## UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSI OFFICE OF ADMINSTRATIVE LAW JUDGE

In the Matter of

LabMD, Inc., a corporation, Respondent. PUBLIC

Docket No. 9357

02 20 2014

568702

SECRETARY

## **<u>RESPONDENT LABMD, INC.'s OPPOSITION TO COMPLAINT COUNSEL'S</u> <u>MOTION TO QUASH THE SUBPOENA FOR FACT WITNESS CARL SETTLEMYER</u> AND MOTION TO LIMIT THE SUBPOENA FOR FACT WITNESS RUTH YODAIKEN**

The subpoenas *ad testificandum* that Respondent LabMD, Inc. (LabMD) served on fact witnesses Carl Settlemyer (Settlemyer) and Ruth Yodaiken (Yodaiken) were properly issued and should not be quashed or limited as requested in Complaint Counsel's Motion. LabMD respectfully requests that Complaint Counsel's Motion be denied in its entirety.

## BACKGROUND

Settlemyer and Yodaiken are Federal Trade Commission (FTC) employees. (Compl. Mot. Ex. F). Settlemyer works in the Division of Advertising Practices. (Compl. Mot. Ex. F). Yodaiken works in the Division of Privacy and Identity Protection (Civil Investigative Demand Schedule 4, attached as Ex. 1). It is believed that both were FTC employees involved with: (1) FTC's handling of LabMD's property when importuned from the Sacramento Police Department (SPD); (2) FTC's interactions with Tiversa Holding Corporation (Tiversa) preceding this adjudication, including but not limited to Tiversa's possession and transmittal of LabMD's

property to FTC; and, (3) communications involving Dartmouth College's (Dartmouth) data security study.<sup>1</sup>

LabMD seeks to depose Settlemyer and Yodaiken because they have personal knowledge of FTC's complaint, and LabMD's defenses thereto. Settlemyer was a point of contact for FTC's interactions with Tiversa and Dartmouth (Compl. Mot. Ex. F). Settlemyer corresponded with Tiversa regarding Tiversa's report on the release of Protected Health Information (PHI). (Compl. Mot. Ex. F). Settlemyer was party to e-mails with Eric Johnson of Dartmouth regarding Mr. Johnson's paper on PHI. (Attached as Ex. 2).

Yodaiken was party to the FTC's conversations with SPD when FTC assured SPD that FTC would contact LabMD clients whose PHI was in SPD's possession. (Dep. of Detective Karina Jestes, Dec. 17, 2013, 65-67, attached as Ex. 3). Yodaiken may also have been a party to correspondence and meetings with Tiversa and Dartmouth.

LabMD seeks information that is: (1) reasonably expected to yield information relevant to the allegations in the complaint and LabMD's defenses; (2) neither privileged nor protected from discovery.

#### ARGUMENT

## I. Settlemyer and Yodaiken's Depositions Are Reasonably Expected To Yield Information Relevant To The Allegations In The Complaint and LabMD's Defenses.

Discovery before FTC is broad. "Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). "In fact, the Rules of Practice adopt a liberal approach to discovery." *In re Chain Pharmacy Ass'n, Inc.*,

<sup>&</sup>lt;sup>1</sup> M. Eric Johnson, <u>Data Hemorrhages in the Health-Care Sector</u>, Dartmouth College, Presented at Financial Cryptography and Data Security, Feb. 22-25, 2009, *available at* http://cds.tuck.dartmouth.edu/cds-uploads/research-projects/pdf/JohnsonHemorrhagesFC09Proceedingd.pdf.

1990 FTC LEXIS 193, at \*3 (June 20, 1990). While Complaint Counsel has taken full advantage of this liberal approach to discovery by taking numerous depositions, it now seeks to deny LabMD the same rights. Complaint Counsel cannot use Commission discovery procedures as both sword and shield. *See In re Polypore Int'l, Inc.*, 2008 FTC LEXIS 155, at \*8-16 (Nov. 14, 2008). "Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied." *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at \*4-5 (July 6, 2001). Complaint Counsel makes no such showing.

Moreover, "[a] party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome. . . . [Yet even given] a substantial degree of burden, inconvenience, and cost, <u>that will not excuse producing information that appears generally</u> <u>relevant to the issues in the proceeding.</u>" *In re Laboratory Corp. of America*, 2011 FTC LEXIS 31, at \*7 (Feb. 28, 2011) (emphasis added) (citations omitted).

This Court's order in *In re Hoechst Marion Roussel, Inc.*,<sup>2</sup> (Order Denying Mot. to Compel, Docket No. 9293 (FTC Nov. 8, 2000), is exactly apposite, if not dispositive. Deposition of counsel is "permissible where the attorney is a fact witness . . . . Where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness." (*Id.* at \*2) (citations, brackets, and quotation marks omitted). Complaint Counsel cannot deny the relevance of either Settlemyer or Yodaiken's testimony. Moreover, the Motion does not demonstrate an undue burden upon FTC.

## A. LabMD Seeks Relevant Information.

"A party's incantation that a proposed deponent is a [Commission] official with limited knowledge cannot insulate him from appropriate discovery." *Schering-Plough Corp.*, 2001 FTC LEXIS 105, at \*4.

<sup>&</sup>lt;sup>2</sup> See http://www.ftc.gov/sites/default/files/documents/cases/2000/11/001108odamtcdt.pdf.

## 1. Settlemyer's deposition is likely to yield information relevant to LabMD's defenses.

Respondent's subpoena does not target information outside the scope of discovery. Settlemyer has personal knowledge of the allegations of the Complaint, proposed relief, and facts relevant to defenses of Respondent. Settlemyer was personally involved with FTC's interactions with Tiversa and Dartmouth. Complaint Counsel admits his participation but attempts to categorize these communications as falling within Rule 3.31(c)(2)'s limitation on discovery because Settlemyer's activities ostensibly resulted in materials that were "not collected or reviewed in the course of the investigation . . . of this case." (Compl. Mot. 5).

Rule 3.31(c)(2) does not bar LabMD from deposing Settlemyer for three reasons.

*I*. Rule states that "Complaint counsel need only *search for materials* that were collected or reviewed in the course of the investigation." (emphasis added). 16 C.F.R.  $\S3.31(c)(2)$ . Respondent is not asking Complaint Counsel to "search for materials," but simply asks Settlemyer to appear for a deposition which will seek information about the critical document upon which the complaint is largely based - the 1,718 file that FTC received from Tiversa. The burden to appear for a deposition is exceedingly low and is easily outweighed by the benefit of allowing Respondent to establish defenses. 16 C.F.R.  $\S3.31(c)(2)(iii)$ .

2. The Civil Investigative Demand which resulted in the production of Tiversa's documents to FTC was served on a third party other than Tiversa. Settlemeyer is likely to have knowledge of this unusual arrangement. (Dep. of Robert Boback 142-143, Nov. 21, 2013, attached as Ex. 4).

This information was collected or reviewed in the course of the Phase II the investigation that resulted in FTC's Complaint. Additionally, Complaint Counsel contends that, because Settlemyer's conversations with Tiversa and Dartmouth occurred in 2009 and because FTC did

4

not formally open its Part II investigation into LabMD until January 2010, Settlemyer's knowledge is "presumptively outside the scope of discovery." (Compl. Mot. 5). Respondent seeks information showing that these communications and unusual arrangements may form the basis of its defenses against this action.

This Court has ruled that the FTC may seek information from "January 1, 2005 to the present." (Order on Resp't Mot. for a Protective Order 7, Nov. 22, 2013, attached as Ex. 5; *see also* Comm'n Resolution for Investigation of Data Security, Jan. 3, 2008, attached as Ex. 6). Why should Respondent's ability to seek information be extremely narrow as compared with that of FTC's, when Respondent is merely seeking information from 2008 and 2009.

*3.* Rule 3.31(c)(2) allows this Court to permit discovery of information within the Commission's possession. LabMD urges the Court to avail itself of this discretion, if necessary, and allow Respondent access to information necessary for a proper defense.

## 2. Respondent has already attempted to gather the information it seeks from Settlemyer from other sources.

Rule 3.31 provides that discovery may be limited if it "is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." 16 C.F.R.  $\S3.31(c)(2)(i)$ . Complaint Counsel contends that Respondent has "already deposed Tiversa's designated witness about the communications he had with [Mr.] Settlemyer . . ." and should not be allowed to depose Settlemyer on the same subject. (Compl. Mot. 6). Tiversa's CEO Robert Boback (Mr. Boback) testified:

Q. Do you recognize what these are?

A. A series of e-mails, yes.

Q. And who are they between?

A. Appear to be between myself and Carl Settlemyer.

Q. Do you recall what the meeting or call [between you and Mr. Settlemyer] would have been about?

A. . . . [H]e reached out to me. I didn't reach out to him. So, I don't know. I didn't set this up. This didn't come from me.

. . .

Q. ... Was this peer-to-peer ID theft research conference call about Lab MD?

- A. No.
- Q. It was not?
- A. I don't know. I just testified. I don't recall

(Dep. of Robert Boback 138-39, Nov. 21, 2013, attached as Ex. 4).

Mr. Boback could not recall the substance of the correspondences. Respondent seeks Settlemyer's recollection.

## 3. Yodaiken's deposition is likely to yield information relevant to Respondent's defenses.

Respondent seeks to depose Yodaiken about her knowledge of FTC's interaction with Tiversa while investigating this matter. This information is reasonably expected to yield information relevant to the allegations in the complaint and Respondent's defenses. 16 C.F.R. § 3.31(c)(1). LabMD believes that Yodaiken has information about FTC's dealings with Tiversa and Dartmouth because she customarily participates with Alain Sheer (Sheer) when investigating data security matters.

Yodaiken is the record custodian for the civil investigative demand FTC served on LabMD. (Civil Investigative Demand Schedule 4, Ex. 1). She is also listed as the secondary point of contact after Sheer for the "Meet and Confer" and the "Modification of Specifications." (Id. at 2, 3).

Previous deposition testimony establishes that it is customary for Yodaiken to join Sheer when contacting third parties concerning LabMD. For example, Yodaiken twice participated in a phone call between Sheer and SPD, (Jestes Dep. 64-68, Dec. 17, 2013, Ex. 3), and again in December 2013. (*Id.* at 100.) In conjunction with Sheer, Yodaiken received data-security information from SPD. (*Id.* at 74). In one deposition, Respondent discovered three separate incidents when Sheer and Yodaiken worked together on data security.

In 2009, Tiversa met with FTC in Pittsburgh and in Washington, D.C. When asked who was present at that meeting, Mr. Boback said, "Alain Sheer and I believe it was a woman that was with him. But I don't know who. I don't know who she was." (Boback Dep. 138-39, Nov. 21, 2013, Ex. 4). When asked if the name "Ruth [Yodaiken] . . . ring[s] a bell," and if she was the woman at the meeting, Mr. Boback responded, "It may have been her . . . I don't know her name at all." (*Id.* at 145). Respondent seeks to depose Yodaiken to discover whether she was at the 2009 Pittsburgh and D.C. meetings.

Complaint Counsel seeks to limit Respondent's subpoena to Yodaiken and prevent inquiry into matters involving Tiversa and Dartmouth. However, if Yodaiken did not attend, she may be able to identify the person who did. Respondent sought this information from Sheer but has been prevented from doing so by this court's ruling quashing the Sheer subpoena. The burden of allowing Respondent to explore whether Yodaiken has information regarding Tiversa and Dartmouth is minute, especially when weighed against the potential benefit of shedding light on the 2009 Pittsburgh and D.C. meetings between FTC and Tiversa. Again, Yodaiken will be asked for factual information about the critical document upon which the complaint is largely based - the 1,718 file that FTC received from Tiversa.

## II. LabMD Seeks Information That Is Not Privileged Or Shielded From Discovery.

## A. Settlemyer And Yodaiken Are Not Opposing Trial Counsel.

This Court's previous order to quash the subpoena issued to Sheer was largely based on the fact that Sheer is opposing trial counsel. (Order on Compl. Counsel Mot. to Quash 2-3, attached as Ex. 7). In an apparent attempt to bootstrap that order, Complaint Counsel refers to

7

Settlemyer and Yodaiken as Commission attorneys. However, neither has filed a notice of appearance in this matter and neither are opposing trial counsel. They simply happen to be attorneys who possess information critical to Respondent's defense. Deposing an attorney is "permissible where the attorney is a fact witness. . . . Where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness." *In re Hoechst Marion Roussel, Inc.*, Order Denying Mot. to Compel, Docket No. 9293, at \*2 (FTC Nov. 8, 2000) (citations, brackets, and quotation marks omitted).

As this Court recently reminded, "attorneys are not immune from being deposed." (Order on Compl. Counsel Mot. to Quash, Ex. 7). This Court held that a "'blanket' prohibition against future subpoenas directed at yet-to-be determined counsel" was not appropriate. (*Id.*). Respondent seeks information to bolster its defenses, not to invalidate FTC's investigative process. LabMD seeks to discover whether FTC's process contributed to or affected the risk of substantial injury that FTC now levels against LabMD.

#### **CONCLUSION**

For the reasons stated above, Complaint Counsel's Motion to Quash and Motion to Limit should be denied.

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

In the Matter of

LabMD, Inc., a corporation.

DOCKET NO. 9357

## [PROPOSED] ORDER DENYING COMPLAINT COUNSEL'S MOTION TO QUASH AND MOTION TO LIMIT THE SUBPOENA

Upon consideration of Complaint Counsel's Motion to Quash and Motion to Limit the Subpoena, 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. Mail Stop NJ-8122 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: January February 20, 2014

By: William A. Sherman, II

winnani A. Sherman

# EXHIBIT

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### CIVIL INVESTIGATIVE DEMAND SCHEDULE FOR ORAL TESTIMONY, INTERROGATORY RESPONSE, AND DOCUMENTS TO LABMD, INC.

To: LabMD, Inc. 2030 Powers Ferry Road Building 500, Suite 520 Atlanta, Ga. 30339

Attn: Stephen F. Fusco, General Counsel

#### I. **DEFINITIONS**

As used in this Civil Investigative Demand, the following definitions shall apply:

**A.** "And," as well as "or," shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.

**B.** "Any" shall be construed to include "all," and "all" shall be construed to include the word "any."

C. "CID" shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions, and Specifications.

**D.** "Company" shall mean LabMD, Inc., its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.

**E. "Document"** shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. **"Document" shall also include Electronically Stored Information**.

F. "Each" shall be construed to include "every," and "every" shall be construed to include "each."

G. "Electronically Stored Information" or "ESI" shall mean the complete original and any non-identical copy (whether different from the original because of notations, different

metadata, or otherwise), regardless of origin or location, of any information created, manipulated, communicated, stored, or utilized in digital form, requiring the use of computer hardware or software. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media. "ESI" also includes such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

H. "FTC" or "Commission" shall mean the Federal Trade Commission.

I. "Identify" shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable; and (c) documents by bates number or by title or description, date, and author.

J. "Referring to" or "relating to" shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

K. "You" and "Your" shall mean the Company.

L. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.

### II. INSTRUCTIONS

**A. Sharing of Information:** The Commission often makes its files available to other civil and criminal federal, state, local, or foreign law enforcement agencies. The Commission may make information supplied by you available to such agencies where appropriate pursuant to the Federal Trade Commission Act and 16 C.F.R. § 4.11 (c) and (j). Information you provide may be used in any federal, state, or foreign civil or criminal proceeding by the Commission or other agencies.

B. Meet and Confer: You must contact Alain Sheer, at 202.326.3321, or Ruth Yodaiken, at 202.326.2127, as soon as possible to schedule a meeting (telephonic or in person) to be held within ten (10) days after receipt of this CID in order to confer regarding your response, including but not limited to a discussion of the submission of Electronically Stored Information and other electronic productions as described in these Instructions.

**C.** Applicable time period: Unless otherwise directed in the specifications, the applicable time period for the request shall be from January 1, 2007 until the date of full and complete compliance with this CID.

**D.** Claims of Privilege: If any material called for by this CID is withheld based on a claim of privilege or any similar claim, the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.8A(a), submit, together with the claim, a schedule of the items withheld, stating individually as to each item:

- 1. the type, specific subject matter, date, and number of pages of the item;
- 2. the names, addresses, positions, and organizations of all authors and recipients of the item; and
- 3. the specific grounds for claiming that the item is privileged.

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. A petition to limit or quash this CID shall not be filed solely for the purpose of asserting a claim of privilege. 16 C.F.R. § 2.8A(b).

**E. Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. <u>Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. See 15 U.S.C. § 50; see also 18 U.S.C. §§ 1505, 1519.</u>

15

**F.** Petitions to Limit or Quash: Any petition to limit or quash this CID must be filed with the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. § 2.7(d).

G. Modification of Specifications: If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with Alain Sheer, at 202.326.3321, or Ruth Yodaiken, at 202.326.2127. All such modifications must be agreed to in writing by an Associate Director, Regional Director, or Assistant Regional Director. 16 C.F.R. § 2.7(c).

H. **Procedures:** This CID is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1. The taking of oral testimony pursuant to this CID will be conducted in conformity with that section and with Part 2A of the Commission's Rules, 16 C.F.R. §§ 2.8-2.9.

I. Certification: A responsible officer or a duly authorized manager of the company shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. § 1746.

J. Scope of Search: This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.

K. Document Production: You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to Ruth Yodaiken, Federal Trade Commission, Division of Privacy and Identity Protection, 601 New Jersey Ave., NW, Mail Stop NJ-8100, Washington, DC 20001. Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Notice of your intended method of production shall be given by mail or telephone to Alain Sheer, at 202.326.3321, at least five days prior to the return date.

L. Document Identification: Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

**M.** Information Identification: Each interrogatory specification and sub-specification of this CID shall be answered separately and fully in writing under oath. All information submitted shall be clearly and precisely identified as to the specification(s) or sub-specification(s) to which it is responsive.

N. Production of Copies: Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this

# EXHIBIT

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## Kelly, Andrea

From:	Johnson, M. Eric <m.eric.johnson@tuck.dartmouth.edu></m.eric.johnson@tuck.dartmouth.edu>
Sent:	Tuesday, February 03, 2009 5:21 PM
То:	Settlemyer, Carl
Subject:	RE: New Article
Attachments:	JohnsonHemorrhagesFC09d.pdf

Yes Carl, I remember you! I trust all is well.

The forthcoming paper is attached. Given your experience in this area, our findings should not be surprising. But the leakage in the healthcare sector is more complex and (in some ways) frightening. Computerworld has a pretty good summary (much better than what appeared in USAToday):

## http://www.computerworld.com/action/article.do?command=viewArticleBasic&taxonomyName=Security&articleId=91 27066&taxonomyId=17&pageNumber=1

Best,

Eric

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov] Sent: Tuesday, February 03, 2009 5:02 PM To: Johnson, M. Eric Cc: Ferguson, Stacey Subject: New Article

Professor Johnson:

We hope you are well. We saw that you have a new article coming out concerning health info available on P2P networks and were wondering if you could send us a copy when it becomes available. As you know from our past discussions, this is an area of interest to us. It sounds like this article is a significant expansion of your prior work. We look forward to reading it.

Thanks.

Carl S.

Carl H. Settlemyer, Attorney Federal Trade Commission BCP-Division of Advertising Practices 600 Pennsylvania Ave., N.W., Room NJ-3212 Washington, DC 20580 Tel: 202-326-2019 csettlemyer@ftc.gov

From:	Johnson, M. Eric <m.eric.johnson@tuck.dartmouth.edu></m.eric.johnson@tuck.dartmouth.edu>
Sent:	Tuesday, March 10, 2009 1:30 PM
To:	Sheer, Alain <asheer@ftc.gov></asheer@ftc.gov>
Subject:	RE: Health Care Data Leaks via P2P

All contact info below. Talk to you on Thursday at 3pm. Best, Eric

M. Eric Johnson Professor of Operations Management Director, Glassmeyer/McNamee Center for Digital Strategies Tuck School of Business Dartmouth College Hanover, NH 03755 603-646-0526 Fax: 603-646-1308 http://mba.tuck.dartmouth.edu/digital/

From: Sheer, Alain [mailto:ASHEER@ftc.gov] Sent: Tuesday, March 10, 2009 9:09 AM To: Johnson, M. Eric Subject: RE: Health Care Data Leaks via P2P

Three is fine with us. Please email me your number and we'll call you then. My number is 202.326.3321. Thanks. Alain

From: Johnson, M. Eric [mailto:M.Eric.Johnson@tuck.dartmouth.edu]
Sent: Monday, March 09, 2009 7:03 PM
To: Sheer, Alain
Subject: RE: Health Care Data Leaks via P2P

Yes, happy to chat - does sometime between 3-5 work?

Eric

From: Sheer, Alain [mailto:ASHEER@ftc.gov] Sent: Monday, March 09, 2009 1:17 PM To: Johnson, M. Eric Subject: RE: Health Care Data Leaks via P2P

Hi Eric. Would you be available to talk sometime Thursday with me and a colleague in the Division of Identity Protection? I know you've spoken with Carl about the work he is doing, but on the chance that you aren't familiar with DPIP, here is a link to our information security cases: http://www.ftc.gov/privacy/privacy/privacy/promises\_enf.html. Thanks. Alain Sheer

From: Johnson, M. Eric [mailto:M.Eric.Johnson@tuck.dartmouth.edu]
Sent: Sunday, March 08, 2009 11:24 PM
To: Settlemyer, Carl
Cc: Sheer, Alain
Subject: RE: Health Care Data Leaks via P2P

Happy to chat.

Eric

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov] Sent: Thursday, March 05, 2009 2:02 PM To: Johnson, M. Eric Cc: Sheer, Alain Subject: Health Care Data Leaks via P2P

Eric:

Thanks for sending us your recent article about health care data leaks via P2P networks. We'd like to discuss your research with you when you have some free time. Toward that end, I'd like to introduce you to my colleague, Alain Sheer, by copy of this email. Alain is an attorney in our Division of Privacy and Identity Protection and he will contact you directly to try to set something up.

Regards,

Carl S.

Carl H. Settlemyer, Attorney Federal Trade Commission BCP-Division of Advertising Practices 600 Pennsylvania Ave., N.W., Room NJ-3212 Washington, DC 20580 Tel: 202-326-2019 csettlemyer@ftc.gov

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In the Matter of:

LabMD, Inc.

December 17, 2013 Detective Karina Jestes

Condensed Transcript with Word Index



For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

ct.

## Jestes

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## 12/17/2013

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1		FEDERAL TRADE COMMISSION		1	UNITED STAT	TES OF AMERICA
2		INDEX		2	FEDERAL TRA	ADE COMMISSION
3				3	OFFICE OF THE ADM	NISTRATIVE LAW JUDGES
4	WITNESS:	EXAMINATION:	PAGE	4		
5	DETECTIVE	KARINA JESTES BY MS. VANDRUFF	5, 104	5		~ )
6		BY MS. HARRIS	51	5		)
7				6	In the Matter of	)
8						) Docket No. 9357
9				7	LabMD, Inc.,	>
10	EXHIBIT:	DESCRIPTION:	FOR ID	8	a corporation, Respondent.	)
11	CX301	Declaration of Custodian of Records	47	0	hosponacho.	>
12	CX302	Compact Disc	48	9		)
13	CX0016	Docket No. 9357 and Protective Order	8	10		
14	CX0085	Packet Containing Personal IDs	28	11	Tuesday, Dec	ember 17, 2013
15	CX0086	Declaration of Custodian of Records	32	12 13	Sagramento Bo	lice Department
16	CX0087	LabMD Transaction Detail	30	13		ort Boulevard
17	CX0088	Copies of Checks	31	15	=	alifornia 95822
18	CX0090	SPD Related Text Document	23	16		
19	CX0091	SPD Related Text Document	24	17		ter came on for deposition,
20	CX0092	SPD Related Text Document	21	18 19	pursuant to not	ice, at 9:02 A.M.
21	CX0094	SPD Related Text Document	16	20		
22	CX0097	SPD Related Text Document	20	21	CONFIDENTIAL	
23	CX0100	Supplementary Investigative Report	38	22	Pursuant to Protective O	rder
24	CX0101	NetAnalysis Document	41	23		
25	CX0104	Subpoena Duces Tecum	105	24		
20	0.00101	Subporta Paceb recam	200	25		
			2		******	4
,	CX0105	SPD General Offense Information	105	1		
2	CX0105	SPD General Offense Information	105	1	APPEARANCES:	
2	CX0100	11/25/13 FTC Document	8	23	ON BEHALF OF THE FEDE	DAL WRADE COMMISSION.
4	RX1	SPD Related Text Document	52	4	LAURA RIPOSO VAND	
5	RX2	SPD Related Text Document	77	4	MEGAN E. COX, ESQ	
6	RX3	Copies of Checks	79	6	600 Pennsylvania	
7	RX4	SPD Related Property Report	80	7	Mail Stop NJ-8100	
8	RX5	SPD Related Text Document	82	8	Washington, D.C.,	
° 9	RX6	SPD Related Image Document	84	0 9	TEL: (202) 326-2	
9 10	RX7	SPD Related Text Document	86	10	FAX: (202) 326-3	
	RX8	SPD Related Text Document	90	11		
11	RX9	Supplementary Investigative Report	102	12	lvandruff@ftc.gov mcox1@ftc.gov	
12	KA 9	supprementary investigative report	102	12	MCOXIGICC. 90V	
13				13	ON BEHALF OF LABMD:	
14				14	LORINDA HARRIS, E	50
15				16	HALLEE MORGAN, ES	
16				17	1919 Pennsylvania	
17				17	Suite 650	Avenue, NW
18				10	Washington, D.C.,	20006
19				20	TEL: (202) 499-2	
20				20		
21				21	hallee.morgan@cau	seorace ton.org
22				22		
23				23		
24				24		
25				23		
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1 (Pages 1 to 4)

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## 12/17/2013

Labh	AD, Inc.		12/17/2013
	61		63
1	Q When did that occur?	1	if I who started that part of the conversation, but
2	A I think it was December of '12.	2	yes, there was a discussion of "This relates to your
3	Q Do you recall when you had your first	3	investigation, and we would like to get them to you"; so I
4	communication with the FTC regarding the LabMD documents	4	don't remember if it was me saying "Would you like this,"
5	that you found at the Wilkinson Street residence?	5	or them saying "We have this," but that was established.
6	A Are you asking for a date or if I just recollect	6	BY MS. HARRIS:
7	the	7	Q Do you recall when the LabMD documents were first
8	Q If you have a date or a general time frame, that	8	transmitted to the FTC?
9	would be helpful.	9	MS. VANDRUFF: Objection. Asked and answered.
10	A From my recollection, it was the week after the	10	Go ahead.
11	incident occurred because I think this was close to a	11	THE WITNESS: Yes, I recall it being
12	weekend, if I'm remembering correctly, and I think I	12	December of 2012.
13	called and left a message, and then my phone call was	13	BY MS. HARRIS:
14	returned when I returned back to work the next week, but I	14	Q You said that early on you had quite a few
15	might be off on the date.	15	conversations with the FTC; is that correct?
16	Q Do you recall who at the FTC returned your call?	16	A Yes.
17	A I'm not sure if it was Alain Sheer at that point,	17	Q What else can you tell me about what you recall
18	but he became my contact person. There might have been	18	about the substance of those communications?
19	one immediate phone call made before I was connected with	19	A If I recall, we discussed kind of some of the
20	him by somebody else, but pretty quickly I was directed to	20	things that we discussed here today, that I couldn't find
21	Mr. Sheer.	21	a Sacramento connection to the people listed in these
22	Q What do you recall about the substance of your	22	documents nor the company itself.
23	initial communication with the FTC, and then we'll get to	23	I also determined that in some of those
24	Mr. Sheer specifically in a minute?	24	conversations it didn't make sense for me to initiate a
25	A I'm sorry. Could you repeat the question?	25	conversation, and we could just do this cooperative, joint
	62		64
1	Q Sure.	1	investigation.
2	What do you recall about the substance of your	2	Going along, I would continue to say "I need to
3	initial communication with the FTC following the	3	check with my supervisor"; so that was some of those
4	October 5, 2012 events?	4	conversations I would have to go check with a lieutenant
5	A I told them what I had said earlier, that through	5	or so to make sure that I was following
6	an Internet search I learned that there was an	6	Sacramento Police Department procedures; so we talked
7	investigation going on between the FTC and LabMD. I told	7	about that and, again, that I wouldn't be attempting to
8	them that I found some documents that looked like they	8	contact all of these people, and I think there was a later
9	related to LabMD and their customers, and then we	9	discussion that the FTC said that they would be doing
10	discussed how we could share this information in a kind of	10	that, and at some point, they asked if they could use my
11	cooperative investigation.	11	name or contact information in a letter or e-mail-type
12	Q What do you recall was your next strike that.	12	communication, and again, after checking with my
13	When do you recall was your next communication	13	supervisors, I said "Yes, we could do that." Those types
14	with the FTC regarding the events of October 5 and the	14	of discussions.
15	FTC's investigation?	15	Q So you referenced a cooperative joint
16 17	A At that time, we were talking quite a bit about how to get the documents safely to them; so it might have	16 17	investigation with the FTC.
18	been that we were speaking on at least a weekly basis,	17	Has that been happening — in other words, has the Sacramento Police Department been, beginning in and
18	maybe biweekly.	18	about fall 2012 and continuing to the present, engaging in
20	$\mathbf{Q}$ Is it fair to say that fairly early on in your	20	a cooperative joint investigation with the FTC with
20	communications with the FTC they asked for copies of the	20	respect to the LabMD documents?
22	LabMD documents that were retrieved from the	21	A In as much as it's kind of when I'm not
23	Wilkinson Street residence?	22	really doing anything in an active investigation, but if
23	MS. VANDRUFF: Objection to form.	23	they call and they need something, that's kind of going
24	THE WITNESS: Vos. and I can't remember exactly	24	applier to why this begin the returned to LohMD. I made

16 (Pages 61 to 64)

earlier to why this hasn't been returned to LabMD. I made

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THE WITNESS: Yes, and I can't remember exactly

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## 12/17/2013

65         67           1         an arrangement so that the items of evidence would remain in our evidence section even though the Sacraneato Police county case has been closed on the two subjects so that in case the FTC needed these documents they still would be accessible. I don't want to use the term of 'join' investigation' if that's the a legal erem ty thin' working with them when they need my assistance.         Q         De you have a copy of that teler?           7         A At that point, I was still speaking with accessible. I don't want to use the term of 'join' investigation' if that's the a legal erem ty the number below and the provide context all the a legal erem they would search the proper below and the proper below approximation of the rane (verbatim). Not all oft they would context all the proper below that the tert approximation of the rane (verbatim). We did discuss -1 basically said that I could of assochem the pronunciation of ther awas thut' podalice.         Q         The sent it the would be able to be object and the tert is all of the copies the tert they would be able to do that, so I know that that the would be able to do that for you'' or not maybe. 'for you'' = 'fiver soging to able, the intent of 'a would be able to do that for you'' or not maybe. 'for you'' = 'fiver soging to able, the intent of 'a would be able to do that for you'' or not maybe. 'for you'' = 'fiver soging to do the, the recurstion the that the terr is the your contacted the 'fit the recipiest - was it be fit do that correct?           64         A base and the that correct?         A base and the that correct?           7         A base referenced that the provide would assochem the that the provide and the fit was all as it the propelit hithe tere solut 'genere and the fit the propelit hithe prov	N		<u> </u>	
2         Alain Sheer and Ruh Yodiken.           3         County case has been foculated in the solution on subjects so hit is more acaps of that letter?           4         Case the FTC needed these documents they still would be accessible. I dort want to use the term of "joint investigation" if that's like a legat term, but Tm         3           7         Q         Do you have a copy of that letter?           7         A hain Sheer and Ruh Yodiken.         1           7         Would assume 1 kept it to use the error of "joint investigation" if that's like a legat term, but Tm         4           7         Q         Do you recall generally what the letter said?           8         Not coaugh. 1 just remember lub as packing with Alain Sheer, and 1           9         Poise Degortreait who at the FTC fold you that?           16         Do you recall who at the FTC fold you that?           17         A remember I was speking with Alain Sheer, and 1           19         believe also on the innex.           19         believe also moch innex.           21         basically said that 1 could or someone from the           22         As a smaller agency 1 didn' really feel like I           23         As a smaller agency 1 didn' really feel like I           24         had the manpower to do hat; so 1 know that that did, indeed, happen.           24		65		67
2         In our evidence section even though the Sacramento Police scoreshibe. I don't was objects to bit working with them when they noted my assistance.         A hain Sheer and Ruth Yodaken.           3         Q Do you have a copy of that letter?           4         A more maints of the more of "joint investigation" if that's like a legat term, but I'm working with them when they need my assistance.         A not concell generally what the letter said?           4         A Not concell generally what the letter said?         A Not concell generally what the letter said?           7         Q Do you have a copy of that letter?           8         A Not concell generally what the letter said?           9         Not concell generally what the letter said?           9         You also referenced that the FTC fold you that?           10         The WTNESS: No.           11         The WTNESS: No.           12         Was bas referenced that the FTC fold you that?           13         A remember I was speking with Alain Sheer, and I           14         they would contract if the same in the propulsition of the rame (verbatim). We did discuss - 1           15         basicsulfy said that 1 could or some of from the           16         De you recall who at the roy ou' or not maybe' for your - fly were going to do in, it eny our would discus in fail of 2012?           16         A login, thu we so list gou done."	1	an arrangement so that the items of evidence would remain	1	A At that point. I was still speaking with
3         county case has been closed on the two subjects so that in excessible. Left TC needed these documents they still would be accessible. Left these documents they still would investigation" if that's like a legal term, but 'fm working with them when they need my asistance.         3         Q Do you nevcal generally what the lefter 3 twould assume 1 kept it, but 1 can't guarantee that 1 kept it.           8         Q Okay. Did the FTC ever tell you to not return Imwestigation" if that's like a legal term, but 'fm working with them when they need my asistance.         7         Q Do you recall generally what the lefter said?           9         A ND, Start it to any use in there and that people could contact they would contact all the people that the FTC fold you that?         7         Q The lefter - was it being sent to the people who appeared on the LabMD documents?           10         Da you recall who at the FTC fold you that?         7         MS. VANDRUFF: Objection. Lacks foundation.           11         Therember 2 would base on the line was Ruth Yodaiken, 1 think is the pronunciation of her mane (verbatim). We did kicuus - 1         7         MS. VANDRUFF: Objection at the top one mather appeared on the LabMD documents?           12         Just - the would kas on the inter.         7         7         7         8           13         Q Poy our know was that lefter sent to the consumers 20         7         1         7           14         the would have been after December of 12.         8         9         9         9			1	
4         Case the FPC needed these documents they still would be assume it to me vice and its or positive.         A They sent it to me vice and its or positive.           5         accessible. I dort want to use the term of "joint investigation" if that's like a legal term, but "means and the positive that its or the PTC event by our on out return the sent its or the PTC event by our on out return the sent its or the PTC event by the letter was being sent out.         A Not enough. 1 just remember that my name and the popole could contact the sent its or the PTC event by the letter was being sent out.           13         Q. You also referenced that the FTC fold you that't the way ould contact all the popole listed on the LabMD documents?         A The event in the event is the term and that popole could contact the popule listed on the LabMD documents?           14         BY MS, HARRIS:         Q. The letter - was it heigs sent to the popole who appered on the LabMD documents?           15         documents.         M. Termember I was speaking with Alian Sheer, and I had the manpower to do that; so I know that that its of the recipients - but from my understanding, -that was bein itent.           16         Do you receall when that conversation occurred?         A samaler agency I didy really feel like I           17         A samaler agency I didy really feel like I         M. Was was bein itent of what was going to be the intent.           18         Would be able to do that for you" or not maybe "for you" - "I we're going to do i, then you would's means.         A diain there well do any ouccastand was the intent of what was going to be anyet.			3	
5         accessible. 1 don't want to use the term of "ipint           6         investigation" if that ike a legal term, but Im           7         Working with them when they need my assistance.           8         Q. Okay. Did the FTC ever tell you to not return           1         LabMD's documents to LabMD?           1         THE WITNESS: No.           2         MS. MANRUF?: Objection. Asked and answered.           1         THE WITNESS: No.           3         Q. The letter - was it being sent to the people who appeared on the LabMD documents?           4         G. The termber exactly the beginning summary of why the letter was being sent out.           7         Q. The letter - was it being sent to the people who appeared on the LabMD documents?           6         MS. VANDUFP: Objection. Lacks foundation.           7         The member exactly the beginning summary of why the letter was being with the letter sent to the consumers?           10         portionelin of the maneyover to ohtary 51. Kow           11         The was that letter sent to the consumers?           12         path add the anapover to ohtary 51. Kow that that           12         that was after they reactive the documents?           13         Mo do and term y constrated the documents?           14         the tabMD documents?           15 <td< td=""><td></td><td></td><td>1</td><td></td></td<>			1	
6       investigation*** fit hat's like a legal term, but Tm         7       working with then when they need my assistance.         8       Q Okay. Did the FTC ever tell you to not return         9       Lab/MD's documents to Lab/MD?         10       MS. VANDRUPF: Objection. Asked and answered.         11       THE WITNESS: No.         12       BY MS. HARRIS:         13       Q You also referenced that the FTC told you that         14       they would contact all the people listed on the Lab/MD         15       documents.         16       D you recall who at the FTC told you that?         17       A I remember! was speaking with Alain Sheer, and I         18       believe also on the line was Ruth Yodalken, I think is the         19       pronneidition of her amane (verbaint). We did discuss -1         19       basically sidd that I could or soncoore from the         19       Department could do tha, thor you wouldn't need the say amaler agency I didn't really feel like I         14       had the mapower to do that; so I know that that         15       Mould be able to do that for you" on ot maybe "for         19       you "				
7       O Do you recall when the TTC ever tell you to not return         8       Q Obay, Did the TTC ever tell you to not return         10       LabMD's documents to LabMD?         11       THE WITNESS: No.         12       BY MS, HARRIS:         13       Q To a las referenced that the FTC told you that?         14       they would contact all the people listed on the LabMD         15       documents.         16       Do you recall who at the FTC told you that?         17       A I remember I was speaking with Alain Sheer, and I         18       believe also on the line was Ruth Yodalkan, I think is the         19       believe also on the line was Ruth Yodalkan, I think is the         19       point name (verbatim). We did discuss - I         10       as a smaller agency I didn't really feel like I         10       tabelieve you recall when that conversation occurred?         10       A No, I don't.         21       Da you recall did to ccur in fall of 2012?         22       A No, I don't.         23       A bat her would be able to do that for you'' or not maybe "for         24       you' - "I' were a going to do i, then you wouldn't need         25       A No, I don't.         34       Q D you recall did it occur in fall of 2012?			1	
8       Q. Okay. Did the FTC ever (ell you to not return LobMD's documents to LabMD's MS. VANDRUFF: Objection. Asked and answered.       8       A. Not enough. 1 just remember that my name and phone number were in there and that people could contact me or the FTC if they wanted my information, but I don't tremember ever in the and that people could contact me or the FTC if they wanted my information, but I don't tremember ever in the and that people could contact me or the FTC if they wanted my information, but I don't tremember ever in the and that people could contact me or the FTC if they wanted my information, but I don't tremember even in the LabMD documents?         10       D you recall who at the FTC told you that?       9         11       TA. I remember I was speaking with Alain Sheer, and I       11         12       baiscally said that I could or someone from the pronunciation of her name (verbatim). We did discuss - 1       12         12       basically said that I could or someone from the promune into ould a table, but I said it would just - it would takes to much time.       13         13       As as mailer agency I didn't really feel like I       14         14       the adve mapover to do that, so I know that that discussion occurred where they said "Well, we probably       66         66       68         7       A samailer agency I didn't really feel like I       14         7       A sign diance.       16         7       A son't enough. 1 said it would just - it would bacbe to do that for you" onot maybe "for you" - "If we're			1	
9         LabMD? documents to LabMD?         9         phone number were in there and that people could contact THE WITNESS: No.           1         WS. VANDRUFF: Objection. Asked and answerd.         im or othe FCI fit hey wanted my information, but I don't remember exactly the beginning summary of why the letter was being sent out.           2         PY MS. HARRIS:         Q         The iter was it being sent to the people who appeared on the LabMD documents?           3         A van as or eferenced that the FTC told you that?         Q         The iter was it being sent to the people who appeared on the LabMD documents?           4         Do you recall who at the FTC told you that?         MS. VANDRUFF: Objection. Lacks foundation.           7         A I remember I was speaking with Alain Sheer, and I         The WITNESS: Statis of the recipients - but from my understanding, that was going to be the intent.           9         Do you recall who at the People like I         BWS. HARRIS:         D           10         LabMD documents?         A Again, tat was a like intent of what was going to bapen.         Not know was that letter sent to the consumers listed on the LabMD documents?           11         A magain was that intent of the subpeena         Poison that did, indeed, happen.         Poison that did, indeed, happen.           20         Do you recall when that conversation occurred?         A Olay.         A Olay.           4         Do you recall when that conversa				
10       MS. VANDRUFF; Objection. Asked and answered.       10       Ine or the FTC if Hey wanted my information, but I don't remember exactly the beginning summary of why the letter was being sent out.         11       Q You also referenced that the FTC told you that?       11       Pole letter - was it being sent to the people who appeared on the LabMD documents?         12       Do you recall who at the FTC told you that?       11       Q The letter - was it being sent to the people who appeared on the LabMD documents?         13       Do you recall who at the FTC told you that?       11       11         14       they would context all the people listed on the LabMD documents?       MS. VANDRUFF: Objection. Lacks foundation.         14       the pronuciation of her name (verbatim). We did discuss - 1       11       11         15       Do you recoult do that, so 1 I said it would       12       A sa smaller agency I didn't really fiel like I         16       Mould be able to do that for you" or not maybe "for       20       0 you recall when that conversation occurred?         17       A link it was after they received the documents?       2       A log and the FTC if du you dematical the sector you have if.         18       Which would have ben after they received the documents?       2       4         20       Do you recall when the to prome or not maybe "for       9       9         30       O you recall				
11       THE WITNESS: No.       11       remember exactly the beginning summary of why the letter         12       BY MS. HARRIS:       12       was being sent out.         13       Q You also referenced that the FTC told you that       13       The letter was it being sent to the people who are being summary of why the letter         14       they would contact all the people listed on the LabMD       14       are being sent out.         15       Do you recall who at the FTC told you that?       A       The letter was it being sent out.         16       Do you recall who at the FTC told you that?       A       The letter was it being sent out.         16       Do you recall who at the FTC told you that?       MS. VANDRUFF: Objection. Lacks foundation.         17       A is a malter agency 1 didn't really feel like 1       14         18       believe also on the inew sa was that that       17         19       Do you recall when that conversation occurred?       A again, that was liknow that was the intent of         21       pa you recall when that conversation occurred?       A         22       you office and the FTC; so to the extent you have it, that letter would be an example of communications between your office and the FTC; so to the extent you have it, that letter would be an example of ond was it, that letter would be an example of communications with adains Sheer and Ruh or TC; so to the extent you have it, that letter woul			3	
12       BY MS. HARRIS:       12       was being sent out.         13       Q You also referenced that the FTC toly ou that       13       Q The letter was it being sent to the people who appeared on the LabMD documents?         14       they would contact all the people listed on the LabMD       appeared on the LabMD documents?         15       Do you recall who at the FTC told you that?       15         16       Do you recall who at the FTC told you that?       15         17       A I remember I was speaking with Alain Sheer, and I       17         18       believe also on the line was Rut Polatiken, I think is the pronunciation of her name (verbatim). We did discuss - 1       19         19       basically said that I could or someone from the could do that, but I said it would is a a smaller agency I didn't really feel like I       20       Q Do you know was that letter sent to the consumers         12       had the manpower to do that; so I know that that       21       A Again, that was the intent of what was to going to bappen. I vouldn't be able to say whether or not that did, indeed, happen.         25       do you recall when that conversation occurred?       A       A (Again, that was a kend for all communications thet you office and the FTC; so to the extent you have it, that with the fort Q in you reflice and the fort; so it have it, that we submitted, we asked for all communications that you that whe the aster they recould the able to do that for you?       64       A dagain, that was are sample o		-	1	
13       Q       You also referenced that the FTC told you that       13       Q       The letter - was it being sent to the people who appeared on the LabMD documents?         14       they would contact all the people listed on the LabMD       appeared on the LabMD documents?         15       Do you recall who at the FTC told you that?       If an appeared on the LabMD documents?         16       Do you recall who at the FTC told you that?       If an appeared on the LabMD documents?         17       A I remember device was peaking with Alian Sher and I was peaked for all communications with and the manpower to do that; so 1 know that that       Do you know was that letter sent to the consumers         18       believe also on the line was appeared where they said "Well, we probably       Q       Do you know was that letter sent to the consumers?         19       BY MS. HARRIS:       Q       PII just note that, when you do get the subpoena         20       whould be able to do that for you" or not maybe "for       your office and the FTC; so to the extent you have it, that therer would be an example of communications between appour encall did it accur in fall of 2012?       A No, I dont.       A link it was after they received the documents         10       Do you recall when that conversation occurred?       A       A link the FTC so to the extent you have it, that therer would be an example of communications with that there would be an example of communications with that there would be ano that apou terestified that you contacted the			3	
14       they would contact all the people listed on the LabMD       14       appeared on the LabMD documents?         15       documents.       15       MS. VANDRUFF: Objection. Lacks foundation.         16       Do you recall who at the FTC told you that?       15         17       A I remember I was speaking with Alain Sheer, and I       15         18       believe also on the line was Ruft Vodikaci, I think is the pronunciation of her name (verbatim). We did discuss - 1       19         19       basically said that I could or someone from the pronunciation of ther name over lod ub at so much time.       19         23       As a smaller agency I didn't really feel like I       24         24       had the manpower to do that; so I know that that       24         25       Q Do you know was that letter sent to the consumers       10         26       would be able to do that for you" or not maybe "for       27         26       1       that we submitted, we asked for all communications between         27       A No, I dont.       66       68         16       that letter would be a extent you have it, that we submitted, we asked for all communications sthat you have it, that we submitted, we asked for all communications that you your office and the TC: so to the extent you have it, that we submitted, we asked for all communications with that it would have been after December of 12.       66 <t< td=""><td></td><td></td><td>3</td><td></td></t<>			3	
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17 (Pages 65 to 68)

# EXHIBIT

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## In the Matter of:

a,

LabMD, Inc.

November 21, 2013 Robert J. Boback

Condensed Transcript with Word Index



For The Record, Inc. (301) 870-8025 - www.ftrinc.net - (800) 921-5555

Boback

## 11/21/2013

I 3 FEDERAL TRADE COMMISSION I 1 UNITED STATES OF AMERICA 7 INDEX 2 FEDERAL TRADE COMMISSION 3 3 In the Matter of: d WITNESS: EXAMINATION: PAGE Lab MD, Inc., a corporation, 4 Docket No. 9357 s ROBERT J. BOBACK BY MR. SHEER 6 Respondent. 5 164 б 6 7 BY MR. SHERMAN 97 7 Thursday, November 21, 2013 8 8 Q EXHIBTT: DESCRIPTION FOR ID q REED SMITH, LLP 10 NO. CX 8 [173.16.83.112] 10 225 Fifth Avenue 11 Insuranceaging 6.05.07 42 11 Suite 1200 [201.194.118.82] 12 No. CX 9 12 Pittsburgh, PA 15222 13 Insuranceaging\_6.05.0 49 13 14 No. CX 10 Tiversa insurance aging file 3 23 14 The above-entitled matter came on for deposition, 15 No. CX 11 Tiversa insurance aging file 4 56 15 pursuant to notice at 9:09 a.m. No. CX 12 Subpoena to Tiversa б 16 16 No. CX 18 [71.62.145.247] daily credit card 17 17 18 Transactions.pdf 65 CONFIDENTIAL 18 19 NO. CX 19 Four IP addresses 50 19 Pursuant to Protective Order 20 No, CX 20 2-page Document with insurance 20 Aging info 38 21 71 No, CX 21 18 22 SOW 77 23 No. CX 22 email 4/17/08 72 23 24 No. CX 23 email 5/13/08 76 24 79 75 No. CX 24 email 5/15/08 25 4 2 86 No. CX 25 email 5/22/08 I **APPEARANCES:** 1 No. CX 26 email 5/23/08 92 2 2 No. CX 27 email 7/22/08 93 3 ON BEHALF OF THE FEDERAL TRADE COMMISSION: 3 No. CX 29 subpoena to Tiversa with updated ALAIN SHEER, ESQ. å 4 6 5 MAGGIE LASSACK, ESQ. 5 Date No. 0200 Boback's certification of records 95 6 JOHN A. KREBS, ESQ. 6 7 (Exhibits retained by Attorney Sheer.) 7 Federal Trade Commission 8 8 Bureau of Consumer Protection No. RX 1 Testimony of May 4, 2009 143 9 600 Pennsylvania Avenue, NW Q No. BX 2 Letter from the Federal Trade 10 Mail Stop NJ-8100 10 Commission to Robert Boback 124 Washington, DC 20580 11 11 202-326-3713 12 No, RX 3 Press release 130 12 NO. RX 4 Dartmouth study 136 13 13 ON BEHALF OF RESPONDENTS: 14 No. RX 5 Series of e-mails between Robert 14 Boback and Carl Settlemyer 137 15 William A. Sherman, II, Esq. 15 124 DINSMORE & SHOHL, LLP No. RX 6 Subpoena 16 16 801 Pennsylvania Avenue, N.W. 17 17 Suite 610 18 18 19 Washington, DC 20004 19 20 202-372-9117 20 21 21 22 HALLEE MORGAN, ESO 22 MICHAEL PEPSON, ESQ. 23 23 CAUSE OF ACTION 24 24 25 1919 Pennsylvania Avenue, NW 25

1 (Pages 1 to 4)

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## 11/21/2013

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	137		139
1	back. That's it.	1	A. I don't recall.
2	A. Okay. Okay.	2	Q. Do you recall what the meeting or call would have
3	Q. Do you recognize what RX 4 is?	3	been about?
4	A. RX 4?	4	A. If you look to the last section of it, he reached
5	Q. The exhibit that I just handed you.	5	out to me. I didn't reach out to him. So, I don't
6	A. I do. It appears to be the Dartmouth study, Data	6	know. I didn't set this up. This didn't come from me.
7	Hemorrhages and the Health Care Subject.	7	Q. But if you look at the last section of the
8	Q. And you have seen this report before or this	8	subject, all the way through, is peer-to-peer theft
9	article?	9	research conference call; is that correct?
10	A. I have.	10	A. That is what Carl Settlemyer started the whole
11	Q. Okay. And we've turned to a page where figure	11	subject line on, yes. I didn't write that.
12	No. 4 is depicted.	12	Q. I understand. Was this peer-to-peer ID theft
13	Are you there?	13	research conference call about Lab MD?
14	A. Yes, I am.	14	A. No.
15	Q. Is that a redacted version of one of the pages	15	Q. It was not?
16	contained from the 1,718 file that we've been referring	16	A. I don't know. I just testified. I don't recall
17	to?	17	what it was about. I don't know what it was about. If
18	A. It appears to be.	18	you go to the last e-mail, we saw your press release.
19	MR. SHEER: Objection. Foundation.	19	And I don't recall, specifically, FTC in any
20	(Deposition Exhibit RX 5 was marked for	20	conversation, really, bringing up Lab MD, specifically,
21	identification.)	21	so if that helps you.
22	BY MR. SHERMAN:	22	Q. I'm just wondering if, as a result of the press
23	Q. I'll show you what has been marked as Exhibit RX	23	release that they saw, if they had any specific
24	5 and ask that you take a look at that and let me know	24	inquiries about Lab MD?
25	when you are prepared to talk about it.	25	A. I don't recall. This was someone reaching out to
	138		140
1	A. Okay.	1	us. I have no idea what they talked to us about. I am
2	Q. Do you recognize what these are?	2	sure they talked to us about the press release. I know
3	A. A series of e-mails, yes.	3	that the FTC looked foolish in the 2007 testimony that
4	Q. And who are they between?	4	there also to the destriction of the transformer of the second second second second second second second second
5		4	they also testified at that time. And my assumption is
	A. Appear to be between myself and Carl Settlemyer.	5	that they wanted to they reached out in this fashion
6	<ul> <li>A. Appear to be between myself and Carl Settlemyer.</li> <li>Q. And does this refresh your recollection as to who</li> </ul>		
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6	Q. And does this refresh your recollection as to who	5 6	that they wanted to they reached out in this fashion to us, based on that, in an effort to try to educate
6 7	Q. And does this refresh your recollection as to who Carl Settlemyer is?	5 6 7	that they wanted to they reached out in this fashion to us, based on that, in an effort to try to educate themselves on what was going on with peer-to-peer,
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35 (Pages 137 to 140)

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## 11/21/2013

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1	A. I do. Alain Sheer and I believe it was a woman that was with him. But I don't know who. I don't know	1 2	It was not in our interest to give any information to
2 3	who she was.	3	the FTC, but we were under federal subpoena. Q. The subpoena was actually issued to the Privacy
4	Q. Do you recall what year that was?	4	Institute rather than to Tiversa?
5	A. I think it was 2009.	5	MR. SHAW: It is civil investigative demand.
6	Q. Would it have been around the time of these	6	It is different than a subpoena.
7	e-mails or do you know?	7	BY MR. SHERMAN:
8	A. It was probably sometime after, after these	8	Q. Yes, it is a civil investigative demand.
9	e-mails, yes.	9	A. The civil investigative demand, my understanding,
10	Q. And the meeting that you had at the FTC, do you	10	it was issued to the Privacy Institute, however, if I
11	recall what year that occurred?	11	didn't allow it to go to the Privacy Institute, it would
12	A. In that same time, later in the year.	12	go directly to Tiversa, so it was only to try to
13	Q. I'm sorry. Do you recall who was in attendance	13	separate that.
14	at those meetings?	14	Q. Do you have an estimation of how many documents
15	A. Alain Sheer, and I don't really recall. There	15	you disclosed to the FTC?
16	were other people, maybe another person or two, but I	16	A. I do not, the number of documents. We responded
17	don't specifically recall who they were.	17	to the civil investigative demand exactly to the letter
18	Q. At those meetings, was Lab MD specifically	18	of what we had to, because it was a civil investigative
19	discussed?	19	demand. So, whatever the totality of those documents
20	A. In the meeting in Pittsburgh, no. In the meeting	20	were, we responded accordingly.
21	in DC it may have been, but only in the context of	21	(Deposition Exhibit RX 1 was marked for
22	multiple organizations as well. It wasn't there was	22	identification.)
23	no extended time on Lab MD any more than any of the	23	BY MR. SHERMAN:
24	other organizations that we discussed.	24	Q. I've handed you what has just been marked as RX
25	Q. Did you provide the FTC with a list of	25	1. I'll ask you to take a look at that and let me know
	142		144
I	organizations from whom or for whom you had identified	1	when you are prepared to answer questions about it.
2	as having personal identifying information or personal	2	A. Is there any specific area, or would you like me
3	health information accessible on the web?	3	to read the whole thing?
4	A. On the web? No.	4	Q. No. Have you seen it before?
5	Q. I'm sorry, on the peer-to-peer network?	5	A. I have seen it before.
6	A. We did not directly provide it to the FTC,	6	Q. So, you are familiar with the document as it is
7	however, we provided it to the Privacy Institute, which	7	presented to you; correct?
8	under a civil investigative demand, provided it to the	8	A. I'm familiar with my testimony, if you are
9	FTC.	9	stating that that is what it was, then, that is what it
10	Q. How did you become aware that the Privacy	10	is.
11	Institute, under a civil investigation demand, provided	11	Q. Well, it indicates that this is your testimony
12	it to the FTC?	12	before the house subcommittee on commerce trade and
13	A. The FTC told us that they wanted this	13 14	consumer protection dated May 4, 2009; is that right? A. That's correct.
14 15	information. And we could provide it or they have they will use a civil investigative demand. And we did	14	
15	not want a civil investigative demand put against	16	Q. And you recall giving that testimony on that date?
17	Tiversa. We felt, frankly, we felt pressured into that	17	A. I do.
18	situation. And, so, therefore, through a third party,	18	Q. Now, how did you come to testify before the house
19	just to try to create some distance, because we were in	19	subcommittee on commerce and trade?
20	discussions from an acquisition standpoint at Tiversa,	20	A. I don't recall.
21	that we didn't want to be in the middle of a civil	21	Q. Were you contacted by a Congressman or
22	investigative demand. So, to separate that, through a	22	A. I probably was. I think it was a Congressman or
23	third party, put the Privacy Institute, which then they	23	Congresswoman that started this one. I think it was
24	gave a civil investigative demand to the Privacy	24	Mary Bono Mack, B-o-n-o, M-a-c-k.
25	Institute, which ultimately funneled back to us anyway.	25	MR. SHERMAN: Let me take about a
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36 (Pages 141 to 144)

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## 11/21/2013

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1	five-minute break before we go through this. All right.	1	Q. Yes. Did I read that correctly?
2	(There was a brief recess in the	2	A. Yes, I see that as written in there.
3	proceeding.)	3	Q. How do you define a hacker?
4	BY MR SHERMAN:	4	MR. SHAW: Objection. Don't answer the
5	Q. Back on the record. Just to go back very	5	question. Move on.
6	briefly. You indicated that you had two meetings with	6	MR. SHERMAN: Can you mark that as well?
7	the FTC and could not remember some of the names of the	7	BY MR. SHERMAN:
8	individuals that were there. I just want to ask you if	8	Q. You indicate that later on in the same paragraph,
9	Ruth Gutican (phonetic), does that name ring a bell?	9	the same testimony, these worms will index and share all
10	A. No, it doesn't.	10	information on the victim's computer, without any
11	Q. As to the female who might have been at any of	11	visibility to the victim. Some ways down in the same
12	those meetings?	12	paragraph.
13	A. It may have been her. I have no recollection,	13	A. Yes, I see where it says this.
14	other than the meeting in Pittsburgh, it was Alain Sheer	14	Q. You also go on to say this code is very insidious
15	and what I believe was a female. But I don't know her	15	as users cannot detect their presence on their systems.
16	name at all.	16	Do you see that?
17	Q. And the meeting in DC?	17	A. I see it.
18	A. I don't recall. Again, I remember Alain Sheer,	18	Q. Is that the usual MO of a hacker?
19	but beyond that I don't know who else was in the	19	MR. SHAW: Objection. It is outside the
20	meeting.	20	scope of the subpoena. Don't answer the question. You
21	Q. All right. So, let's go back to what has been	21	can mark it.
22	marked as RX 1, which is your testimony of May 4, 2009.	22	MR. SHERMAN: Mark it.
23	If you turn to Page 3, the second paragraph. You	23	BY MR. SHERMAN:
24	indicated that the fact that peer-to-peer involves	24	Q. When Tiversa is searching individual hard drives
25	downloading of files from individuals that are unknown	25	or computers, are they detectable?
	146		148
ĩ		1	148 A Tiversa doesn't search individual hard drives or
1	to the downloader. When you say, individuals, do you	1	A. Tiversa doesn't search individual hard drives or
2	to the downloader. When you say, individuals, do you mean individual entities or actual individual computer	2	A. Tiversa doesn't search individual hard drives or computers. Tiversa searches the peer-to-peer network.
2 3	to the downloader. When you say, individuals, do you mean individual entities or actual individual computer hard drives?	2 3	<ul> <li>A. Tiversa doesn't search individual hard drives or computers. Tiversa searches the peer-to-peer network.</li> <li>Q. When they are searching the network, when Tiversa</li> </ul>
2 3 4	to the downloader. When you say, individuals, do you mean individual entities or actual individual computer hard drives? MR. SHAW: I'm going to object to this	2 3 4	<ul> <li>A. Tiversa doesn't search individual hard drives or computers. Tiversa searches the peer-to-peer network.</li> <li>Q. When they are searching the network, when Tiversa is searching the network, is Tiversa detectable?</li> </ul>
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#### UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

LabMD, Inc., a corporation, Respondent. DOCKET NO, 9357

### **ORDER ON RESPONDENT'S MOTION FOR A PROTECTIVE ORDER**

I.

On November 5, 2013, Respondent LabMD, Inc. ("Respondent") filed a Motion for a Protective Order ("Motion") pursuant to Commission Rule of Practice 3.31(d), 16 C.F.R. § 3.31(d), seeking an order limiting or barring deposition and document subpoenas issued by Complaint Counsel to various nonparties.<sup>1</sup> Complaint Counsel filed an opposition to the Motion on November 15, 2013 ("Opposition"). For the reasons set forth below, Respondent's Motion is GRANTED in part and DENIED in part.

Respondent's Motion included a request for oral argument on its Motion. That request is DENIED.

#### П.

#### A.

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, engaged in an unfair trade practice in violation of Section 5(a) of the FTC Act. Complaint ¶ 23. Specifically, the Complaint alleges that Respondent failed to maintain adequate network security to protect confidential patient information and that such failure caused, or is likely to cause, substantial consumer injury. Complaint ¶ 22. According to the Complaint, a third party informed Respondent that its June 2007 insurance aging report was available on a peer-to-peer, or "P2P," network through Limewire, a P2P file sharing application. Complaint ¶ 17. This file, the Complaint alleges, contained the names, dates of birth, Social Security

<sup>&</sup>lt;sup>1</sup> According to the Motion, Respondent seeks protection from subpoenas for deposition and/or documents issued to: Allen Truett, 21st Century Oncology, Alison Simmons, Automated PC Technologies, David Lapides, Cyprus Communications, Eric Knox, Erick Garcia, Jeff Martin, Forensic Strategy Services, Karalyn Garrett, Josie Maldanado, John Boyle, Karina Jestes, Lawrence Hudson, Jeremy Dooley, Managed Data Solutions, Matt Bureau, MasterCard Worldwide, Patrick Howard, ProviDyn, Robert Hyer, Rosalind Woodson, Sacramento Police Dept., Sandy Springs GA Police Depart., Scott Moulton, Trend Micro, Inc., US Bank Nat'l Ass'n, Chris Maire, Visa Inc., Michael Daugherty, and Southeast Urology Network (hereafter, the "Nonparties"). See Motion at 2 n.1.

With respect to discovery into any information involving a time period other than 2005 to 2008, Respondent asserts that LabMD's technology and software, other than that in place at the time of the events in Complaint paragraphs 17-20, is irrelevant. Motion at 7. In its Opposition, Complaint Counsel asserts that LabMD's failures began before 2005 and continued past 2008 and that the subpoenas specify reasonable time periods that are appropriate to the discovery sought. Opposition at 1, 7 n.8.

A request for documents relating to the time period being investigated by Complaint Counsel is relevant. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at \*4 (Jan. 30, 2004). The Complaint does not allege that Respondent's "failures" began before 2005 and thus discovery of such information does not appear relevant to the allegations of the Complaint. Moreover, with one exception, the instructions on the subpoenas *duces tecum* limit the period covered by a document request to the period from January 1, 2005 or a later period to present.<sup>7</sup>

Information from the time period after 2008 may provide information on whether, in the time period since the alleged security breach, Respondent has employed reasonable and appropriate measures to prevent unauthorized access to personal information and thus may be relevant to the scope of the requested injunctive relief in this case. Accordingly, the subpoenas shall be limited to the period from January 1, 2005 to present.

Regarding discovery into the nature of Respondent's computer network security, including its services contracts and communications with various IT service providers, such information is relevant to whether Respondent failed to provide reasonable and appropriate security for personal information on its computer networks and thus is relevant to the allegations of the Complaint.

With respect to discovery into the existence of any security incidents involving Respondent's computer network, the Complaint alleges as "security incidents" the exposure of the P2P insurance aging file and the Sacramento Incident. It is not apparent that any other security incidents are relevant to the allegations of the Complaint; however, Respondent denies that its security practices caused any consumer injury. Therefore, the existence of other security incidents may be relevant to Respondent's defenses. In addition, the existence of additional security incidents may be relevant to the nature and extent of any appropriate relief in this case, should the alleged violations of the FTC Act be proven. Accordingly, Respondent has failed to demonstrate that the requested discovery is not reasonably likely to lead to the discovery of relevant evidence, or that the requested discovery should otherwise not be allowed.

As to discovery regarding a book written by Respondent's CEO Michael Daugherty, Complaint Counsel states that Mr. Daugherty's book concerns the circumstances relating to the exposure of the P2P insurance aging file and LabMD's business practices. Respondent argues that Mr. Daugherty's self-published manuscript, titled "The Devil Inside the Beltway," is critical of the FTC's conduct with regard to the investigation and litigation of the instant matter, and that the document subpoena to Mr. Daugherty – and Complaint Counsel's nonparty discovery

<sup>&</sup>lt;sup>7</sup> The only subpoena *duces tecum* seeking documents from the period before 2005 was the one served on Automated PC Technologies.

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#### UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSION

#### **COMMISSIONERS:**

Deborah Platt Majoras, Chairman Pamela Jones Harbour Jon Leibowitz William E. Kovacic J. Thomas Rosch

#### RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN NONPUBLIC INVESTIGATION OF ACTS AND PRACTICES RELATED TO CONSUMER PRIVACY AND/OR DATA SECURITY

#### File No. P954807

Nature and Scope of Investigation:

To determine whether unnamed persons, partnerships, corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such investigation shall, in addition, determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation not to exceed five (5) years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. 1.1 *et seq.* and supplements thereto.

By direction of the Commission.

Donald S. Clar Secretary

Issued: January 3, 2008

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#### UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

LabMD, Inc., a corporation, Respondent. DOCKET NO. 9357

## ORDER ON COMPLAINT COUNSEL'S MOTION TO QUASH SUBPOENA SERVED ON COMPLAINT COUNSEL AND FOR PROTECTIVE ORDER

On January 6, 2014, Complaint Counsel filed a Motion to Quash Subpoena Served on Complaint Counsel and for a Protective Order ("Motion"). Complaint Counsel seeks an order quashing a subpoena *ad testificandum* served by Respondent LabMD ("Respondent" or "LabMD") on Senior Complaint Counsel Alain Sheer and barring Respondent in the future from serving any subpoena *ad testificandum* on any Complaint Counsel attorneys. Respondent filed its opposition on January 16, 2014 ("Opposition").

Having fully reviewed the Motion and the Opposition, and considered all arguments and contentions raised therein, the Motion is GRANTED IN PART AND DENIED IN PART, as explained below.

#### I. Introduction

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, engaged in an unfair trade practice in violation of Section 5(a) of the FTC Act. Complaint ¶ 23. Specifically, the Complaint alleges that Respondent failed to maintain adequate network security to protect confidential patient information, including by making certain "insurance aging reports." allegedly containing confidential patient information, available on a peer-to-peer. or "P2P" file sharing application. Complaint ¶¶ 17, 19. The Complaint further avers that in October 2012, the Sacramento, California Police Department found more than 35 LabMD "day sheets," allegedly containing confidential patient information ("Day Sheets")<sup>1</sup>, and a small number of copied checks in the possession of individuals who subsequently pleaded no contest to state charges of identity theft. Complaint  $\P 21$ .

<sup>&</sup>lt;sup>1</sup> As alleged in the Complaint, Day Sheets are spreadsheets of payments received from consumers, which may include personal information such as consumer names. SSNs, and methods, amounts, and dates of payments. Complaint § 9.

Respondent's Answer admits that an alleged third party, Tiversa Holding Corporation ("Tiversa"), contacted Respondent in May 2008 and claimed to have obtained the P2P insurance aging file via Linnewire, but denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23, Respondent's answer also includes a number of affirmative defenses, including among others, failure to state a claim, lack of subject matter jurisdiction, denial of due process and fair notice, and that the actions of the FTC are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with applicable law. Answer at pp. 6-7.

Although Respondent's subpoena does not designate any topics for Mr. Sheer's deposition, according to Respondent's Opposition, Respondent seeks to inquire into the following areas:

- 1. Mr. Sheer's communications with the Sacramento Police Department ("SPD") in or around December 2012 regarding SPD's discovery of LabMD Day Sheets;
- Mr. Sheer's communications with Tiversa in meetings and/or conference calls taking place in 2009;
- 3. Mr. Sheer's communications with Dartmouth College via email in March 2009, regarding a study that Dartmouth conducted on health information available on P2P networks and whether the FTC and Dartmouth "exchanged information" regarding LabMD's alleged data security breach; and
- 4. Mr. Sheer's knowledge regarding the FTC's "analys[e]s and processes including any rules, regulations, and guidelines, which led the FTC to its decision to investigate LabMD and other similarly situated victims of cyber theft as a means to expand its authority under section 5." Opposition at 3-4.

#### 11. Overview of Applicable Law

The general scope of discovery is set forth in Commission Rule of Practice 3.31(c), which provides in pertinent part: "Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). However, a party may not seek discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; or where the burden or expense of providing the discovery outweighs its likely benefit. 16 C.F.R. § 3.31(c)(2)(i); see also 16 C.F.R. § 3.31(d) (Administrative Law Judge "may also deny discovery . . to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.").

In light of the generally broad scope of permissible discovery, opposing trial counsel is not "absolutely immune from being deposed." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), but such discovery is, nevertheless, generally disfavored. *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re*  Subpoena Issued to Dennis Friedman), 350 F.3d 65, 71-72 (2d Cir. 2003); Nguyen v. Excel Corp., 197 F.3d 200, 208-09 (5th Cir. 1999); Corporation v. American Auto. Centennial Comm 'n, 1999.U.S. Dist. LEXIS 1072, at \* 3 (D.D.C. Feb. 2, 1999). "Most courts which have addressed [requests to depose opposing counsel] have held that the taking of opposing counsel's deposition should be permitted only in limited circumstances and that, because of the potential for abuse inherent in deposing an opponent's attorney, the party seeking the deposition must demonstrate its propriety and need before the deposition may go forward." American Casualty Co. v. Krieger, 160 F.R.D. 582, 588 (S.D. Cal. 1995). Accordingly, when, as here, a party seeks to depose opposing trial counsel, the party seeking such discovery must show: "(1) no other means exist to obtain the information than to depose opposing counsel, ...; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Shelton, 805 F.2d at 1323; Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628 (6th Cir. 2002); see Friedman, 350 F.3d at 71-72, and cases cited therein (hereafter, the "Shelton factors"). See In re Hoechst Marion Roussel, Inc., 2000 WL 33944050, at \*1 (Nov. 8, 2000) (applying Shelton factors to deny motion to compel depositions of, among others, FTC attorneys).

As the court stated in American Casualty:

There are good reasons to require the party seeking to depose another party's attorney to bear the burden of establishing the propriety and need for the deposition. "While the Federal Rules do not prohibit the deposition of a party's attorney. experience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney . ..."

160 F.R.D. at 588 (quoting in part *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987)).

Based on the foregoing, the analysis now turns to whether Respondent has met its burden of demonstrating that the information that Respondent seeks to obtain can only be obtained from Mr. Sheer; that the information is both relevant and nonprivileged; and that the desired information is crucial to Respondent's case.

### III. Analysis

## A. Whether other means exist to obtain the information than to depose opposing counsel

Respondent argues that only Mr. Sheer can provide information regarding the FTC's communications with nonparties SPD, Tiversa, and Dartmouth College, and "the FTC's behavior . . ." regarding this case. Respondent sets forth, as an example of Mr. Sheer's allegedly unique knowledge, that only Mr. Sheer "can testify why the FTC waited four months to notify LabMD about the Day Sheets [found in Sacramento and provided to the FTC by SPD] and why the FTC never contacted the consumers" to advise them that their personal information may have been compromised. Opposition at 5. However, the testimony of Ms.

In the instant case, permitting the requested deposition of Mr. Sheer implicates each of the foregoing concerns. Where, as here, it does not appear that Mr. Sheer possesses unique and/or crucial information, allowing the requested deposition risks disrupting trial preparation, increasing time and cost requirements, and countenancing potentially harassing trial tactics.

#### E. Protective Order

In addition to an order quashing the Sheer deposition subpoena, Complaint Counsel seeks an order barring Respondent from issuing any deposition subpoenas to Complaint Counsel generally. The burden of demonstrating an entitlement to this protective order is on Complaint Counsel. In re Polypore Int 1, 2008 FTC LEXIS 155, at \*14-16 (Nov. 14, 2008); In re Schering-Plough Corp., 2001 FTC LEXIS 105, at \*5 (July 6, 2001).

It cannot be determined on the present record that the requested protective order is warranted. Complaint Counsel does not contend that Respondent has issued any deposition subpoenas to Complaint Counsel other than that issued to Mr. Sheer. Moreover, as noted earlier, attorneys are not immune from being deposed. Shelton, 805 F.2d at 1327. Rather, as is clear from *Shelton* and related authorities, the determination of whether a counsel deposition can proceed is a fact-based inquiry. Complaint Counsel's invitation to issue a "blanket" prohibition against future subpoenas directed to yet-to-be determined counsel is declined.

Because Complaint Counsel has failed to meet its burden of demonstrating an entitlement to the requested protective order. Complaint Counsel's Motion for a Protective Order is DENIED.

#### IV. Conclusion

For all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART. and it is hereby ORDERED that Respondent's subpoena ad testificandum served on Complaint Counsel Alain Sheer is QUASHED. In all other respects, including Complaint Counsel's request for a protective order, the Motion is DENIED.

ORDERED:

D. Michael Chappell

Chief Administrative Law Judge

Date: January 30, 2013

From:	Yodaiken, Ruth <ryodaiken@ftc.gov></ryodaiken@ftc.gov>
Sent:	Thursday, February 21, 2013 4:22 PM
То:	Jestes, Karina <kjestes@pd.cityofsacramento.org></kjestes@pd.cityofsacramento.org>
Cc:	Sheer, Alain <asheer@ftc.gov></asheer@ftc.gov>
Subject:	contact with FBI

Karina,

I have given your contact information to Patricia (Trish) Curran of the FBI as she or one of her colleagues might be trying to speak with you. I thought I would give you a heads up so you know how they found you.

Also, we did not receive notice that you been approved for us to share documents. If you have requested that access through sending the form to our General Counsel's office (or do so in the future), please let Alain and I know so we can follow-up.

I hope life is treating you well. All the best,

Ruth