

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



In the Matter of)

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

PUBLIC

Docket No. 9357

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR AN
EXTENSION OF TIME TO RE-DEPOSE DETECTIVE KARINA JESTES**

The Court should deny Respondent's Motion for an extension of time to re-depose Sacramento Detective Karina Jestes. First, Respondent requests that it be allowed to take a second deposition of Detective Jestes on or before April 11, 2014, ten days after the deadline in the Court's March 12, 2014 Order, after the deadline of nearly every significant pretrial disclosure by the parties, and by that point less than 40 days before trial. The extension of time requested by Respondent to take this deposition would prejudice Complaint Counsel's trial preparations and disrupt and delay the Court's tight discovery and pretrial schedule. Second, February 2014 communications between Respondent's counsel and counsel for the City of Sacramento, about which Complaint Counsel first learned on March 18, 2014, demonstrate that Respondent materially misrepresented to the Court the circumstances under which the City of Sacramento would consent to a second deposition of Detective Jestes, and those communications demonstrate that a deposition would be of little, if any, value.

BACKGROUND

On February 19, 2014, Respondent filed a Motion for Leave to re-depose Detective Jestes. In its Motion, counsel for Respondent represented to the Court that the City of Sacramento had consented to the re-deposition of Detective Jestes. *See* Respondent Motion at 4 (“The City of Sacramento has already agreed with LabMD’s request and is willing to make Detective Jestes available for a second, limited deposition.”); and Declaration of Lorinda Harris, Esq., attached to Respondent’s Motion as Exhibit E (“On February 6, 2014, Deputy City Attorney Mike Fry consented to the taking of Detective Jestes’s deposition for the limited purpose of examining her concerning the documents the Sacramento Police Department had produced by way of LabMD’s subpoena that refreshed her recollection about her communications with the FTC.”). Complaint Counsel filed an Opposition to Respondent’s Motion on March 3, 2014.

On March 12, 2014, this Court granted Respondent’s Motion to conduct a second deposition of Detective Jestes, “limited to the narrow issue of Detective Jestes’ communications with the FTC based on Recently Disclosed Documents.” Order at 3. The Court found that “Sacramento Deputy City Attorney Mike Fry ha[d] consented to the taking of Detective Jestes’ deposition” *Id.* at 2. The Court’s Order provided that the fact discovery deadline of March 5, 2014 be extended “for an additional 20 days from the date of this Order for the purpose of allowing the deposition of Detective Jestes, as limited by this Order.”

Two days after the Court issued the March 12, 2014 order, Respondent’s counsel, Kent Huntington, contacted Mr. Fry to schedule Detective Jestes’ deposition. *See* Email from K. Huntington to M. Fry (Mar. 14, 2014) (attached as **Exhibit A**, at page 5). On Monday, March

17, 2014, Mr. Fry notified Mr. Huntington that Detective Jestes is out of the office in training and unable to appear for a deposition until April 7, 2014.

After notifying Respondent's counsel of Detective Jestes' availability, Mr. Fry contacted Complaint Counsel the following day, on March 18, 2014, to relay the same information. On March 19, 2014, Mr. Fry informed Complaint Counsel of his February 2014 email communications with Respondent's counsel, Lorinda Harris, who executed the declaration in support of Respondent's February 19, 2014 Motion for Leave.¹ On March 21, 2014, Mr. Fry provided Complaint Counsel with a copy of those emails. *See* Emails between M. Fry and L. Harris (Feb. 6, 2014; Feb. 7, 2014) (attached as **Exhibit B**). In Mr. Fry's February 6, 2014 email to Ms. Harris, Mr. Fry states "as we discussed, if the Federal Trade Commission has no objections, the City of Sacramento will stipulate to having you take Detective Jestes's deposition for the limited purpose of discussing the additional questions you have in light of the documents the City disclosed by way of the subpoena." *Id.* Mr. Fry also explains that "in speaking with Detective Jestes, it does not sound like she will have much to add to her prior testimony." *Id.*

On March 21, 2014, Mr. Huntington proposed that Complaint Counsel consent to the re-taking of Detective Jestes' deposition after the extended discovery deadline prescribed by the Court's March 12, 2014 Order had passed. Complaint Counsel stated that it would not consent to this proposal in light of the deadline in the Court's March 12, 2014 Order.

¹ Prior to March 18, 2014, Complaint Counsel had never communicated with Mr. Fry or anyone in the Office of the Sacramento City Attorney about Detective Jestes' deposition or any other matter regarding this case. Complaint Counsel also has had no contact with Detective Jestes since her December 17, 2013 deposition.

On March 22, 2014, Mr. Huntington continued his email correspondence with Mr. Fry about Detective Jestes' deposition. Mr. Huntington copied Complaint Counsel and, among other things, leveled accusations at the City about obstructing justice, conspiring to intentionally hide a witness, and thwarting a Court order. *See Exhibit A.*

On March 24, 2014, Mr. Fry responded by letter to Mr. Huntington's March 22, 2014 email. In that letter, Mr. Fry explained that the statement in Ms. Harris's declaration "*is inaccurate and misstates my explicit written position. . . .*" and noted that "*Despite the City's express written directive, Ms. Harris represented to the Court that the City apparently gave unconditional consent to the retaking of the deposition.*" (emphasis added) (attached as **Exhibit C**).

ARGUMENT

I. EXTENSION OF DEADLINE TO RE-DEPOSE DETECTIVE JESTES WOULD DISRUPT PROCEEDINGS AND PREJUDICE COMPLAINT COUNSEL

Respondent seeks to extend the deadline to re-depose Detective Jestes from April 1 to April 11, 2014. Any further extension of time would disrupt the Court's prehearing litigation schedule and prejudice Complaint Counsel. By April 11, 2014, several pretrial deadlines will have passed: Complaint Counsel and Respondent will have both exchanged expert reports; Complaint Counsel and Respondent will have exchanged final proposed witness and exhibit lists, including deposition designations; and Complaint Counsel will have identified and provided rebuttal expert report(s). Further, the parties will be mere days away from exchanging deposition counter-designations on April 14, 2014, and certain expert depositions likely will have concluded before a second deposition of Detective Jestes takes place. A further extension of the deadline to

re-depose Detective Jestes would disrupt the Court's prehearing litigation schedule and prejudice Complaint Counsel's trial preparations.

II. RESPONDENT'S FEBRUARY 19, 2014 MOTION MATERIALLY MISREPRESENTED THE CITY OF SACRAMENTO'S POSITION

Since the Court's March 12, 2014 Order, Complaint Counsel has learned that Respondent's counsel materially misrepresented to the Court the position of the City of Sacramento regarding its consent to produce Detective Jestes for a second deposition. Specifically, counsel for Respondent represented to the Court that the City of Sacramento had consented to the re-deposition of Detective Jestes. *See* Respondent Motion at 4 and Declaration of Lorinda Harris, Esq., attached to Respondent's Motion as Exhibit E ("On February 6, 2014, Deputy City Attorney Mike Fry consented to the taking of Detective Jestes's deposition for the limited purpose of examining her concerning the documents the Sacramento Police Department had produced by way of LabMD's subpoena that refreshed her recollection about her communications with the FTC.").

Respondent's counsel failed to inform the Court that the City of Sacramento and its counsel had explicitly made any such consent conditioned upon the FTC's agreement to allow the second deposition. *See* February 6, 2014 Email from M. Fry to L. Harris (attached as **Exhibit B**); *see also* Email from M. Fry to K. Huntington (Mar. 21, 2014) (attached as **Exhibit A**); Email from M. Fry to K. Huntington (March 20, 2014) (attached as **Exhibit A**); Letter from M. Fry to K. Huntington (Mar. 24, 2014) (attached as **Exhibit C**). Since Complaint Counsel had communicated to Respondent's counsel its opposition to a second deposition of Detective

Jestes, Respondent's counsel's representation to the Court regarding the City of Sacramento's consent to the deposition was false.

The Court referred to the inaccurate representations of Respondent in its March 12, 2014 Order. In light of the Court's reliance on Respondent's counsel's inaccurate representations of the City's position, it is appropriate for the Court to deny Respondent's request for a further extension of time to re-depose Detective Jestes.

III. SECOND DEPOSITION OF DETECTIVE JESTES WOULD BE UNREASONABLEY CUMULATIVE OR DUPLICATIVE

The February 2014 communications between Mr. Fry and Ms. Harris also reveal the City's position about the utility of a second deposition of Detective Jestes. Notably, Mr. Fry wrote to Ms. Harris on February 6, 2014: "*While I was not present at the [December 17, 2013] deposition, in speaking with Detective Jestes, it does not sound like she will have much to add to her prior testimony.*" (emphasis added). This fact militates against the Court granting Respondent an extension of time to re-depose Detective Jestes.²

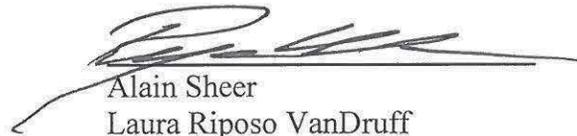
CONCLUSION

For the foregoing reasons, the Court should deny Respondent's Motion for an extension of time to re-depose Detective Jestes.

² Respondent's Motion fails to comply with Rule 3.22(c). Rule 3.22(c) states: "Motions must also include the name, address, telephone number, fax number, and e-mail address (if any) of counsel and attach a draft order containing the proposed relief. 16 C.F.R. 3.22(c). Because Respondent failed to attach a draft order, Respondent's Motion violates Rule 3.22(c) and should be denied.

Dated: March 27, 2014

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown

Federal Trade Commission
600 Pennsylvania Ave., NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2918 – Mehm
Facsimile: (202) 326-3062
Electronic mail: rmehm@ftc.gov

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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

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 Pepson
Lorinda Harris
Hallee Morgan
Robyn Burrows
Kent Huntington
Daniel Epstein
Cause of Action
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william.sherman@dinsmore.com

sunni.harris@dinsmore.com
Counsel for Respondent LabMD, Inc.

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

Michael A. Fry
Senior Deputy City Attorney
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915 I Street, Fourth Floor
Sacramento, CA 95814-2604
MFry@cityofsacramento.org

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 27, 2014

By: 

Megan Cox
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

From: Kent Huntington <kent.huntington@causeofaction.org>
Sent: Saturday, March 22, 2014 6:27 PM
To: Michael Fry
Cc: VanDruff, Laura Riposo; Sherman, William; Cox, Megan
Subject: Please respond by Monday afternoon -- RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Dear Mike—

Thank you for confirming that “[t]he City [of Sacramento] has repeatedly made every effort to work with LabMD and cooperate whenever possible” because there seems to be an unspoken miscommunication, which is hindering our progress in getting this single deposition completed, as envisioned by the Court. Our telephone calls are always polite and cordial, and I value your insights as the primary public official involved in this matter at the California state-level. And, I truly enjoy speaking with you as an attorney because you are working for a beautiful California city. After all, it is *your consent* that is really needed to have this deposition take place, not the FTC’s consent or the Court’s consent. Indeed, I believe you now have read the Court’s order, in its entirety.

Normally, I would not make a record of this disconnect, but I am somewhat troubled by the discussions that you have been conducting with FTC counsel without my involvement over the last few days—perhaps longer. My takeaway is that whatever is necessary will now happen, in order to stop the deposition of Det. Jestes from taking place, including having her *remain* in undisclosed locations while the City of Sacramento runs out the clock. We have offered to travel to wherever she is now located in the United States, but you have firmly informed me that *she is unavailable and to quit asking*, regardless of the various accommodations that I have offered. Indeed, for the convenience of the Court and the parties, we would willingly pay to fly her here to Washington, DC, if you would prefer and consent. It’s a nice time to visit Washington, DC, but we have no problem in traveling to Sacramento either.

Along this same vein, Ms. VanDruff has readily acknowledged to me that you have been in contact with her on a number of occasions this week. What seems to be happening is that there is now a coordinated effort to keep Detective Jestes from testifying. I don’t know what your local rules or laws are on the obstruction of civil testimony in California, but I would predict that they are very similar to the ones we have here in Washington, DC. I am not otherwise hearing from you that the City has a serious objection to the completion of Ms. Jestes’s deposition taking place. However, *if you do have other objections*, please let me know immediately, because I’d rather see your consent granted in written form, hand-in-hand with the FTC.

We fully intend to bring this matter to the Court’s attention because the City of Sacramento still remains out of compliance with the Court’s subpoena to provide relevant records in this case. For now, however, we simply request you make available one material witness, who the Sacramento Police Department and the FTC are now shielding from view. Precipitating yet another discovery skirmish is not in the interests of justice, let alone Detective Jestes. Indeed, I believe you know by now that your police officers were able to locate Mr. Garcia in a day and secure him in jail in order for the FTC to attempt its failed effort to grant him immunity through the U.S. Attorneys office in Sacramento. In this instance, the City seems to have a different perspective with regard to its own employees testifying. Additionally, the City is still sitting on property owned—as acknowledged by a number of your police officers—by LabMD. We would like for you to complete the document production and to make available one single witness.

Should you wish to intervene in this matter further, your office will be readily supplied with each and every filing in this case. However, that might run afoul of the joint investigation agreement or understanding that the police department has entered into with the FTC. We have been operating under the assumption that they had taken the lead for the

City—as evidenced by their defense and counseling of the Detective during the first phase of her deposition. That much is clear from the transcript I provided you. See *Jestes Dep.* at 89 (Dec. 17, 2013).

Please provide us your written response by 3:33 p.m. (PDT) on Monday, so we can advise the Court fully with respect to the City's position. Should the Court request oral argument on this issue, we will work to advise you immediately. I am cc'ing my co-counsel, William Sherman, so he can speak with Ms. VanDruff regarding this matter during a separate "meet and confer" matter that they are likely having on Monday morning. I've also cc'd Ms. Cox at the FTC, but I have done so only to the extent that might assist Ms. VanDruff in handling this case, going forward.

Yours truly—
Kent

Kent Huntington | Counsel | Cause of Action
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From: Michael Fry [mailto:MFry@cityofsacramento.org]
Sent: Friday, March 21, 2014 3:24 PM
To: Kent Huntington
Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Kent,

Please make sure the City is cc'ed on the letter. To avoid any misunderstandings, as you mentioned during our telephone conversation yesterday, LabMD will have to obtain consent from the FTC and obtain permission from the court on extending the discovery deadline in order to move forward with retaking Detective Jestes's deposition since she is presently out of the office until April 7, 2014.

As set forth in my email from yesterday, the City wishes to be copied on all correspondence with the FTC and receive any motions filed with the court concerning any discovery matters involving the City or the attempt to retake the deposition of Detective Jestes. The City was not included in the motion to re-depose Detective Jestes and the court's order indicated the City consented to the retaking of the deposition. Such a statement does not accurately reflect the contents of my conversation or email with Ms. Harris as the City's consent was conditioned on no objections by the FTC and a stipulation by the FTC. If you do not have the email from Ms. Harris, I can forward that to your attention.

Thanks,
Mike

Michael A. Fry
Deputy City Attorney
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915 I Street, 4th Floor

Sacramento, CA 95814
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email: mfry@cityofsacramento.org

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From: Kent Huntington [<mailto:kent.huntington@causeofaction.org>]
Sent: Friday, March 21, 2014 11:15 AM
To: Michael Fry
Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Mike—

I called the FTC yesterday, but have heard nothing back from them yet. You'll be getting a confirmatory letter today, which cc's them. My co-counsel is sending it out, William Sherman from the Dinsmore law firm. I'll be on the road next week, out of the office. If you need to speak with someone from the LabMD side, William will be available. I'll be back the following week.

As promised, please find attached please find attached the Dec. 17, 2013 deposition of Det. Karina Jestes. Thanks again for working with us to make this happen.

We're planning on April 8th or 9th, subject to whatever we hear from the FTC.

Have a great weekend.

—Kent

From: Michael Fry [<mailto:MFry@cityofsacramento.org>]
Sent: Thursday, March 20, 2014 12:46 PM
To: Kent Huntington
Cc: Desiree Stockton; Sherman, William
Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Kent,

As a follow up to my voice mail message, please be advised Detective Jestes is out of the office and will not return until after April 7, 2014. Having her pulled from training is not feasible.

In light of your representation there is a court ordered deadline for discovery, I do wish to address some matters that have been brought to my attention. The City of Sacramento recently learned that LabMD filed a motion to re-depose Detective Jestes following my conversations with Ms. Harris in February. According to the order issued by the Administrative Law Judge, the City consented to the retaking of Detective Jestes's deposition.

As a third party to this action, the City has attempted to avoid becoming involved in any potential discovery disputes between the parties. However, as I stated in my email to Ms. Harris on February 6, 2014, the City's consent to the retaking of the deposition was conditioned on whether the Federal Trade Commission had any objections and was amenable to stipulating to such a proposal. It appears the FTC did not agree to such a proposal, which necessitated the

filing of LabMD's motion. The City was not noticed with the motion or given an opportunity to file any type of response or otherwise be heard on the matter.

I believe the present situation could have been avoided had LabMD involved all parties in its communications to re-take the deposition, had communicated to the City its need to file the motion, and noticed the City with the motion to ensure, that if ordered by the court, the City could make its witness available on a mutually convenient date before the close of discovery.

The City has repeatedly made every effort to work with LabMD and cooperate whenever possible. However, the City is unable to make Detective Jestes available prior to April 7, 2014 due to her prior scheduling commitment. The City leaves it up to you and your client on how you need to proceed at this point. However, to avoid any misunderstandings moving forward the City requests that counsel for the FTC be included in any future communications concerning attempts to schedule Detective Jestes's deposition. Should you need to file any additional motions which involve City employees or discovery connected to the City, the City also requests that it be given notice of any hearing and timely served with all pleadings.

Sincerely,
Mike Fry

Michael A. Fry
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From: Kent Huntington [<mailto:kent.huntington@causeofaction.org>]
Sent: Monday, March 17, 2014 5:27 PM
To: Michael Fry
Cc: Desiree Stockton; Sherman, William
Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Mike-

Thank you for your voicemail and email in response to my messages. Would it be possible to set a date in advance of Det. Jestes's return to the office on April 7th? Currently, we are operating under a court order that requires us to complete her deposition by April 1st. Otherwise, we would have no objection to the timeframe you have provided.

We would willingly work around her training and segment the deposition into two-consecutive weekdays, if that would be of assistance. Additionally, if a weekend date would be workable, we would view that as a viable option of us all, as well.

Thank you for working with us to achieve a mutually amenable deposition date.

Best regards,
Kent

From: Michael Fry [<mailto:MFry@cityofsacramento.org>]
Sent: Monday, March 17, 2014 12:02 PM
To: Kent Huntington
Cc: Desiree Stockton
Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Kent,

I just let you a voice mail message. Detective Jestes is out of the office and in training until April 7, 2014. She will reportedly be checking her email so I hope to receive a reply about her upcoming availability.

When I hear back from her I will let you know. Since it does not look like Thursday will work, are there any other dates you might be available after April 7, 2014?

Thanks,
Mike

Michael A. Fry
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From: Kent Huntington [<mailto:kent.huntington@causeofaction.org>]
Sent: Friday, March 14, 2014 2:43 PM
To: Michael Fry
Subject: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Mike—

You spoke with my colleague, Lorinda Harris, awhile back and I'm following up. Please give me a call when you have the opportunity. My direct dial is below and my cell number is 301.904.4036.

Would next Thursday work for you and Detective Jestes (in Sacramento, of course)?

Best regards-

Kent

Kent Huntington | Counsel | Cause of Action
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kent.huntington@causeofaction.org

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Exhibit B

From: Lorinda Harris <lorinda.harris@causeofaction.org>
Sent: Friday, February 07, 2014 3:40 PM
To: Michael Fry
Subject: RE: In re Matter of LabMD - Subpoena

Hi Mike,

I have submitted our request to the FTC and provided them with the dates of Detective Jestes's availability. They are evaluating our request, and will get back to us.

Thank you again for your cooperation.

Best,
Lorinda

From: Michael Fry [mailto:MFry@cityofsacramento.org]
Sent: Thursday, February 06, 2014 8:09 PM
To: Lorinda Harris
Subject: RE: In re Matter of LabMD - Subpoena

Lorinda,

Sorry. Detective Jestes is not available next Thursday. The dates previously provided were her next available dates.

Mike

From: Lorinda Harris [mailto:lorinda.harris@causeofaction.org]
Sent: Thursday, February 06, 2014 11:00 AM
To: Michael Fry
Subject: Re: In re Matter of LabMD - Subpoena

Mike,

Thanks again for your prompt response. Forgive me for asking, is there any chance Detective Jestes could do the afternoon of Thursday, February 13?

I am having major reconstructive ankle surgery on the 18th, and will be out of commission for a period of time after that. (When I spoke with you yesterday I was hoping to reschedule the surgery, but upon speaking with the surgeon's office this morning that is not possible.)

Thanks again,
Lorinda
(510) 282-3707

From: Michael Fry [mailto:MFry@cityofsacramento.org]
Sent: Thursday, February 06, 2014 12:09 PM
To: Lorinda Harris
Cc: Desiree Stockton <DStockton@cityofsacramento.org>; Moira Smith

Subject: RE: In re Matter of LabMD - Subpoena

Hi Lorinda,

In speaking with Detective Jestes, she is available February 26th or February 27th or the week of March 3rd through March 6th (she is off on Friday's).

Similar to an action filed in federal court, parties are only permitted one deposition of a person for these types of administrative proceedings unless a court order is obtained or the parties agree to another deposition. However, as we discussed, if the Federal Trade Commission has no objections, the City of Sacramento will stipulate to having you take Detective Jestes's deposition for the limited purpose of discussing the additional questions you have in light of the documents the City disclosed by way of the subpoena.

While I was not present at the deposition, in speaking with Detective Jestes, it does not sound like she will have much to add to her prior testimony. Nonetheless, it is up to you whether you believe having her take another deposition will provide any meaningful testimony or is necessary under the circumstances.

Please let me know how you wish to proceed. If the FTC is amenable to having Detective Jestes submit to another deposition, please let me know of the agreed upon date.

Thanks,
Mike

Michael A. Fry
Deputy City Attorney
Office of the City Attorney
915 I Street, 4th Floor
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(916) 808-5346
email: mfry@cityofsacramento.org

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From: Lorinda Harris [<mailto:lorinda.harris@causeofaction.org>]
Sent: Thursday, January 09, 2014 1:38 PM
To: Michael Fry
Cc: Desiree Stockton; Moira Smith
Subject: RE: In re Matter of LabMD - Subpoena

Hi Mike,

We still have not received the documents. Would you mind asking the custodian of records to re-send them? Perhaps they left off our suite number, or something. I have included my contact information again below.

Thanks very much,
Lorinda

Lorinda Harris | Senior Counsel | Cause of Action
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202.400.2723
Admitted in the District of Columbia & California



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From: Michael Fry [<mailto:MFry@cityofsacramento.org>]
Sent: Monday, January 06, 2014 12:32 PM
To: Lorinda Harris
Cc: Desiree Stockton
Subject: RE: In re Matter of LabMD - Subpoena

Good Morning Lorinda,

The custodian of record for the Sacramento Police Department said that copies were sent in response to the subpoena before December 27, 2013. Hopefully you have received them by now.

If you have not received any documents, please let me know.

Thanks,
Mike

Michael A. Fry
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(916) 808-5346
email: mfry@cityofsacramento.org

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From: Lorinda Harris [<mailto:lorinda.harris@causeofaction.org>]
Sent: Monday, January 06, 2014 7:54 AM

To: Michael Fry
Cc: Desiree Stockton
Subject: RE: In re Matter of LabMD - Subpoena

Dear Mike,

I am following up to see whether the Police Department, upon completing its search, has identified any responsive documents to our subpoena.

Thanks,
Lorinda

Lorinda Harris | Senior Counsel | Cause of Action
1919 Pennsylvania Ave NW, Suite 650
Washington, D.C. 20006
lorinda.harris@causeofaction.org
202.400.2723
Admitted in the District of Columbia & California



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From: Michael Fry [<mailto:MFry@cityofsacramento.org>]
Sent: Friday, December 20, 2013 4:48 PM
To: Lorinda Harris
Cc: Desiree Stockton
Subject: In re Matter of LabMD - Subpoena

Dear Ms. Harris,

Following our exchange of emails this past week, I wanted to touch base with you on the subpoena you had served on behalf of your client, LabMD. The subpoena was served on the Sacramento Police Department on or about December 12, 2013.

The subpoena requests three categories of materials; however, you indicated in your recent voice mail that you only remained interested in the request seeking any correspondence between the Sacramento Police Department and the Federal Trade Commission. The date set for compliance of the subpoena had been Tuesday, December 17, 2013.

The Sacramento Police Department has indicated the only documents responsive to your subpoena are the subpoena served by Megan Cox, counsel for the Federal Trade Commission, in October 2013 and the documents provided in response to that subpoena. Nevertheless, I have asked that the Police Department to make sure there are no other

documents in its possession that are responsive to the request for correspondence between Police Department and the Federal Trade Commission.

The Police Department should be able to complete its search by next Friday, December 27, 2013.

Please let me know if you are agreeable to this compliance date. If the Police Department completes its search sooner, I will have the custodian of records forward any responsive documents to your attention as soon as they become available, if any exist.

If you have any other questions or wish to discuss this matter in more detail, please do not hesitate to contact me. My direct line is 916-808-7294.

Sincerely,
Mike Fry

Michael A. Fry
Deputy City Attorney
Office of the City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814
(916) 808-5346
email: mfry@cityofsacramento.org

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Exhibit C



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March 24, 2014

Via E-Mail Only

Kent Huntington
Cause of Action
1919 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006

Re: **In the Matter of LabMD, Inc., FTC Docket No. 9357**
Matter ID: 13-4435
Document No.: 356511

Dear Mr. Huntington:

This letter is in response to your email sent to my attention on Saturday, March 22, 2014 at 3:27 p.m. PST. Our numerous telephone calls and email exchanges over the past week had been cordial, professional, and civil. The ominous and threatening tone of your recent email is in stark contrast to our prior conversations and the direction of this matter. During the past week the only subject that was discussed was the retaking of Sacramento Police Detective Karina Jestes' deposition. Your email raises several points that are matters of first impression to the City, but I will try and discuss each point in turn.

Lack of Notice of Discovery Motion

The City has been put in the unenviable position of attempting to reconstruct what has transpired in this matter. In looking at the Court's website, LabMD filed a motion for leave to retake the deposition of Sacramento Police Detective Karina Jestes on or about February 19, 2014. The certificate of service on page 7 certifies the City of Sacramento was not served with the motion.

Since the motion directly impacts the City of Sacramento and attempts to command it to make its employee available for a second deposition the City was entitled to notice,

service, and an opportunity to be heard. The basic right to due process requires that a party shall have notice, the right to present evidence, object, to be heard, or any other rights essential to a fair hearing. Such rights are equally applicable to a third party, like the City of Sacramento in this matter, as none of the parties to this action are designated to represent the City or otherwise protect the City's interests.

Not only was the City not given notice of the motion, during our conversations on Monday, March 17th and Tuesday, March 18th, you failed to disclose or represent you had filed a motion against the City of Sacramento. I only learned of the motion after checking the court's website following a vague reference you made about a court ordered deadline to complete discovery. Upon discovering the fact a motion had been filed, I repeatedly reminded you both orally and in writing that you had failed to give the City notice of this hearing but you seemed indifferent to this problem.

Please advise how you believe you have not violated the City's right to due process and an opportunity to be heard? I raised the City's concerns about the lack of notice and, despite acknowledging this fact, you failed to offer any reason why you failed to give notice of the motion to the City. As I tried to diplomatically explain to you in my email of March 20, 2014, the current predicament was avoidable had the City been noticed with the motion and granted an opportunity to be heard. Regardless of our respective positions or how the court ultimately would have decided the motion had the City received notice, the City would have at least participated and advised the parties and the Court of Detective Jestes' availability or unavailability in order to assist the Court in coordinating the deadlines for the discovery issues.

Misrepresentation of the City's Position

As the City previously explained, it did not wish to take a position in this discovery dispute and wanted to leave the retaking of the deposition up to the parties. Consequently, the City had stated that if the parties, specifically the Federal Trade Commission, had no objections the City would endeavor to work with the parties on making Detective Jestes available for a second deposition.

It has been brought to my attention that Ms. Harris represented in her declaration to the court in support of the February 19, 2014 motion, that "Deputy City Attorney Mike Fry consented to the taking of Detective Jestes' deposition ...". Such a representation is inaccurate and misstates my explicit written position wherein I confirmed to Ms. Harris in an email that the parties are only entitled to take a witness's deposition one time but "if the Federal Trade Commission has no objections" the City would be amenable to consenting to a second deposition. I concluded my email by stating the consent was conditioned on whether the FTC was amenable to the City's proposal. Apparently, the FTC objected to the retaking of the deposition, which necessitated the filing of LabMD's motion, but the City was not apprised of these developments.

Despite the City's express written directive, Ms. Harris represented to the Court that the City apparently gave unconditional consent to the retaking of the deposition. What exactly transpired is unknown to the City since it received no notice and was unaware of this motion until just last week.

Lack of Notice of a Court Order

Your email also states the City is obstructing justice, is non-compliant with a Court Order and insinuates the City is in contempt of Court. Similar to the lack of due process and notice with the underlying motion, the City was never given notice or served with the Court Order dated March 12, 2014. Despite our numerous telephone calls and email exchanges last week you never made any attempt to try and provide a copy of the Court Order to the City until your colleague, William Sherman, sent an email on Friday, March 21, 2014 at 5:05 p.m. EST. If the rules of court for administrative proceedings are similar to state and federal rules of court, attempted service of a court order or any pleading by email or facsimile is improper absent consent and stipulation by the parties.

Setting aside the issue of whether service was proper under the circumstances, the City questions the timing and motives of this delayed attempt at service. The email thread, which you copied to counsel for the Federal Trade Commission, shows we had been communicating all of last week. Despite having multiple opportunities to provide the Court Order to the City, you failed to do so. In fact, the only document you apparently felt needed to be provided to the City was a copy of Detective Jestes' deposition transcript, which you did not provide until late in the afternoon on Friday, March 21, 2014. If the same evidentiary rules and burden of proof apply for demonstrating non-compliance with a court order in federal administrative hearings then it will be LabMD's burden to prove not only the City had notice of the underlying hearing, but that it was properly served with the Court Order, and then failed to comply with it once served. Under the circumstances, the City is still trying to understand what facts you are relying upon to claim the City had notice of the Court Order and was engaging in overt acts to thwart the Court's authority.

Other Issues Raised by Your Letter

Your email also raises several issues which are matters of first impression (i.e., non-compliance with a subpoena, failure to turn over documents, etc.). As evidenced by my email exchanges with Ms. Harris, the City met and conferred on the subpoena served in December 2013 by LabMD. I believe you have this email thread, but please let me know if you would like me to forward it to your attention. The City thought any issues concerning the subpoena and request for production of documents had been resolved. Indeed, Ms. Harris's declaration in support of the motion for retaking Detective Jestes' deposition affirmatively states she received documents from the Sacramento Police Department on January 21, 2014 in response to the subpoena duces tecum.

Sending an email over the weekend and demanding compliance before the close of the next business day is not a good faith meet and confer attempt. General meet and confer

requirements impose upon a party that it must demonstrate from an objective stand point it promptly raised a discovery issue, expressly stated the contested discovery issue, and provided a reasonable time for compliance prior to seeking relief from the court. 16 Code of Federal Regulations part 3.22(g) appears to outline this by requiring a moving party to demonstrate it has met and conferred in good faith to resolve any discovery dispute. It is clear you had several months and could have raised these issues in your last motion in February but choose not to do so. If anything, it appears you have waived your ability to raise these alleged discovery disputes with the City. Consequently, the City will not be taking any further action on these requests and views your meet and confer effort as a bad faith, perfunctory attempt to raise last minute issues.

If Detective Jestes was available prior to April 7, 2014, the City would make every effort to cooperate and coordinate a mutually convenient time and place for her deposition in order to put these issues to rest. During our first telephone conversation and email exchange on Monday, March 17, 2014, prior to being made aware of the motion or Court Order, I explained Detective Jestes was unavailable until April 7, 2014. The City's position has been consistent from the moment we first spoke so it comes as a surprise that you would now maintain the City knew of the Court Order and is engaging in an overt attempt to violate its terms:

You have leveled serious accusations at the City about obstructing justice, conspiring to intentionally hide a witness, and overtly thwarting a Court Order. It is your burden to prove the City had notice of the motion, had an opportunity to comply, and had been served with the Court Order before taking action against a person and depriving them of their protected rights. As outlined above, you have failed to provide the City with notice or otherwise met and conferred in good faith on these issues. Moreover, it is now obvious the City's interests were not represented at the hearing on your motion and its right to due process has been violated.

In the City's continued effort of extending every professional courtesy to the parties in this matter, the City is still willing to make Detective Jestes available for a deposition on April 7 or April 8, 2014, **provided** the Federal Trade Commission has no objections or the Court otherwise orders the deposition to take place on those dates or upon a mutually agreeable time once Detective Jestes returns to the office from training. Furthermore, any deposition must still be properly noticed. Service of a deposition notice may be directed to my attention.

Nonetheless, should this issue not be resolved and LabMD seeks relief from the Court and maintains the City has engaged in obstruction of justice, is in contempt of court, or is otherwise intentionally trying to thwart a Court Order which it was improperly served with on March 21, 2014, the City will oppose such a motion and otherwise seek any appropriate sanctions against LabMD. The current predicament is entirely due to your inadvertence, mistake, or omission by failing to provide the City with notice or otherwise properly serving it with the Court Order. To now invoke the jurisdiction of the Court under

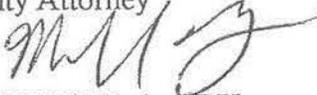
Letter to Kent Huntington
Re: *In the Matter of LabMD*
March 24, 2014
Page 5

these circumstances and claim the City is otherwise intentionally engaging in an overt attempt to flaunt a Court Order would be viewed as an abuse of process by the City.

Please advise how you wish to proceed. If LabMD is required to seek additional relief from the Court, the City demands that it be provided notice of any motion and the opportunity to be heard so it's constitutionally protected right to due process is complied with this time.

Sincerely,

JAMES SANCHEZ
City Attorney



MICHAEL A. FRY
Senior Deputy City Attorney

MAF/dls

Cc: William Sherman (E-Mail Only)
Megan Cox (Email Only)
Laura Van Druff (Email Only)