, the term "relationship" is overbroad; no single witness has personal knowledge of the Bureau, and its directors, officers, and employees, as it relates to the 1,718 file or the LabMD Documents; and it would be impossible to educate a Bureau designee about every conceivable subject of examination regarding the 1,718 file or the LabMD Documents. Motion at 6.

Respondent counters that the meaning of "relationship" is sufficiently clear, and refers to "communications," "behavior," and "dealings" between two entities. Opposition at 4.<sup>5</sup> Respondent further argues that the 1,718 file is clearly relevant to the Complaint (Complaint ¶¶ 11, 13-20) and that the Bureau's communications with Tiversa, Dartmouth College and/or Eric Johnson are narrowed to the topic of the 1,718 file. Opposition at 4-5. Respondent also states that the Complaint expressly refers to the LabMD documents found by the SPD (Complaint ¶ 21) and claims that FTC officials waited four months before contacting LabMD to inform them that the Day Sheets had been found by the SPD. Opposition at 8.

As an initial matter, Topics 1 and 4 are "reasonably particular" enough to enable BCP to designate those with applicable knowledge. The goal of the requirement in the analogous Fed.

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<sup>5</sup> Consistent with Respondent's definition, the Merriam-Webster Online dictionary defines "relationship" as "the way in which two or more people, groups, countries, etc., talk to, behave toward, and deal with each other." Opposition at 4.

R. Civ. Pro. 30(b)(6) that the notice of deposition “describe with reasonable particularity the matters for examination” is to “enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to testify is able to respond regarding that matter.” Charles A. Wright, et al., 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed. 2013). Rule 30(b)(6) requires only that the notice describe in terms as clear as possible the matters about which testimony is sought so that the organization can determine the identity and number of persons whose presence will be necessary to provide an adequate response to any potential questions. *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598, 603-04 (D. Del. 1973).

As stated in the Notice, Topics 1 and 4 may appear to be overly broad; however, Respondent, in its Opposition, has made clear that the information it actually seeks is more narrow. With respect to Topic 1, Respondent seeks testimony on: “how [the] FTC came to possess the 1718 file.” Opposition at 9. With respect to Topic 4, Respondent seeks testimony on how the FTC learned of the Sacramento Incident and how the FTC handled or disseminated LabMD’s property after it learned of the Sacramento Incident. *Id.* The scope of Topics 1 and 4 is, accordingly, so limited.

Complaint Counsel further argues that a deposition of the Bureau regarding its “relationship” with Tiversa, Dartmouth College, and Eric Johnson is outside the scope of discovery under Rule 3.31(c)(1) because Respondent has propounded written discovery to Complaint Counsel regarding communications with these nonparties; issued a subpoena to, and taken the deposition of, Tiversa regarding communications with FTC, Dartmouth College, and Eric Johnson; and also will soon take the deposition of Tiversa employee Rick Wallace on these same matters. Complaint Counsel does not argue, however, that the requested deposition testimony from BCP is unreasonably cumulative or duplicative of other discovery, *see* 16 C.F.R. § 3.31(c)(2)(ii), and the mere fact that discovery is being sought from multiple sources or discovery methods is not a basis for denying discovery. *See* 16 C.F.R. § 3.31(a) (“Parties may obtain discovery by *one or more* of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission”) (emphasis added). Nor does Rule 3.33 require a showing of particular need, in order to take a deposition of designee(s) of the BCP.

Finally, Complaint Counsel contends that the requested information regarding the 1,718 file is outside the scope of discovery under Rule 3.31(c)(2), which states in part:

Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices . . .

16 C.F.R. § 3.31(c)(2). Complaint Counsel asserts that the subject communications with Tiversa, Dartmouth College, and Eric Johnson regarding the 1,718 file “largely predate” the opening of the investigation of LabMD in January 2010 and were not “collected or reviewed” in

the course of the investigation or prosecution of this case. Thus, Complaint Counsel concludes, Respondent must demonstrate good cause to depose BCP. Motion at 5. By its express terms, however, Rule 3.31(c)(2) applies to “searches for materials.” It does not address deposition testimony, and there is no similar restriction to testimony sought under Rule 3.33. Thus, there is no basis for concluding that Rule 3.31(c)(2) requires Respondent to demonstrate good cause to depose BCP.

Accordingly, Complaint Counsel has failed to demonstrate that deposition testimony on Topics 1 and 4 should be barred in its entirety. However, nothing in this ruling is intended to overrule or alter the limitations cited in the January 30 Order and the February 25 Order that pre-complaint attorney communications with SPD, Tiversa, Dartmouth College, and Eric Johnson may not be elicited to derive the FTC’s decision making process in determining to investigate or prosecute this case.

## **B. Deposition Notice Topic 2**

Respondent’s Notice Topic 2 asks for the Bureau’s designee(s) to provide testimony regarding “all data-security standards that have been used by the [Bureau] to enforce the law under Section 5 of the Federal Trade Commission Act since 2005.” (Motion, Ex. B at 4). Complaint Counsel argues that the basis “for the Commission’s commencement of this action” is “not relevant for purpose of discovery in an administrative adjudication” and that Notice Topic 2 does not correspond to any permissible affirmative defense and is foreclosed by the Commission’s January 16, 2014, Order Denying Respondent LabMD’s Motion to Dismiss, *In re LabMD Inc.*, 2014 FTC LEXIS 2 (Jan. 16, 2014) (“January 16 Commission Order”) and the January 30 Order. Motion at 7.

In its Opposition, Respondent acknowledges, as it must, the prior rulings in this case holding that Respondent may not discover the legal standards the FTC has used in the past and is currently using to enforce Section 5 in data security cases, in order to discover and challenge the Commission’s decision making processes in issuing the Complaint in this case. *See, e.g.*, February 25 Order; February 21 Order; January 30 Order. However, notwithstanding the broad language of Topic 2, Respondent does not appear to be seeking discovery of the “standards” for enforcement of Section 5 in data security matters generally. Rather, Respondent states that it is “apparent” that Complaint Counsel seeks to apply a “reasonableness” standard to whether Respondent’s data security practices may be deemed “unfair” under Section 5. Respondent further states that the Commission, in its Order Denying Respondent’s Motion to Dismiss, admitted that in order to establish its case, the FTC would need to determine, as a factual matter, “whether LabMD’s data security procedures were ‘unreasonable.’” Opposition at 6 (*citing* January 16 Commission Order at 18-19). Therefore, Respondent argues, Respondent is entitled to know the bases for the contention that Respondent’s data security practices were not reasonable.

Paragraph 10 of the Complaint alleges that Respondent “failed to provide reasonable and appropriate security for personal information on its computer networks” and cites seven alleged data security practices of Respondent as examples of Respondent’s failures. Complaint ¶ 10 (a)-(g). Respondent’s right to inquire into the factual bases for these allegations cannot credibly be

disputed.<sup>6</sup> 16 C.F.R. § 3.31(c)(1). However, Respondent may not inquire into why, or how, BCP or the Commission determined to use a reasonableness standard to enforce Section 5, or why the alleged facts justify a conclusion of unreasonableness, because “a request for such justification is explicitly a request for the ‘mental impressions, conclusions, opinions or legal theories of a party’s attorney’” and is not permissible. *FTC v. Cyberspy Software LLC*, 2009 U.S. Dist. LEXIS 71270, at \*7 (M.D. Fla. July 31, 2009). For the same reason, Respondent is not entitled to explore attorney thought processes as to which facts support which contentions, and which do not, or what inferences are being drawn from the evidence in the case. *Id.* at \*10-11.

Based upon the foregoing, Complaint Counsel has not demonstrated that Topic 2 is entirely outside the scope of discovery, so as to bar any and all deposition testimony within its scope, and Respondent has articulated a valid line of inquiry. For these reasons, the deposition will not be barred; however, consistent with prior rulings in this case, Respondent may not inquire generally into the legal standards the FTC used in the past and is currently using to determine whether an entity’s data security practices are unfair under Section 5. In addition, to prevent improper inquiry into privileged matters, Respondent will also be barred from inquiring into the legal opinions, legal reasoning, mental processes or decision making of the Bureau, its directors, officers, or employees, or of the Commission, with respect to Section 5 enforcement standards. *See Cyberspy Software*, 2009 U.S. Dist. LEXIS 71270, at \*10-11.

### **C. Deposition Notice Topic 3**

Respondent’s Notice Topic 3 asks for the Bureau’s designee(s) to provide testimony regarding “[c]onsumers that have been harmed by LabMD’s allegedly inadequate security practices.” (Motion, Ex. B at 4). Complaint Counsel does not argue, and has not shown, that Topic 3 is not relevant for purposes of discovery. The Complaint in this matter alleges that Respondent’s asserted inadequate security “caused, or is likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.” Complaint ¶ 22. Thus, inquiry into the facts underlying the allegation of consumer injury is clearly relevant under Rule 3.31(c)(1).

Complaint Counsel nevertheless contends that Respondent should be barred from seeking discovery on the topic from BCP because Topic 3 “demands testimony that Complaint Counsel will present through expert witnesses.” Motion at 7. Complaint Counsel further contends that because Topic 3 “requires the Bureau to prematurely disclose the opinions of Complaint Counsel’s expert witnesses, it is not an appropriate subject for discovery pursuant to Rule 3.33(c)(1).” Motion at 8.

Respondent counters that “Complaint Counsel [is not] allowed to unilaterally restrict the scope of discovery by indicating its own choice of producing testimony [and that] LabMD is clearly entitled to discover [the] FTC’s position on facts regarding potential and/or actual harm

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<sup>6</sup> The February 21 Order held that “documents sufficient to show the standards the FTC used in the past and is currently using to determine whether an entity’s data security practices violate Section 5 of the FTC Act,” are outside the scope of discovery. *See* February 21 Order at 6-7. In the dispute resolved by that Order, Respondent argued that such discovery was relevant to its defense challenging the bases for the Commission’s decision to issue the Complaint against LabMD. For the reasons set forth in the February 21 Order, that argument was rejected. *Id.*

to consumers in this case without regard to [the] FTC's expert witness list." Opposition at 7.

Simply because Complaint Counsel intends to present expert opinion testimony on whether Respondent's practices caused or were likely to cause substantial injury to consumers does not relieve Complaint Counsel from its obligation to provide fact discovery on the topic of consumer injury, such as the identities of customers known to have been harmed and the factual basis underlying the allegation of consumer harm, or other facts that may be required to support these allegations in the Complaint.

Accordingly, Complaint Counsel has not met its burden of showing that inquiry into Topic 3 should be barred. However, Respondent is not entitled to inquire, and will be barred from inquiring, into the legal opinions, legal reasoning, mental processes or decision making of BCP, or its directors, officers, or employees, or of the Commission, with respect to the contention that Respondent's practices caused, or are likely to cause, consumer harm. *See Cyberspy Software*, 2009 U.S. Dist. LEXIS 71270, at \*10-11 (barring discovery of "opposing counsel's thought processes as to which facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far"). In this regard, Respondent may not inquire into why, or how, the factual bases of the allegations in the Complaint justify the conclusion that Respondent violated the FTC Act, because such inquiry is tantamount to "a request for the mental impressions, conclusions, opinions or legal theories" of the FTC.

#### **IV. Conclusion and Order**

Complaint Counsel has failed to demonstrate that the deposition of BCP should be barred in its entirety. Accordingly, to this extent, Complaint Counsel's Motion for a Protective Order is DENIED. However, to ensure compliance with prior discovery orders in this case, and to prevent improper inquiry into privileged matters, Complaint Counsel's Motion for Protective Order is GRANTED IN PART pursuant to Rule 3.31(d), and it is HEREBY ORDERED:

1. 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;
2. Topics 1 and 4 are limited to: how the FTC came to possess the 1718 file; how the FTC learned of the Sacramento Incident; and how the FTC handled or disseminated LabMD's property after it learned of the Sacramento Incident;
3. Notwithstanding the relief granted in this Order, Respondent is prohibited from inquiring into any privileged matters, including without limitation, the legal opinions or legal reasoning or mental impressions of any attorney involved in the investigation or prosecution of this case, and specifically including:

The decision making processes of the Bureau with respect to the investigation of Respondent or the prosecution of this case;

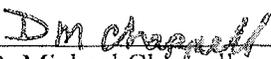
The legal standards the Bureau used in the past and is currently using to determine whether an entity's data security practices are unfair under Section 5;

The legal reasoning or mental processes of the Bureau with respect to the use of a reasonableness standard in the Complaint; and

The legal reasoning or mental processes of the Bureau with respect to the contention that Respondent's practices caused, or are likely to cause, consumer harm; and

4. 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 Rule 3.33 deposition noticed by Respondent on January 30, 2014, as limited by this Order.

ORDERED:

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

Dated: March 10, 2014

# EXHIBIT

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**In the Matter of:**

LabMD, Inc.

*September 25, 2013*  
*Initial Pretrial Conference*

**Condensed Transcript with Word Index**



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1 APPEARANCES:

2

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24 ALSO PRESENT:

25 Victoria Arthaud and Hillary Sloane Gebler

2

1 UNITED STATES OF AMERICA

2 FEDERAL TRADE COMMISSION

3

4

5 In the Matter of: )

6 LABMD, INC., ) Docket No. 9357

7 a corporation. )

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12 INITIAL PRETRIAL CONFERENCE

13 SEPTEMBER 25, 2013

14 2:00 P.M.

15 PUBLIC SESSION

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19 BEFORE THE HONORABLE D. MICHAEL CHAPPELL

20 Administrative Law Judge

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25 Reported by: Susanne Bergling, RMR-CRR-CLR

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1 P R O C E E D I N G S

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3 JUDGE CHAPPELL: Okay. Call to order Docket

4 9357, In Re: LabMD. Is there a space after the B or is

5 that one word, "LabMD"?

6 MR. RUBINSTEIN: It is one word, Your Honor.

7 JUDGE CHAPPELL: Okay. Thank you.

8 I will start with appearances of the parties,

9 and I will start with the Government. Go ahead.

10 MR. SHEER: Good afternoon, Your Honor. I'm

11 Alain Sheer representing the Commission.

12 MS. VANDRUFF: Good afternoon, Your Honor.

13 Laura VanDruff, Complaint Counsel.

14 JUDGE CHAPPELL: Okay.

15 And for Respondent?

16 MR. RUBINSTEIN: Your Honor, Reed Rubinstein

17 representing Respondent. If I could, I would like to

18 take this opportunity to thank you and to thank

19 government counsel for their accommodation of my

20 schedule. It is very much appreciated.

21 JUDGE CHAPPELL: You're welcome. I would expect

22 that request to come a little sooner next time.

23 MR. RUBINSTEIN: Yes, Your Honor.

24 JUDGE CHAPPELL: And also, just so everyone

25 knows, we do follow motions practice, and I will need a

9

1 depending on the information. For example, financial  
 2 information has been misused to open new -- to conduct  
 3 credit card fraud and to go into bank accounts; and  
 4 medical information has been misused to steal insurance  
 5 benefits. In each of the last ten years, identity theft  
 6 has been the number one complaint that the FTC has  
 7 received. There were 369,000 complaints in 2012.  
 8 The personal information that LabMD maintains is  
 9 information that identity thieves want. This was action  
 10 was brought under Section 5 of the FTC Act. Section 5  
 11 provides the Commission with broad authority to address  
 12 new areas and practices as they develop.  
 13 JUDGE CHAPPELL: Have you -- in that regard, has  
 14 the Commission issued guidelines for companies to  
 15 utilize to protect this information or is there  
 16 something out there for a company to look to?  
 17 MR. SHEER: There is nothing out there for a  
 18 company to look to. The Commission has entered into  
 19 almost 57 negotiations and consent agreements that set  
 20 out a series of vulnerabilities that firms should be  
 21 aware of, as well as the method by which the Commission  
 22 assesses reasonableness.  
 23 In addition, there have been public statements  
 24 made by the Commission, as well as educational materials  
 25 that have been provided. And in addition, the industry,

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1 the IT industry itself, has issued a tremendous number  
 2 of guidance pieces and other pieces that basically set  
 3 out the same methodology that the Commission is  
 4 following in deciding reasonableness, with one  
 5 exception, and the exception is that the Commission's  
 6 process as to the calculation of the potential consumer  
 7 harm from unauthorized disclosure of information.  
 8 JUDGE CHAPPELL: Is there a rulemaking going on  
 9 at this time or are there rules that have been issued in  
 10 this area?  
 11 MR. SHEER: There are no -- there is no  
 12 rulemaking, and no rules have been issued, other than  
 13 the rule issued with regard to the Gramm-Leach-Bliley  
 14 Act. There is a safeguards rule there which is issued  
 15 for financial institutions. The way that rule reads and  
 16 the way it works, it basically --  
 17 JUDGE CHAPPELL: The FTC has jurisdiction in  
 18 that area?  
 19 MR. SHEER: It has jurisdiction over certain  
 20 types of financial institutions, such as --  
 21 JUDGE CHAPPELL: Is that expressed in that Act?  
 22 MR. SHEER: It is.  
 23 JUDGE CHAPPELL: Okay.  
 24 MR. SHEER: As I was saying, Your Honor,  
 25 information security, which is an essential part of our

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1 economy now given the increasing reliance on and use of  
 2 computer networks, is one of the new areas that the  
 3 Commission is able to look into. The complaint alleges  
 4 that the company, LabMD, engaged in an unfair act or  
 5 practice in violation of Section 5 by collecting and  
 6 storing large amounts of very sensitive consumer  
 7 information and failing to use reasonable and  
 8 appropriate security measures to prevent the information  
 9 from being disclosed without authorization.  
 10 As set out in 15 USC 45(n), an act or practice  
 11 is unfair when it causes or is likely to cause  
 12 substantial consumer injury that is not -- and the  
 13 injury is not reasonably avoidable by consumers and not  
 14 offset by countervailing benefits to consumers or  
 15 competition. The complaint alleges that LabMD  
 16 systematically failed to practice what IT professionals  
 17 generally call -- quote unquote -- defense in depth.  
 18 Defense in depth is a general approach for  
 19 identifying the kinds of security measures that will be  
 20 reasonable under particular circumstances. It sets out  
 21 guiding principles that IT professionals and industry  
 22 have known and used for years. There are lots of  
 23 sources for the principles, such as materials published  
 24 by the National Institute of Standards and Technology,  
 25 continuing education for IT professionals, practical IT

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1 experience, and lessons learned from publicized  
 2 breaches.  
 3 Some of these guiding principles are, first, do  
 4 not put all your eggs in one basket, because a single  
 5 security measure may fail or be vulnerable. For  
 6 example, if the only security measure for a company's  
 7 network were a firewall and the firewall were not set up  
 8 correctly, an outsider could exploit the mistake and  
 9 gain entry to the network, because there are no other  
 10 security measures in place. The outsider would have  
 11 free reign within the network and could find -- easily  
 12 find and export sensitive information.  
 13 Second, limit a computer user's control over the  
 14 computers and data to the lowest level the user needs to  
 15 perform their job. For example, users do not need to be  
 16 able to change security settings on their computers or  
 17 install programs on their computers without getting  
 18 prior approval.  
 19 Third, also use nontechnical measures, such as  
 20 providing security training for employees, a plan for  
 21 responding to security incidents, and maintaining  
 22 written security policies and procedures for IT  
 23 employees to follow.  
 24 The final step in identifying measures that will  
 25 provide reasonable defense in depth is a common sense

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1 available publicly and we may be able to have a witness  
 2 who says they saw it.  
 3 JUDGE CHAPPELL: Do you have any complaining  
 4 witnesses who say their data was released or disclosed?  
 5 MR. SHEER: Not at this time.  
 6 JUDGE CHAPPELL: Okay.  
 7 MR. SHEER: We will develop that.  
 8 JUDGE CHAPPELL: All right. Thank you.  
 9 MR. RUBINSTEIN: There are some very significant  
 10 legal issues that are created by these facts. The first  
 11 is the ambit of the Commission's authority under Section  
 12 5, which we intend to test. The second is the extent to  
 13 which the file in question is within the Commission's  
 14 ambit under Article 1, Section 8. There are due process  
 15 issues, because notwithstanding counsel's discussions,  
 16 there are no fixed or ascertainable standards by which  
 17 LabMD, a small company, could judge the propriety of  
 18 what it was doing.  
 19 Proofs will show that the billing manager  
 20 downloaded Limewire and did it without the knowledge of  
 21 the company's upper management and contrary to the  
 22 company policy. This was not a shared file. This was  
 23 not a shared file at all. It was never meant for public  
 24 consumption. In fact, there's yet another issue here.  
 25 LabMD is subject to HIPAA, and the Department of Health

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1 and Human Services determined that no action was  
 2 appropriate.  
 3 So, in effect, you have the Commission  
 4 overfiling the agency of the Government that Congress  
 5 designated with primary responsibility for management  
 6 and regulation of HIPAA.  
 7 JUDGE CHAPPELL: So, you're saying -- your  
 8 position is the data was not in a shared folder.  
 9 MR. RUBINSTEIN: It may have been in a -- it was  
 10 in a folder and obviously it was accessible to Tiversa.  
 11 The mechanics of how Tiversa accessed it and what kind  
 12 of folder it was in are things that we are not clear  
 13 about and we are going to, through discovery, better  
 14 ascertain.  
 15 Certainly, it was not supposed to be made  
 16 available to the public. That was not LabMD's policy,  
 17 certainly, and to the extent that the Limewire was  
 18 downloaded, it was done, as I said, without  
 19 authorization and contrary to LabMD's standard policies.  
 20 JUDGE CHAPPELL: I've heard you say a couple  
 21 times you're a small company. I mean, is that  
 22 confidential? I mean, are you 5 million, 10 million?  
 23 What kind of revenues? If it's not -- just ballpark.  
 24 How small or how large are you.  
 25 MR. RUBINSTEIN: I would rather not -- I will

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1 make that information available to you in camera.  
 2 JUDGE CHAPPELL: That's okay. I'll see it in  
 3 the documents. I just thought, when you say small, you  
 4 know --  
 5 MR. RUBINSTEIN: I would rather not -- we will  
 6 say it is a small company with less than 50 employees,  
 7 is my understanding. We will make that available to  
 8 you, Your Honor.  
 9 JUDGE CHAPPELL: Less than 50, 5-0, or 15?  
 10 MR. RUBINSTEIN: I'm sorry, less than 50. But  
 11 for various reasons, it's a closely held corporation,  
 12 and I don't want to put the numbers out. But we are not  
 13 INOVA or Johns Hopkins.  
 14 JUDGE CHAPPELL: Labcorp?  
 15 MR. RUBINSTEIN: Not them either.  
 16 So, what we anticipate with this case, as I  
 17 said, we are going to have to find out Tiversa's role.  
 18 We are going to have to find out the extent to which it  
 19 was involved with and its relationship with the  
 20 Commission in the decision to move forward with this  
 21 investigation. And we're going to be filing a series of  
 22 dispositive motions very early on, because quite  
 23 frankly, we don't believe the Commission has the  
 24 authority to be doing what it's doing to LabMD. We  
 25 don't think that the information --

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1 JUDGE CHAPPELL: Very early on?  
 2 MR. RUBINSTEIN: Very early on, within the -- I  
 3 mentioned this to counsel. We anticipate filing a  
 4 series of motions within the next two to three weeks.  
 5 JUDGE CHAPPELL: And you understand who will be  
 6 deciding those motions?  
 7 MR. RUBINSTEIN: We are well aware, Your Honor,  
 8 but we have an obligation to exhaust our remedies. So,  
 9 we're going to be raising a series of legal issues.  
 10 We're going to be raising a series of evidentiary  
 11 objections based on the circumstances, as we understand  
 12 them today, about how the Government came into  
 13 possession of the information in the first instance.  
 14 And then all of the other things that are laid  
 15 out in the complaint were the result of the knowing  
 16 acceptance from a government contractor of a stolen  
 17 file, files stolen, by the way, in contravention of  
 18 Georgia's law. There was a case in the Eleventh Circuit  
 19 which was dismissed for want of jurisdiction under the  
 20 Georgia long arm statute, but there is, you know, a  
 21 clear suggestion that what Tiversa did violate Georgia's  
 22 law.  
 23 JUDGE CHAPPELL: Who brought that case?  
 24 MR. RUBINSTEIN: LabMD against Tiversa.  
 25 JUDGE CHAPPELL: And, of course, LabMD didn't

# EXHIBIT

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UNITED STATES DISTRICT COURT.  
FOR THE DISTRICT OF NEW JERSEY  
Civil 13-1887 ES

FEDERAL TRADE COMMISSION,

Plaintiff,

MOTIONS  
TO DISMISS

V.

WYNDHAM WORLDWIDE  
CORPORATION, ET AL,

DEFENDANTS.

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NEWARK, NEW JERSEY  
NOVEMBER 7, 2012

B E F O R E: HONORABLE ESTHER SALAS,  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

KEVIN HYLAND MORIARTY, ESQ.  
KRISTIN KRAUSE COHEN, ESQ.  
JONATHAN ELI ZIMMERMAN, ESQ.  
FOR THE FEDERAL TRADE COMMISSION.

GIBBONS  
BY: JUSTIN T. QUINN, ESQ.

AND

KIRKLAND & ELLIS  
BY: EUGENE ASSAF, ESQ.  
AND: K. WINN ALLEN, ESQ.  
For the Defendants.

1  
2 Pursuant to Section 753 Title 28 United  
3 States Code, the following transcript is certified to  
4 be an accurate record as taken stenographically in the  
above-entitled proceedings.

S/LYNNE JOHNSON

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1 MR. MORIARTY: We are pretty squarely within  
2 the fair notices category there. I think there are a  
3 lot of answers to that question, the principal one  
4 being that Wyndham in its privacy policy tells the  
5 consumers that they are going to take commercially  
6 reasonable steps to adequately protect their data. So  
7 you know, it is an objective standard, reasonableness,  
8 and for them to claim that it is now kind of a  
9 meaningless standard, it sort of rings hollow.

10 But as far as advisory opinions, there are  
11 not advisory opinions. But the way companies  
12 determine what is reasonable and what is not  
13 reasonable is the same way companies Act in any other  
14 legal context. The entire foundation of the common  
15 law negligence is requiring companies to Act  
16 reasonably under the circumstances. For example, in  
17 the context of data privacy they should evaluate the  
18 size and complexity of their network, evaluate the  
19 type of consumer data they are collecting and storing.  
20 They should evaluate industry standards. There are  
21 industry standards out there that are not associated  
22 with the FTC. There are experts out there that  
23 consult with companies routinely about the data  
24 security.

25 THE COURT: I am sorry to interrupt you,

# EXHIBIT

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**PREPARED STATEMENT OF  
THE FEDERAL TRADE COMMISSION**

**on**

**Protecting Consumer Information: Can Data Breaches Be Prevented?**

**Before the**

**COMMITTEE ON ENERGY AND COMMERCE  
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE  
UNITED STATES HOUSE OF REPRESENTATIVES**

**Washington, D.C.**

**February 5, 2014**

business educational materials on specific topics – such as the risks associated with peer-to-peer (“P2P”) file-sharing programs and companies’ obligations to protect consumer and employee information from these risks<sup>33</sup> and how to properly secure and dispose of information on digital copiers.<sup>34</sup>

### III. DATA SECURITY LEGISLATION

The FTC supports federal legislation that would (1) strengthen its existing authority governing data security standards on companies and (2) require companies, in appropriate circumstances, to provide notification to consumers when there is a security breach.<sup>35</sup>

Reasonable and appropriate security practices are critical to preventing data breaches and protecting consumers from identity theft and other harm. Where breaches occur, notifying consumers helps them protect themselves from any harm that is likely to be caused by the misuse of their data. For example, in the case of a breach of Social Security numbers, notifying consumers will enable them to request that fraud alerts be placed in their credit files, obtain

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<sup>33</sup> See *Peer-to-Peer File Sharing: A Guide for Business* (Jan. 2010), available at <http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business>.

<sup>34</sup> See *Copier Data Security: A Guide for Business* (Nov. 2010), available at <http://business.ftc.gov/documents/bus43-copier-data-security>.

<sup>35</sup> See, e.g., Prepared Statement of the Federal Trade Commission, “Privacy and Data Security: Protecting Consumers in the Modern World,” Before the Senate Committee on Commerce, Science, and Transportation, 112<sup>th</sup> Cong., June 29, 2011, available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-privacy-and-data-security-protecting-consumers-modern/110629privacytestimonybrill.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-privacy-and-data-security-protecting-consumers-modern/110629privacytestimonybrill.pdf); Prepared Statement of the Federal Trade Commission, “Data Security,” Before Subcommittee on Commerce, Manufacturing, and Trade of the House Committee on Energy and Commerce, 112<sup>th</sup> Cong., June 15, 2011, available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-data-security/110615datasecurityhouse.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-data-security/110615datasecurityhouse.pdf); FTC, *Security in Numbers, SSNs and ID Theft* (Dec. 2008), available at <http://www.ftc.gov/sites/default/files/documents/reports/security-numbers-social-security-numbers-and-identity-theft-federal-trade-commission-report/p075414ssnreport.pdf>; President’s Identity Theft Task Force, *Identity Theft Task Force Report* (Sept. 2008), available at <http://www.ftc.gov/sites/default/files/documents/reports/presidents-identity-theft-task-force-report/081021taskforcereport.pdf>.