

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



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

**RESPONDENT’S RESPONSE IN OPPOSITION TO COMPLAINT COUNSEL’S  
MOTION FOR DISCOVERY SANCTIONS**

Comes Respondent, LabMD, Inc. (“LabMD”), by and through its attorneys, pursuant to Rule 3.38(b) of the Commissioner’s Rules of Practices, 16 C.F.R. § 3.38(b), opposing Complaint Counsel’s Motion for Discovery Sanctions.

**BACKGROUND**

Complaint Counsel’s motion for discovery sanctions against Respondent is woefully premature, especially in light of the exigent circumstances surrounding LabMD’s business (and as a result, LabMD’s limited resources to devote to discovery), as well as Respondent’s good faith attempts to work with Complaint Counsel regarding its deficient discovery. As this court and Complaint Counsel are well aware, LabMD began winding down its operations January 2014. (*See* Reply Ex. 2 to LabMD’s Reply in Support of Motion for Stay Pending Review).<sup>1</sup> In contrast to several months ago when LabMD had over 40 employees, LabMD currently only employs two people – Michael Daugherty as CEO, and one other person. (Declaration of Michael Daugherty, Feb. 20, 2014, attached hereto as Exh. 1). Importantly, LabMD is accepting no new business; rather, it is only winding down previous accounts.

<sup>1</sup>, This court has received courtesy copies of LabMD’s filings within the 11<sup>th</sup> circuit, and thus contrary to Complaint Counsel’s assertion, this Court received notice that LabMD was winding down its operation.

Given LabMD's status, the only person capable of complying with the FTC's discovery demands is Mike Daugherty. *Id.* Moreover, much of the information ordered to be produced is now in boxes and located in storage. *Id.* Despite the difficulties surrounding the production of documents, LabMD has made and continues to make good faith efforts to produce all documents ordered by the Court. For example, since January 10<sup>th</sup>, 2014, LabMD has made three separate productions to the FTC.

- January 27, 2014, Responding to Complaint Counsel's Interrogatories 1 and 2
- January 31, 2014, Responding to Complaint Counsel's Request for Production of Documents 3, 4, and 27 et. al.
- February 20, 2014, Revising response to Complaint Counsel's Interrogatories 1 and 2 and Document Request 13, 21, and 28.

Below is a chart identifying, by bates stamp range, the documents that LabMD has produced to date that are responsive to the requests at issue:

<b>Request</b>	<b>Bates Range</b>
Document Request 13	FTC-LABMD 002722-003067, 003636-003645, 004576-004593
Document Request 21	FTC-LABMD 004537-004535
Interrogatories 1 and 2	Served on 1/27/14 without bates stamps; Served revised version on 2/20/14
Document Request 3, 4, and 27 <sup>2</sup>	FTC-LABMD 004099-004188 et. al.
Document Request 28	FTC-LABMD 004405-004513

To LabMD's best knowledge, all discovery deficiencies have been cured with the exception of Interrogatory 9 and Document Request 28 (partially cured). Importantly, the discovery dispute with which this court's January 10, 2014 Order is predicated relates to the parties disagreement over the application of the Commission's discovery rules, not a failure of LabMD to timely produce documents. Noticeably, the FTC's motion was not granted in full, as this ALJ partially agreed with Respondent's contentions. As such, documents responsive Interrogatory 9 and Document Request 28 are tardy by less than a month.

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<sup>2</sup> To LabMD's knowledge, it has no further documents to supplement other than those previously provided.

## ARGUMENT

Due process limits a court's power to impose sanctions only to the extent that the party's conduct is based on bad faith, obstructiveness, or failure to produce material evidence. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-354 (1909). Here, it is obvious that LabMD's belated discovery responses are not as a result of bad faith or obstructiveness, but related to LabMD's limited resources to devote to complying with the discovery responses. (Exh. 1).

Thus, if this court considers imposing sanctions on Respondent, it would likely be based on a "failure to produce material evidence." While Respondent admits that it has been unsuccessful in completely complying with the court's January 10, 2014 order, it has worked diligently to respond to Complaint Counsel's requests – despite the exigent circumstances surrounding the winding down of LabMD's operations. This court has broad discretion to decide whether to impose sanctions, Rule 3.38, and should choose not to do so here, where LabMD has acted entirely in good faith and is in the processes of responding to Interrogatory 9 and Document Request 28.

LabMD's discovery failure is directly analogous to the issue set forth in this court's February 4, 2014 Order in *In the Matter of ECM BioFilms*. (See order, attached to Complaint Counsel's Motion as Exh. G). In this matter, the court found that the respondent failed to answer an interrogatory, thereby not complying with its discovery obligations. *Id.* at 5. Instead of imposing the complaint counsel's requested sanctions (which are similar to the sanctions requested by Complaint Counsel), this court held:

It does not follow, however, that Complaint Counsel's requested sanctions must be entered. Rather, Rule 3.38 (b) grants the Administrative Law Judge the discretion to take whatever action in regard Respondent's failure "as is just . . ." 16 C.F.R. § 3.38(b). The Motion failed to demonstrate that Complaint Counsel's requested sanctions, at this state of the proceedings, would be just.

*Id.* Similarly, Respondent has failed to respond to one interrogatory, and partially to one document request. Complaint's Counsel's requested sanctions are unjust in light of the surrounding facts. Thus, Respondent respectfully requests that you deny Complaint Counsel's Motion for Sanctions.

**CONCLUSION**

For the reasons stated, Complaint Counsel's Motion should be denied.

Respectfully submitted,



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**[PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR  
DISCOVERY SANCTIONS**

Upon consideration of Complaint Counsel's Motion for Discovery Sanctions, 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:

**CERTIFICATE OF SERVICE**

I hereby certify that on February 20, 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

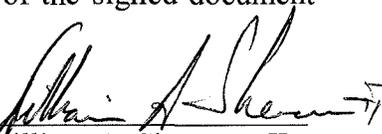
I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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.  
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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: February 20, 2014

By:   
William A. Sherman, II

# EXHIBIT

1

