

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

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

JOINT STIPULATIONS OF FACT, LAW, AND AUTHENTICITY

Pursuant to the Court’s Revised Scheduling Order dated October 22, 2013, Complaint Counsel and Respondent LabMD, Inc. (“Respondent or “LabMD”) have agreed to stipulate to the following and respectfully request that the Court admit these Joint Stipulations of Fact, Law, and Authenticity into the record as JX0001:

STIPULATED MATERIAL TERMS

1. **1718 File:** The 1,718-page LabMD Insurance Aging report with the filename “insuranceaging_6.05.071.pdf” that is identified as the “P2P insurance aging file” in Paragraphs 17, 18, 19, and 21 of the Complaint, copies of which are located at CX0008, CX0009, CX0010, CX0011, and CX0697, and a redacted copy of which is located at RX72.
2. **Consumer:** A natural person. The patients of LabMD’s physician clients are consumers.
3. **Personal Information:** 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. Protected health information as defined in 45 C.F.R. § 160.103 (“PHI”) is Personal Information.

STIPULATIONS OF LAW

1. The acts and practices of Respondent alleged in the Complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
2. The patients of LabMD’s physician clients are “consumers” as that term is used in Section 5(n) of Federal Trade Commission Act, 15 U.S.C. § 45(n).
3. Respondent is accused of violating 15 U.S.C. § 45(a), also known as Section 5(a) of the Federal Trade Commission Act.
4. An unfair practice is defined as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition,” 15 U.S.C. § 45(n).
5. Complaint Counsel has the burden of proof, except as to factual propositions put forward by another proponent, such as affirmative defenses. Rule 3.43(a); Administrative Procedure Act, 5 U.S.C. § 556(d). The standard of proof is preponderance of the

evidence. *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 157, at *133-35 (Aug. 5, 2009).

6. Complaint Counsel has the burden of proof to prove by a preponderance of the evidence that LabMD's practices are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.
7. Complaint Counsel does not seek to enforce HIPAA in this case.

STIPULATIONS OF FACT

1. Since January 2014, LabMD has had its principal place of business at 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339.
2. Since January 2014, LabMD has maintained at least a portion of its computer network at .
3. LabMD currently does not have any plans to dissolve as a Georgia corporation.
4. The Personal Information that LabMD maintains on its computer network, which LabMD contends is PHI, includes: names; addresses; dates of birth; gender; telephone numbers; Social Security numbers; health care provider names, addresses, and telephone numbers; test codes, test results, and diagnoses; and health insurance company names and policy numbers.
5. LabMD maintains on its computer network Personal Information, which LabMD contends is PHI, about approximately 100,000 consumers for whom it never performed testing (either directly or by outsourcing to another laboratory).

6. The policies set forth in CX0006 and RX172 were not memorialized in writing as they appear in CX0006 until 2010.
7. The policies set forth in CX0007 and RX74 were not memorialized in writing as they appear in CX0007 until 2010.
8. LabMD did not conduct any penetration tests on its network until May 2010.
9. In May 2008, LabMD was contacted by Tiversa and was told that Tiversa had found the 1718 File on a peer-to-peer network.
10. LimeWire was installed on a computer used by LabMD's billing manager no later than 2006.
11. More than 900 files on a computer used by LabMD's billing manager, including the 1718 File, were available for sharing through LimeWire.
12. In October 2012, the Sacramento, California Police Department found more than 35 LabMD Day Sheets and approximately 10 copied checks made payable to LabMD in a house in Sacramento, California.
13. Some of the Day Sheets found by the Sacramento, California Police Department in October 2012 are dated later than June 5, 2007.

PROPOSED STIPULATIONS OF AUTHENTICITY

The parties stipulate to the authenticity of all exhibits, with the exception of CX0451, RX270, and RX414.

Dated: May 14, 2014

Respectfully submitted,

William A. Sherman II
Reed Rubinstein
William A. Sherman, II /with permission
Sunni Harris
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW, Suite 610
Washington, DC 20004
reed.rubinstein@dinsmore.com
william.sherman@dinsmore.com
sunni.harris@dinsmore.com

Michael Pepson
Lorinda Harris
Hallee Morgan
Robyn Burrows
Kent Huntington
Daniel Epstein
Patrick Massari
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006
michael.pepson@causeofaction.org
lorinda.harris@causeofaction.org
hallee.morgan@causeofaction.org
robyn.burrows@causeofaction.org
kent.huntington@causeofaction.org
daniel.epstein@causeofaction.org
patrick.massari@causeofaction.org

Counsel for Respondent LabMD, Inc.

Megan Cox
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) 326-2282 – Cox
Facsimile: (202) 326-3062
Electronic mail: mcox1@ftc.gov

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 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
Patrick Massari
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006
michael.pepson@causeofaction.org
lorinda.harris@causeofaction.org
hallee.morgan@causeofaction.org
robyn.burrows@causeofaction.org
kent.huntington@causeofaction.org
daniel.epstein@causeofaction.org
patrick.massari@causeofaction.org

Reed Rubinstein
William A. Sherman, II
Sunni Harris

Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW, Suite 610
Washington, DC 20004
reed.rubinstein@dinsmore.com
william.sherman@dinsmore.com
sunni.harris@dinsmore.com
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.

May 14, 2014

By: 

Megan Cox
Federal Trade Commission
Bureau of Consumer Protection