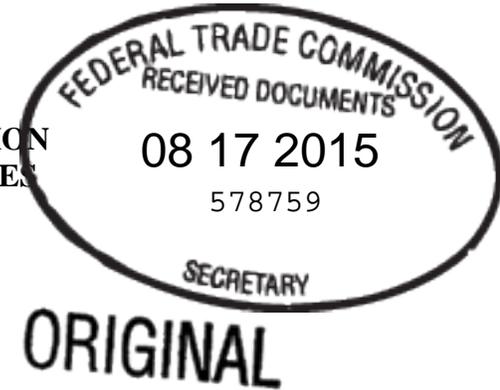


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
) PUBLIC
)
LabMD, Inc., a corporation)
Respondent.)

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)
)
)

**Respondent LabMD’s Corrected¹ Motion to Accord Portions of Complaint Counsel’s
Post-Trial Briefing in Camera Treatment**

On August 10, 2015, Complaint Counsel filed its Post-Trial Brief, Proposed Findings of Fact, and Proposed Conclusions of Law (collectively referred to as “Post-Trial Briefing”) which include references to the current location of Respondent LabMD Inc.’s (“LabMD”) data. Pursuant to Rule 3.45(b), LabMD respectfully requests an order: (1) finding that *in camera* treatment is appropriate for certain portions of the Post-Trial Briefing that mention the current location of LabMD data, (2) requiring that current versions of the Post-Trial Briefing be removed from the FTC website, and (3) requiring Complaint Counsel to file amended confidential versions of their Post-Trial Briefing placing references to the location of LabMD data *in camera*.

ARGUMENT

Under Rule 3.45(b), an Administrative Law Judge may order that material be placed *in camera* . . . “after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment.” 16 C.F.R. § 3.45(b).” Here, Complaint Counsel’s disclosure of the location of LabMD-related data could result in an injury to Respondent, Respondent’s physician’s client’s patients, or Michael Daugherty.

¹ Respondent has filed a CORRECTED Certificate of Service, as well as an added redaction under the Rule 3.45 Statement.

After LabMD began winding down its business operations in December 2013, LabMD business records, including records containing protected health information, were moved to another location. The central issue of this case is data security, and the best way to ensure that sensitive data remains protected from wrongdoers is to prevent public disclosure of its location. However, Complaint Counsel states on page one of its Proposed Findings of Fact that:

[REDACTED]

Complaint Counsel's Proposed Findings of Fact, *In the Matter of LabMD, Inc.*, FTC Dkt. 9357, at *1 (Aug. 10, 2015). This case has received substantial media attention, and LabMD believes that the Post-Trial Briefing from both parties has received and will continue to receive significant exposure. Wrongdoers can utilize information contained in Complaint Counsel's Post-Trial Briefing to perform simple internet searches to find the address to the corporate condo and Michael Daugherty's residence, thereby revealing the location of the data.

Should this data be stolen or somehow accessed due to the disclosure of its location, such an event would expose Respondent, and possibly Mr. Daugherty personally, to liability from those consumers whose information would be misused. Complaint Counsel may oppose this request because the facts indicating the whereabouts of the patient information are in the public record based on previous depositions, court testimony, and filings. However, these depositions and filings are not of interest to the media, nor are they about to be the subject of stories in the press.

[REDACTED]

Despite the obvious risks created by Complaint Counsel's public disclosure of the location of thousands of documents containing sensitive personal information, Complaint Counsel refuses to voluntarily remove its Post-Trial Briefing. By doing so, the Commission ignores the risk it creates for the consumers it purports to protect when it repeatedly discloses the location of data it claims is not adequately secure. Either the Commission doubts its own claims or would risk harm to consumers in order to prove its point.

WHEREFORE, LabMD respectfully requests that the Court grant this motion and issue an order (1) finding that *in camera* treatment is appropriate for those portions of the Post-Trial Briefing that mention the current location of LabMD data, (2) requiring that current versions of the Post-Trial Briefing be removed from the FTC website, and (3) requiring Complaint Counsel to file amended confidential versions of their Post-Trial Briefing placing references to the location of LabMD data *in camera*.

Dated: August 14, 2015

Respectfully submitted,

/s/ Daniel Z. Epstein
Daniel Z. Epstein
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Patrick J. Massari
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/s/ Reed D. Rubinstein

Reed D. Rubinstein

William A. Sherman, II

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Counsel for Respondent, LabMD, Inc.

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

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

[Proposed Order] Granting Motion for In Camera Treatment of Location of LabMD Data

Upon consideration of the Motion for In Camera Treatment related to the location of LabMD, Inc.-related data, it is hereby

ORDERED, that: (1) *in camera* treatment is appropriate for certain portions of the Post-Trial Briefing that mention the current location of LabMD data, (2) current versions of the Post-Trial Briefing be removed from the FTC website, and (3) Complaint Counsel file amended confidential versions of their Post-Trial Briefing, placing references to the location of LabMD data *in camera*.

ORDERED:

D. Michael Chappell

Date:

Rule 3.45 Statement

Should the Commission intend to disclose any of the confidential information in the attached document, the following individual should be notified:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)
AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER

Respondent respectfully submits this Statement, pursuant to FTC Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached motion, Respondent (William Sherman) met and conferred with Complaint Counsel (Laura Van Druff and Jarad Brown), in an effort in good faith to resolve by agreement the issues raised by the motion. Despite good faith efforts, an agreement was unable to be reached.

Dated: August 14, 2015

Respectfully submitted,

/s/ William A. Sherman, II
William A. Sherman, II, Esq.

CORRECTED CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, I caused to be filed the foregoing document electronically through the Office of the Secretary's FTC E-Filing system, which will file the document electronically with:

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

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 on August 14, 2015, I caused to be served the foregoing document electronically to the following:

Alain Sheer, Esq.
Laura Riposo Van Druff, Esq.
Megan Cox, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
Jarad Brown, Esq.
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., NW
Room CC-8232
Washington, DC 20580

Dated: August 14, 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: August 14, 2015

By: /s/ Patrick J. Massari

Notice of Electronic Service

I hereby certify that on August 17, 2015, I filed an electronic copy of the foregoing Respondent LabMD's **CORRECTED** Motion to Accord Portions of Complaint Counsel's Post-Trial Briefing in Camera Treatment, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on August 17, 2015, I served via E-Service an electronic copy of the foregoing Respondent LabMD's **CORRECTED** Motion to Accord Portions of Complaint Counsel's Post-Trial Briefing in Camera Treatment, upon:

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Attorney