

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



ORIGINAL

COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

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

RESPONDENT LabMD, INC.'S NOTICE OF CONDITIONAL CROSS-APPEAL

Pursuant to 16 C.F.R. § 3.52(b) and solely in response to Complaint Counsel’s Notice of Appeal, Respondent hereby gives notice of its conditional and protective cross-appeal solely to raise additional and/or alternative grounds to support the Order issued by Chief Judge D. Michael Chappell dismissing the Complaint, and to preserve its rights. A conditional, protective cross-appeal in response to Complaint Counsel’s notice of appeal is proper even where, as here, the administrative law judge’s initial decision and proposed order dismissed the complaint in its entirety. *See, e.g., In the Matter of Rambus, Inc.*, Docket No. 9302, 2006 FTC LEXIS 60, at *28-34 (F.T.C. Aug. 2, 2006) (notwithstanding that the ALJ’s initial decision and proposed order—like here—dismissed the complaint in its entirety, Respondent cross-appealed the ALJ’s finding on applicable burden of proof to ensure that its rights were preserved); *cf. Sea-Land Serv., Inc. v. Dep’t of Transp.*, 137 F.3d 640, 649 (D.C. Cir. 1998) (prevailing party’s conditional cross-appeal seeking affirmance on alternative grounds proper).

Based on the facts and law in this case, the Initial Decision and Order dismissing the Complaint entered by D. Michael Chappell, Chief Administrative Law Judge in the above-

captioned matter, were both correct and should be affirmed. Chief Judge Chappell's Initial Decision contains detailed findings of fact and credibility determinations based on a very careful review of the evidence, and reasoned conclusions of law that give effect to the plain meaning of FTC Act Section 5. Yet, Complaint Counsel has filed a general Notice of Appeal without specifying any factual or legal errors supposedly committed by Chief Judge Chappell, leaving Respondent, once again, to guess at what the Federal Trade Commission's case against it might be.

According to former Commissioner Joshua Wright:

[I]n 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed. This is a strong sign of an unhealthy and biased institutional process....Even bank robbery prosecutions have less predictable outcomes than administrative adjudication at the FTC.

See Wright, "Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority" at 6 (Feb. 26, 2015) available at

https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf. Given this statistical certainty, to protect its rights and to preserve all meritorious issues for appeal to an Article III court, Respondent must file this conditional and protective cross-appeal with respect to the absence of certain findings of fact and/or conclusions of law in the Chief Judge's Initial Decision, all of which would have provided additional and/or alternative grounds for the Order that he issued. Among other things, the omitted findings of fact and conclusions of law relate to the following:

- a. The legal and constitutional infirmity of this case due to the Commission's and Complaint Counsel's reliance on and proffer of falsified and/or illegally-obtained evidence;

- b. The legal and constitutional infirmity of this case due to the collusion and/or relationship between Complaint Counsel Alain Sheer, Ruth Yodaiken, Carl Settlemyer, and other Federal Trade Commission employees with Tiversa, Inc.;
- c. The legal and constitutional infirmity of this case due to Complaint Counsel's failure to prove jurisdiction;
- d. The legal and constitutional infirmity of this case due to the multiple "as-applied" violations of due process;
- e. The legal and constitutional infirmity of this case due to the Commission's bias, predetermination, and legal process advantages.
- f. The legal and constitutional infirmity of this case because Complaint Counsel abdicated its duty to investigate or corroborate evidence received from a third party, did not act with the due diligence required to reduce the risk of a mendacious or misguided informant, and failed to meet the standards of conduct required of government attorneys;
- g. The legal infirmity of this case due to the Federal Trade Commission's violations of the Administrative Procedure Act;
- h. The legal and constitutional infirmity of this case because Complaint Counsel failed to prove LabMD's data security violated relevant medical industry data security standards;
- i. The legal infirmity of this case because the FTC Act, as-applied, creates a clear repugnancy with HIPAA and is preempted.

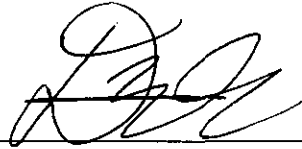
- j. The legal infirmity of this case because *all* of the evidence from *all* of Complaint Counsel’s expert witnesses should have been excluded under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993);
- k. The legal infirmity of this case because Complaint Counsel did not carry its burden under Section 5(a) or under Section 5(n) of the FTC Act; and
- l. The legal and constitutional infirmity of the proposed Notice Order in this case.

Also, in response to Complaint Counsel’s appeal (whatever it may be) and to any action this Commission may take or issues it might raise or rulings it might make, whether arising from the Commission’s claimed “plenary” authority over this adjudication or otherwise, Respondent hereby preserves and advances *all* of the arguments it presented before Chief Judge Chappell prior to and at the evidentiary hearing and through Respondent’s post-trial briefs.

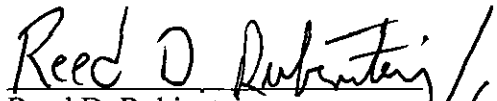
Finally, in anticipation of Article III review, Respondent hereby conditionally preserves its right to protect its interests and to object to certain evidentiary, discovery, and other rulings by Chief Judge Chappell in this action. *See Hartman v. Duffey*, 19 F.3d 1459, 1465-66 (D.C. Cir. 1994) (“In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against his interests are reviewed so that if the main appeal results in modification of the judgment his grievances will be determined as well. Some protective cross-appeals are ‘conditional’ in the sense that the cross-appeal is reached *only if and when the appellate court decides to reverse or modify the main judgment*. The theory for allowing a conditional cross-appeal is that as soon as the appellate court *decides to modify the trial court’s judgment, that judgment may become ‘adverse’ to the cross-appellant’s interests* and thus qualify as fair game for an appeal ...”) (emphasis added).

Respondent intends to file a brief perfecting this Notice of Appeal pursuant to 16 C.F.R.

§ 3.52(b) and (c).



Daniel Z. Epstein
Patrick J. Massari
Cause of Action Institute
1919 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006



Reed D. Rubinstein
William A. Sherman, II
Sunni R. Harris
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20004

by
ATM

Dated: December 1, 2015

Counsel for Respondent LabMD, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2015, I caused to be filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send an electronic notification of such filing to the Office of the Secretary:

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

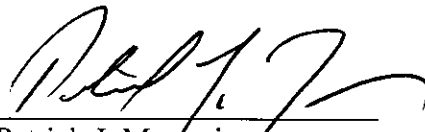
I ALSO CERTIFY that I caused to be delivered via hand delivery and electronic mail copies of the foregoing document to:

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 caused to be delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff, 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: December 1, 2015

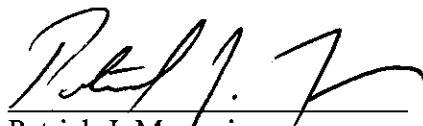


Patrick J. Massari

CERTIFICATE OF ELECTRONIC FILING

I HEREBY 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: December 1, 2015


Patrick J. Massari

Notice of Electronic Service

I hereby certify that on December 01, 2015, I filed an electronic copy of the foregoing Respondent LabMD, Inc.'s Notice of Conditional Cross-Appeal, 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 December 01, 2015, I served via E-Service an electronic copy of the foregoing Respondent LabMD, Inc.'s Notice of Conditional Cross-Appeal, upon:

John Krebs
Attorney
Federal Trade Commission
jkrebs@ftc.gov
Complaint

Hallee Morgan
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Jarad Brown
Attorney
Federal Trade Commission
jbrown4@ftc.gov
Complaint

Kent Huntington
Counsel
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Sunni Harris
Esq.
Dinsmore & Shohl LLP
sunni.harris@dinsmore.com
Respondent

Daniel Epstein
Cause of Action
daniel.epstein@causeofaction.org
Respondent

Patrick Massari
Counsel
Cause of Action
patrick.massari@causeofaction.org
Respondent

Alain Sheer
Federal Trade Commission
asheer@ftc.gov
Complaint

Laura Riposo VanDruff
Federal Trade Commission
lvandruff@ftc.gov
Complaint

Megan Cox
Federal Trade Commission
mcox1@ftc.gov
Complaint

Ryan Mehm
Federal Trade Commission
rmehm@ftc.gov
Complaint

Erica Marshall
Counsel
Cause of Action
erica.marshall@causeofaction.org
Respondent

I hereby certify that on December 01, 2015, I served via other means, as provided in 4.4(b) of the foregoing Respondent LabMD, Inc.'s Notice of Conditional Cross-Appeal, upon:

Reed Rubinstein
Dinsmore & Shohl LLP
Respondent

Patrick Massari
Attorney