

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



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

PUBLIC
Docket No. 9357

**RESPONDENT LABMD, INC.’S OPPOSITION TO COMPLAINT COUNSEL’S
MOTION TO AMEND ITS RESPONSE TO RESPONDENT’S
FIRST SET OF REQUESTS FOR ADMISSION**

Pursuant to Commission Rules 3.22 and 3.38, 16 C.F.R. §§ 3.22, 3.38, Respondent LabMD, Inc., (“LabMD”) opposes Complaint Counsel’s motion to amend its responses to LabMD’s First Set of Requests for Admission. Although Complaint Counsel (the “FTC”) has attempted to moot LabMD’s underlying motion by amending its responses and then seeking the Court’s permission to do so, the FTC’s responses remain deficient. Moreover, this issue is *not* moot, and LabMD continues to suffer prejudice. Accordingly, we respectfully request the Court resolve this matter by issuing an order. As we established in our initial motion filed on March 25, 2014, and as we again establish below, the Court should order LabMD’s requests for admission (the “RFAs”) numbers 1, 2, 3, 5, 11, 13, 15, 17, and 19 to be fully admitted as established Court facts.

BACKGROUND

On February 19, 2014, LabMD sent FTC RFAs, which requested that the government admit or deny the truth of a mere twenty statements of fact. On March 3, 2014, the FTC responded with a series of evasive answers that were not consistent with its previous statements. On March 25, 2014, LabMD filed a motion with the Court to deem RFAs 1, 2, 3, 5, 11, 13, 15,

17, and 19 admitted as fact due to FTC's failure to provide compliant responses. On March 31, 2014, the FTC attempted to pressure LabMD into consenting to allow FTC to amend its previous flawed response. Given our initial, pending motion and the FTC's persistent failure to conduct discovery in the manner envisioned by the Court's Rules, LabMD declined the government's invitation to provide consent, especially since our initial RFA motion was still pending. On the same date, the government also offered up newly issued, proposed RFA responses in the form of a proposed amendment. Compl. Counsel Ex. B. The proposed, amended RFA responses contain the same—and similar—deficiencies as the FTC's original RFA responses. On April 1, 2014, FTC filed a motion seeking leave to amend its original responses. On April 4, 2014, FTC filed an opposition to LabMD's underlying motion. This opposition to the FTC's motion follows.

ARGUMENT

I. LabMD's Underlying Motion Has Not Been Mooted and Allowing the FTC's Most Recent Effort to Amend Its Responses is Futile.

The FTC's proposed amended responses contain the same systematic flaws as its initial RFA responses. For example, with respect to the FTC's proposed amended response to RFA 15, LabMD had requested the FTC admit or deny that it "has no complaining witness who says that his or her data was released or disclosed as the result of LabMD's" actions. *See* Compl. Ex. B 12-13. The FTC has responded with twelve general objections, three specific objections, one conditional statement, a partial denial, and an admission. *Id.* at 13. Stated another way, the FTC has proposed a response that contains excuses, disclaimers and apologies. LabMD seeks, however, no such response. Rather, LabMD simply seeks admissions.

Here, the FTC is continuing to allege that LabMD seeks *expert* witnesses, despite our RFA 15 plainly asking about *complaining* witnesses. Upon this point, the FTC must certainly understand the difference between these two types of witnesses. However, the FTC continues to

argue that expert testimony is not a proper subject for discovery, despite this Court's prior order directing that the presentation of expert testimony on a subject does not relieve a party of its obligation to provide fact discovery on the specific issue. *See* LabMD Mot. to Have RFAs Deemed Admitted 7.

Furthermore, it is clearly improper to interject conditional statements into an RFA response and then respond to a question that was not asked. *In re McWane, Inc.*, 2012 FTC LEXIS 124, at *7 (July 5, 2012). The FTC's proposed amended response to RFA 15 *does not* address any of these deficiencies, as we pointedly identified in our underlying March 25th motion. The FTC's deficient proposed amended response to RFA 15 is but a representative example of its proposed amended responses to *all* of the RFAs LabMD moved this Court to deem admitted. Accordingly, it would now be futile to allow the FTC to issue the proposed amended responses. LabMD's requests should be ordered admitted in their entirety.

II. LabMD's Trial Preparation Has Been Prejudiced by Complaint Counsel's Ongoing Refusal to Provide Good Faith Responses.

The parties now find themselves in the very late stages of discovery. The purpose of an RFA is to ease the Court's and the parties' trial preparation by "relieving 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*, 2012 FTC LEXIS 124, at *3. Neither the FTC's original, nor its amended responses provide clarity upon the FTC's position as to the veracity of LabMD's RFAs. Accordingly, LabMD is prejudiced to the extent that we cannot proceed with trial preparation absent the Court's assurance of whether the FTC intends to place the truth of these matters at issue during trial, in light of the government's asserted objections. As of April 11, 2014, the FTC is now over forty days beyond the date by which Rule 3.32(b) directs a party to respond to an RFA with a simple, direct response. Throughout this duration of time, and going forward, the FTC has

frustrated and prejudiced LabMD's trial preparation. The timing of the Court's pre-trial proceedings has also been frustrated.

Presently, the FTC is attempting to support its mootness argument by arguing that an amendment of its previous responses has happened and that no prejudice has been conveyed to LabMD. However, it is not the amended responses that prejudice LabMD; it is the FTC's ongoing and naked refusal to provide straightforward answers that prejudices LabMD. Indeed, the FTC alleges LabMD "cannot be prejudiced by receiving the very relief it requested." Compl. Counsel Mot. to Amend 3. That allegation has been interposed while LabMD has not received the relief requested. In a very open manner, the FTC is now asking the Court to rule in a manner that departs from the agency's own rules. Accordingly, LabMD respectfully requests that this Court order RFAs 1, 2, 3, 5, 11, 13, 15, 17 and 19 to be fully admitted as fact to streamline the Court's pre-trial proceedings. Here, it remains abundantly clear that LabMD did not ask the FTC to provide yet another set of flawed and evasive responses.

III. As Evidenced by Complaint Counsel's Deficient Proposed Amended Responses, a Meet and Confer Was Futile.

The FTC has consistently refused to provide good faith responses to LabMD's discovery requests.¹ The FTC now argues that LabMD's decision to not meet and confer is dispositive of the question at issue. Compl. Counsel Opp. Mot. 3. This argument, however, is undermined by the FTC's request to the Court to deem the flawed and evasive responses, *i.e.*, the proposed amended responses, as sufficient. Quite clearly, had LabMD and the FTC met and conferred on yet another baseless discovery dispute, the FTC would have again produced the very same flawed responses that it now attempts to pass off as sufficient. Such a process would have

¹ Compare Compl. Counsel's Proposed Am. Resps. (Compl. Counsel Ex. B) (asserting a litany of general and specific objections while never directly addressing the RFA) with LabMD's Resps. to Compl. Counsel's Initial Request for Admissions (attached as Ex. 1) (providing a one-word "admit" or "deny" response to thirty-seven of FTC's fifty RFAs).

resulted in the same outcome that it now uses to seek Court relief. Here, LabMD has simply requested that the FTC admit or deny the truth of a mere twenty statements, which the FTC refuses to do. The Court should reject the government's attempt to spur this—yet another—endless round of motions practice. LabMD's RFAs should be admitted, as we requested in the initial motion.

CONCLUSION

Given the FTC's refusal to supply good faith RFA responses, the FTC's persistent deficiencies in its original and amended RFA responses, and the ongoing prejudice that has been occasioned upon LabMD during trial preparation, it is both just and appropriate that this Court should recognize RFAs 1, 2, 3, 5, 11, 13, 15, 17, and 19 as admitted facts. LabMD's initial motion should be granted and this collateral attack upon the Court's rules should be rejected.

Respectfully submitted,

Dated: April 11, 2014



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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 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 on April 11, 2014, 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 on April 11, 2014, I delivered via electronic mail and hand-delivered a copy of the foregoing document to:

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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: April 11, 2014

By: 
William A. Sherman, II

**UNITED STATES OF AMERICA
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In the Matter of)	
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LabMD, Inc.,)	
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**RESPONDENT’S OBJECTIONS AND RESPONSES TO
COMPLAINT COUNSEL’S REQUESTS FOR ADMISSION**

OBJECTIONS

Respondent hereby objects to Complaint Counsel’s definition of “consumer”. Complaint Counsel’s definition of consumer, as “any natural person” is so broad as to render the term useless and outside of its common meaning. In response to the requests which use the term consumers, LabMD utilizes the term to mean its Physician Client’s patients.

Respondent objects to Complaint Counsel’s definition of Personal Information. LabMD receives Protected Health Information (“PHI”) from its Physician Clients about their individual patients. This PHI was received from LabMD’s Physician Clients in anticipation of and/or for the purpose of providing lab results as per the requests of the Physician Clients. The categories of information listed in subparts (a) through (k) of Complaint Counsel’s definition as received by LabMD is PHI as that term is defined under HIPAA.

LabMD objects to the definition assigned to the term “collected” by the FTC and hereby states that in response to any request for admission that uses the term “collected”, LabMD’s answer will use the word received.

REQUESTS FOR ADMISSION

1. Admit that LabMD is a corporation organized under the laws of the State of Georgia.

Response Admit

2. Admit that Michael J. Daugherty is President and Chief Executive Officer of LabMD.

Response Admit

3. Admit that Michael J. Daugherty is the sole shareholder of LabMD.

Response Admit

4. Admit that, prior to April 2009, LabMD had its principal place of business at 1117 Perimeter Center West, Atlanta, Georgia 30338.

Response Admit

5. Admit that, between April 2009 and January 2014, LabMD had its principal place of business at 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339.

Response Admit

6. Admit that, since January 2014, LabMD has operated its business from two offices in the State of Georgia, one located in a condominium owned by Michael J. Daugherty, and the other located in the personal residence of Michael J. Daugherty.

Response Respondent denies that LabMD is operated out of two offices. LabMD admits that it operates out of 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339

7. Admit that, since at least 2001, LabMD has been in the business of conducting Clinical Laboratory Tests and providing Clinical Laboratory Test results to LabMD's Physician Clients.

Response Admit

8. Admit that LabMD has provided Clinical Laboratory Test results to Physician Clients whose offices are located in States other than Georgia.

Response Admit

9. Admit that LabMD has provided Clinical Laboratory Test results to Physician Clients whose offices are located in at least seven (7) different States.

Response Admit

10. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of Consumers who reside in States other than Georgia.

Response Admit

11. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of Consumers who reside in at least seven (7) different States.

Response Admit

12. Admit that LabMD files insurance claims for charges relating to Clinical Laboratory Tests that LabMD has conducted with health insurance companies whose offices are located in States other than Georgia.

Response Admit

13. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of more than 100,000 different Consumers.

Response Admit

14. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of fewer than 500,000 different Consumers.

Response Deny

15. Admit that LabMD has conducted Clinical Laboratory Tests on specimen samples of fewer than 250,000 different Consumers.

Response Deny

16. Admit that LabMD has collected Consumers' Personal Information from its Physician Clients.

Response Admits that LabMD has received PHI from its Physician Clients

17. Admit that LabMD has used Respondent's Computer Network to collect Consumers' Personal Information from its Physician Clients.

Response Admits that LabMD has used its computer network to receive PHI from its Physician Clients

18. Admit that LabMD has Collected Personal Information about more than 500,000 different Consumers from its Physician Clients.

Response Admits that LabMD has received PHI from its Physician Clients about more than 500,000 different patients

19. Admit that LabMD has Collected Personal Information about more than 750,000 different Consumers from its Physician Clients.

Response Admits that LabMD has received PHI from its Physician Clients about more than 700,000 different patients

20. Admit that LabMD has Collected Personal Information about more than 1,000,000 different Consumers from its Physician Clients.

Response Denies that LabMD has received PHI from its Physician Clients about more than 1,000,000 different patients

21. Admit that LabMD Maintains Consumers' Personal Information on Respondent's Computer Network.

Response Admit

22. Admit that LabMD Maintains on Respondent's Computer Network Personal Information about more than 500,000 different Consumers.

Response Admit

23. Admit that LabMD Maintains on Respondent's Computer Network Personal Information about more than 750,000 different Consumers.

Response Admit

24. Admit that LabMD Maintains on Respondent's Computer Network Personal Information about more than 1,000,000 different Consumers.

Response Deny

25. Admit that LabMD Maintains on Respondent's Computer Network Consumers' specific diagnoses and laboratory results.

Response Admit

26. Admit that LabMD Maintains on Respondent's Computer Network specific diagnoses and laboratory results about more than 100,000 different Consumers.

Response Admit

27. Admit that LabMD Maintains on Respondent's Computer Network specific diagnoses and laboratory results about fewer than 500,000 different Consumers.

Response Deny

28. Admit that LabMD Maintains on Respondent's Computer Network specific diagnoses and laboratory results about fewer than 250,000 different Consumers.

Response Deny

29. Admit that LabMD receives personal checks from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD receives personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

30. Admit that LabMD makes paper copies of personal checks that it receives from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD receives personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

31. Admit that LabMD Maintains paper copies of personal checks that it receives from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD maintains paper copies of personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

32. Admit that LabMD Maintains paper copies of hundreds of personal checks that it has received from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Admits that LabMD maintains paper copies of hundreds personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

33. Admit that LabMD Maintains paper copies of thousands of personal checks that it has received from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD has conducted.

Response Denies that LabMD maintains paper copies of thousands personal checks from patients of its Physician Clients as payment relating to Clinical Laboratory tests that LabMD conducted.

34. Admit that the copied checks and money orders included in the Sacramento Documents are copies of checks and money orders that LabMD received from Consumers as payment for charges relating to Clinical Laboratory Tests that LabMD conducted.

Response LabMD cannot admit or deny the request as LabMD outsourced to other laboratories some tests which LabMD did not conduct and those checks could be for payment for those tests.

35 Admit that LabMD's billing department has used computers on Respondent's Computer Network to generate spreadsheets of insurance claims and payments, which include Personal Information such as Consumers' names, dates of birth,

and SSNs; the American Medical Association current procedural terminology (“CPT”) codes for laboratory tests conducted; and health insurance company names, addresses, and policy numbers.

Response Admit

36. Admit that LabMD’s billing department has used computers on Respondent’s Computer Network to generate spreadsheets of payments received from Consumers titled “Day Sheets,” which include Personal Information such as Consumers’ names and SSNs; and information concerning methods, amounts, and dates of payments.

Response Admit

37. Admit that the 1,1718 File contains Personal Information about approximately 9,300 Consumers, including names; dates of birth; SSNs; the American Medical Association current procedural terminology (“CPT”) codes for laboratory tests conducted; and, in some instances, health insurance company names, addresses, and policy numbers.

Response Admit

38. Admit that the Documents titled “Day Sheets” included in the Sacramento Documents contain Personal Information about at least 500 Consumers, including: names; SSNs; and in some cases, diagnosis codes.

Response Admit

39. Admit that on May 13, 2008, LabMD received from Tiversa a copy of the 1,718 File.

Response Admit

40. Admit that LabMD determined that LimeWire had been downloaded to a computer used by Respondent’s billing department manager.

Response Admit

41. Admit that LabMD determined that LimeWire had been installed on a computer used by Respondent's billing department manager.

Response Admit

42. Admit that LabMD determined that a copy of the 1,718 File had been Maintained on a computer used by Respondent's billing department manager, on which LimeWire had been installed.

Response Admit

43. Admit that, prior to May 2008, LabMD did not detect the installation of LimeWire on any LabMD computer.

Response Admit

44. Admit that, prior to May 2008, LabMD detected the installation of LimeWire on a LabMD computer.

Response Deny

45. Admit that, prior to May 2008, LabMD did not detect the use of LimeWire on any LabMD computer.

Response Admit

46. Admit that, prior to May 2008, LabMD detected the use of LimeWire on a LabMD computer.

Response Deny

47. Admit that the 1,718 File was created by or for LabMD.

Response Admit

48. Admit that the 1,718 File is the property of LabMD.

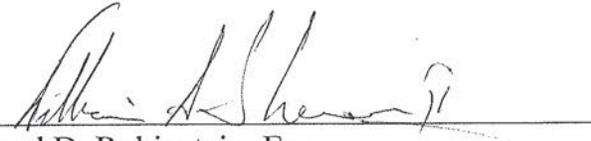
Response Admit

49. Admit that, prior to 2013, none of LabMD's Communications to Consumers included information about the measures Respondent has taken to protect Personal Information from unauthorized disclosure while the information is Maintained on Respondent's Computer Network or in transit to or from Respondent's Computer Network.

Response Admits that none of LabMD's Communications to patients of its Physician Clients included information about the measures Respondent has taken to protect Personal Information from unauthorized disclosure while the information is Maintained on Respondent's Computer Network or in transit to or from Respondent's Computer Network.

50. Admit that LabMD has not identified to its Physician Clients the measures Respondent has taken to protect Personal Information from unauthorized disclosure while the information is Maintained on Respondent's Computer Network or in transit to or from Respondent's Computer Network.

Response Admit



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Practice limited to cases in federal court and
administrative proceedings before federal
agencies.

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 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

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Chief Administrative Law Judge
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Washington, DC 20580

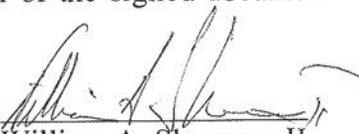
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CERTIFICATE OF ELECTRONIC FILING

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 3, 2014

By: 
William A. Sherman, II

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of

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

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PUBLIC

Docket No. 9357

**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL’S MOTION TO AMEND
ITS RESPONSES TO THE REQUESTS FOR ADMISSION**

Upon consideration of Complaint Counsel’s Motion to Amend its Responses to the Requests for Admission, and Respondent’s Opposition thereto, IT IS HEREBY ORDERED that Complaint Counsel’s Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: