

Complaint Counsel took no position on the motion for leave to withdraw.

On September 14, 2016, the Commission entered an Order requiring “Counsel of Record to file a short letter to explain further why good cause exists for their withdrawal from this matter for the Commission to consider *in camera*.” Ex. 1.

Accordingly, Respondent Counsel submits *ex parte in camera confidential* the letter dated September 20, 2016 (with attachment), pursuant to Commission Rules 3.45 and 4.7. 16 C.F.R. §§ 3.45 and 4.7 (2016); *see* Ex. 2.

These documents are submitted *ex parte* and *confidential* because they are “communication[s] occasioned by and concerning a nonadjudicative function of the Commission,” and are not “relevant to the merits of [this] or a factually related proceeding.” *See* Commission Rule 4.7(b)1) & 4.7(f), 16 C.F.R. §§ 4.7(b)(1) & 4.7(f).

Further, these documents are submitted *in camera* and *confidential* pursuant to the Commission’s September 14, 2016 Order, and the District of Columbia Rules of Professional Conduct. *See* D.C. Rule of Prof. Conduct 1.16(b)(4), 1.16(b)(5); *see also* D.C. Ethics Opinion 317 (listing examples of situations when an attorney’s withdrawal is permitted).

The attorney-client privilege and/or work product doctrine may be implicated by this filing, and Respondent Counsel asserts that *ex parte in camera* treatment is necessary to protect the confidentiality and privilege properly accorded these communications.

Respondent’s Counsel are not at liberty to elaborate beyond what is set forth in Exhibit 2 regarding the reasons why good cause exists to grant this Motion. *See* D.C. R. Prof. Cond. 1.6. *Cf. In re Gonzalez*, 773 A.2d 1026, 1030-32 (D.C. 2001) (addressing improper motion for leave to withdrawal).

While LabMD continues to withhold consent to the withdrawal at issue,³ LabMD has no extant representation agreement with Respondent Counsel and CoA Inst. Moreover, LabMD has engaged the law firm of Ropes and Gray LLP to represent it before a United States circuit court of appeals pursuant to 45 U.S.C. § 45(c).⁴ Moreover, FTC rules permit LabMD to proceed *pro se*, if necessary before the Commission. Commission Rule 4.1(a)(2), 16 C.F.R. § 4.1(a)(2).

For the foregoing reasons, Respondent Counsel respectfully request that the Commission GRANT the Motion for Leave to Withdraw as Counsel of Record for Respondent LabMD, Inc.; find that no material adverse effects will result from withdrawal or that other good cause exists to permit withdrawal; and ORDER that the Secretary is directed to withdraw the appearances of Respondent's Counsel as Counsel of Record for LabMD, Inc. from the Docket and Record in this case.

September 20, 2016

Respectfully submitted,



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³ Based upon public emails sent September 20, 2016 to Secretary Clark, and cc'ed to Complaint Counsel, Respondent Counsel understands that LabMD, through its President and Chief Executive Officer Michael J. Daugherty, is filing an *ex parte in camera confidential* opposition to Respondent Counsel's Motion to Withdraw.

⁴ This representation is public and can be found on the Ropes and Gray website *See Ropes & Gray to Represent LabMD in FTC Data Security Challenge* (Aug. 19, 2016), *available at* <https://www.ropesgray.com/newsroom/news/2016/08/Ropes-Gray-to-Represent-LabMD-in-FTC-Data-Security-Challenge.aspx> (last accessed Sept. 5, 2016). *See Ex. 3.*

EXHIBIT 1
PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

ORDER REQUESTING SUPPLEMENTAL FILING

Attorneys of record for Respondent LabMD, Inc., Patrick J. Massari, and Erica L. Marshall of the Cause of Action Institute (“Counsel of Record”), have filed a motion for leave to withdraw as counsel of record from this matter. They argue that ceasing their representation of LabMD would have no material adverse effect on LabMD’s interests, but state that LabMD does not consent to their withdrawal. Counsel of Record also assert that there is good cause for their withdrawal. However, they provide no additional information supporting this assertion in their motion. Instead, they offer to provide such support *in camera*. Complaint Counsel take no position on the motion.

It is important for the Commission to have a complete understanding of the relevant facts as it considers this motion. We therefore direct Counsel of Record to file a short letter to explain further why good cause exists for their withdrawal from this matter for the Commission to consider *in camera*. Accordingly,

IT IS HEREBY ORDERED that Patrick J. Massari and Erica L. Marshall file a short letter containing any supplemental information they wish to submit in support of their motion for leave to withdraw as counsel of record, on or before September 20, 2016. Counsel may request *in camera* treatment of their submission in accordance with Commission Rule 3.45. 16 C.F.R. § 3.45 (2016).

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: September 14, 2016

EXHIBIT 2
PUBLIC

EXHIBIT 3
PUBLIC

IN THE NEWS

- NEWS
- ALERTS
- RANKINGS & AWARDS
- VIDEOS
- EVENTS

Ropes & Gray to Represent LabMD in FTC Data Security Challenge

August 19, 2016

Practices: [Privacy & Data Security](#)

A Ropes & Gray litigation team has been retained by LabMD to challenge a finding by an FTC Administrative Law Judge (ALJ) that the company's data security practices constitute a violation of Section 5 of the Federal Trade Commission Act. A Ropes & Gray [alert](#) examines the ALJ's decision, and an [article](#) (subscription required) published by *The National Law Journal* examines Ropes & Gray's involvement in the case. LabMD is represented by privacy & data security partners **Douglas Meal** and **Michelle Visser**, and privacy & data security counsel **David Cohen**.

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, 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 delivered via 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 delivered via electronic mail a copy of the foregoing document to:

Michael J. Daugherty, in his capacity as President and Chief Executive Officer of
Respondent LabMD, Inc.

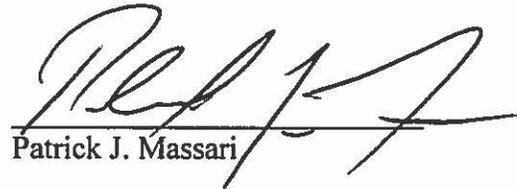
James W. Hawkins, Esq. d/b/a James W. Hawkins, LLC
Counsel for LabMD, Inc.

Douglas Meal, Esq.
Michelle Visser, Esq.
David Cohen, Esq.
Ropes & Gray LLP
Counsel for LabMD, Inc.

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

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

September 20, 2016


Patrick J. Massari

Notice of Electronic Service

I hereby certify that on September 20, 2016, I filed an electronic copy of the foregoing FILING OF SUPPLEMENTAL MATERIAL AND CONCURRENT REQUEST FOR EX PARTE IN CAMERA CONFIDENTIAL TREATMENT AS DIRECTED BY ORDER OF THE COMMISSION IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW AS COUNSEL OF RECORD FOR RESPONDENT LabMD, INC., 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 September 20, 2016, I served via E-Service an electronic copy of the foregoing FILING OF SUPPLEMENTAL MATERIAL AND CONCURRENT REQUEST FOR EX PARTE IN CAMERA CONFIDENTIAL TREATMENT AS DIRECTED BY ORDER OF THE COMMISSION IN SUPPORT OF MOTION FOR LEAVE TO WITHDRAW AS COUNSEL OF RECORD FOR RESPONDENT LabMD, INC., upon:

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