

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



\_\_\_\_\_  
In the Matter of )

) PUBLIC

LabMD, Inc., )  
a corporation, )  
Respondent. )  
\_\_\_\_\_)

) Docket No. 9357

ORIGINAL

**RESPONDENT LABMD, INC.'S OPPOSITION TO  
COMPLAINT COUNSEL'S MOTION TO POSTPONE RESUMPTION  
OF THE EVIDENTIARY HEARING<sup>1</sup>**

In seeking yet another delay to resolution of this case, Complaint Counsel rests almost exclusively on the Court's granting limited discovery as to Mr. Wallace. *See generally* Mot. (citing Order dated Dec. 8, 2014). Complaint Counsel ignores, however, the remainder of that same Order, in which the Court found:

- "Complaint Counsel erred in failing to take Mr. Wallace's deposition during the discovery period."
- "Complaint Counsel also erred in failing to seek leave to take Mr. Wallace's deposition (or take any other discovery from Mr. Wallace), after the close of discovery, even after Respondent on April 9, 2014 designated Mr. Wallace as a defense witness for trial."
- "Complaint Counsel's failure to know the specifics of Mr. Wallace's testimony until June 12, 2014, is a function of having decided not to seek Mr. Wallace's deposition."
- "The failure to take discovery from Mr. Wallace earlier was a strategic error."

<sup>1</sup> LabMD, Inc. ("LabMD") takes no position as to Complaint Counsel's Motion to Compel Responses to Complaint Counsel's Subpoena *Duces Tecum* to Richard Wallace.

Order at 3-4. Moreover, Complaint Counsel's latest request for delay is open-ended – it seeks a postponement “until at least two weeks from the date Complaint Counsel receives the full response.” *See* Mot. at 1.

Enough is enough. For five years, LabMD has been dragged through this administrative process, which has damaged LabMD's reputation, drained LabMD's bank account, and virtually closed LabMD's doors. All of the facts and witnesses are available. Complaint Counsel already has been provided with the relief it previously sought – additional discovery and a deposition of Mr. Wallace – despite its strategic errors in failing to obtain the same during discovery, when all other parties are required to obtain evidence for their case. Even assuming the Court compels Mr. Wallace to provide the requested materials to Complaint Counsel (and, in turn, LabMD), there is no reason for a delay – and certainly no reason provided for “at least two weeks” to review the documents.

Indeed, any prejudice that Complaint Counsel might suffer would be entirely self-inflicted harm. *See* Order at 3-4; *c.f., e.g., United States v. Marshall*, 132 F.3d 63, 70 (D.C. Cir. 1998); *United States v. Santos-Frias*, No. 94-1942, 1995 U.S. App. LEXIS 24135, at \*5 (1st Cir. Aug. 25, 1995). Moreover, any further delay at this point unjustifiably prolongs LabMD's administrative ordeal.

For the foregoing reasons, LabMD respectfully requests that the Court deny Complaint Counsel's Motion to Postpone Resumption of the Evidentiary Hearing. Any documents produced can be reviewed by *both* parties on short notice.

Dated: February 12, 2015

Respectfully submitted,

/s/ Prashant K. Khetan

Prashant K. Khetan

Daniel Z. Epstein

Patrick J. Massari

Hallee K. Morgan

Cause of Action

1919 Pennsylvania Ave., NW, Suite 650

Washington, D.C. 20006

Telephone: 202.499.4232

Fax: 202.330.5842

Email: prashant.khetan@causeofaction.org

/s/ Reed D. Rubinstein

Reed D. Rubinstein

William A. Sherman, II

Sunni R. Harris

Dinsmore & Shohl, L.L.P.

801 Pennsylvania Ave., NW, Suite 610

Washington, D.C. 20006

Telephone: 202.372.9120

Fax: 202.372.9141

Email: reed.rubinstein@dinsmore.com

*Counsel for Respondent, LabMD*

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  
POSTPONE RESUMPTION OF THE EVIDENTIARY HEARING**

Upon consideration of Complaint Counsel’s Motion to Postpone Resumption of the Evidentiary Hearing, and Respondent LabMD, Inc.’s Opposition thereto, and in consideration of the entire Record in this matter, it is hereby

**ORDERED**, that Complaint Counsel’s Motion to Postpone Resumption of the Evidentiary Hearing be and the same is DENIED, and it is further

**ORDERED**, that the evidentiary hearing in this matter will resume on Tuesday, March 3, 2015 at 10:00 a.m.

**SO ORDERED:**

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

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2015, 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 caused to be sent by overnight 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 a copy of the foregoing document to:

Alain Sheer, Esq.  
Laura Riposo VanDruff  
Megan Cox  
Ryan Mehm  
John Krebs  
Jarad Brown  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Mail Stop NJ-8122  
Washington, D.C. 20580

Dated: February 12, 2015

By: /s/ Patrick J. Massari

**CERTIFICATE OF ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: February 12, 2015

By: /s/ Patrick J. Massari