

ORIGINAL

PUBLIC

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



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

**RESPONDENT’S OPPOSITION TO COMPLAINT COUNSEL’S MOTION IN LIMINE TO STRIKE THE DEPUTY DIRECTOR OF THE BUREAU OF CONSUMER PROTECTION AS A LIVE TRIAL WITNESS**

As this court is aware, Respondent’s Motion to Compel Deputy Director of the Bureau of Consumer Protection (“BCP”), David Kaufman, to appear and provide deposition testimony is pending. During the deposition of Mr. Kaufman, Complaint Counsel instructed him not to answer any of Respondent’s questions regarding data-security standards which the FTC plans to use at the hearing to establish that LabMD’s data-security was inadequate. The gist of Respondent’s Motion to Compel asserts that this Court’s March 10, 2014 Order (“Order”) allowed this line of questioning, and that Respondent should be able to re-depose Mr. Kaufman.

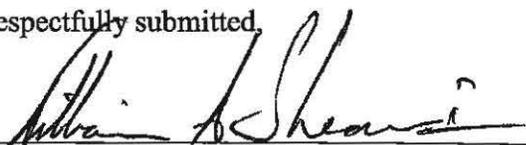
Presently, Complaint Counsel contends that Mr. Kaufman should be stricken as a live witness regarding the Commission’s “standards, guidelines, and regulations regarding data security.” Complaint Counsel’s Mot. in Limine at 1. Respondent opposes this motion and believes that both resolution of its Motion to Compel and Complaint Counsel’s present Motion in Limine hinges on the Court’s illumination of its Order.

To support its argument in its Motion in Limine, Complaint Counsel relies on the Order which states 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. Order at 6-7 (emphasis added).

Notably however, Respondent neither inquired during the deposition of Mr. Kaufman, nor intends to inquire at trial, about the FTC's *legal standards*.<sup>1</sup> Instead, Respondent has only sought, and only seeks, to inquire about the FTC's data-security standards, if any. Indeed this Court stated that "Respondent's right to inquire into the factual bases for these allegations cannot credibly be disputed." Order at 6. As such, this line of questioning, both with regard to Mr. Kaufman's deposition testimony and live witness testimony, seems to be within the bounds of the Order. Thus, Respondent respectfully requests that this Court deny Complaint Counsel's Motion, and allow Mr. Kaufman to be questioned live at trial regarding the FTC's data-security standards.

DATED: April 29, 2014

Respectfully submitted,



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<sup>1</sup> For example, the FTC's "reasonableness" standard is considered a legal standard.

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[PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S  
MOTION IN LIMINE

Having considered LabMD's Opposition to Complaint Counsel's Motion in Limine, and good cause appearing, it is hereby ORDERED that Complaint Counsel's Motion in Limine is DENIED.

ORDERED:

Date:

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

**CERTIFICATE OF SERVICE**

I hereby certify that on April 29, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

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

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

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

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**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 29, 2014

By: 