UNited States of America
Before the Federal Trade Commission

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

In the Matter of

LabMD, Inc., a corporation.

Docket No. 9357

PUBLIC

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.

Cause of Action Institute ("CoA Institute"), and attorneys of record for Respondent LabMD, Inc. ("LabMD") in this action, Patrick J. Massari and Erica L. Marshall (collectively, "Respondent Counsel"), pursuant to Commission Rule 3.45,1 hereby respectfully submit supplemental material along with a concurrent request for ex parte in camera confidential treatment, as directed by Order of the Commission dated September 14, 2016,2 in support of the motion of Respondent Counsel to request leave to withdraw as counsel of record for LabMD in the above-captioned matter.

On September 6, 2016, Respondent Counsel filed a motion for leave to withdraw as counsel of record.

1 16 C.F.R. § 3.45 (2016).
2 The Order states in pertinent part: "[w]e 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. . . . in accordance with Commission Rule 3.45. 16 C.F.R. § 3.45 (2016).” See Ex. 1.
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, 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). 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,

Patrick J. Massari
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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.

EXHIBIT 1
PUBLIC
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of

LabMD, Inc.,
a corporation

DOCKET NO. 9357

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
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

[Signature]

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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