

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



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

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S
MOTION FOR A RULE 3.36 SUBPOENA**

INTRODUCTION

Complaint Counsel submits this Opposition to Respondent LabMD, Inc.’s (“LabMD” or “Respondent”) Motion for a Rule 3.36 Subpoena. This Court should deny the Motion for a Rule 3.36 Subpoena for Respondent’s failure to satisfy the requirements of Rule 3.36. Respondent’s Motion is not reasonable in scope, does not describe the information sought with sufficient particularity, does not seek to discover information that may reasonably be expected to yield information relevant to the allegations of the Complaint, the proposed relief, or properly-asserted and permitted defenses in this proceeding, and does not demonstrate that the material sought cannot reasonably be obtained by other means.

BACKGROUND

Commission staff opened a Part II investigation into the adequacy of LabMD’s information security practices in January 2010. On August 28, 2013, the Commission voted to approve an Administrative Complaint alleging LabMD engaged in unfair practices in violation of Section 5 of the FTC Act by failing to take reasonable and appropriate measures to prevent unauthorized access to consumers’ personal information. Compl. ¶¶ 6-11, 17-21. The

Complaint alleges that one of LabMD's failures resulted in the sharing of a LabMD file containing the sensitive personal information of approximately 9,300 consumers to a public peer-to-peer ("P2P") file sharing network without detection by LabMD. Compl. ¶¶ 10(g), 17-20.

On December 24, 2013, Respondent served written discovery on Complaint Counsel. Complaint Counsel served its written responses timely on January 24, 2014, and Complaint Counsel supplemented its written responses with its first of a rolling production of documents on January 27, 2014. Respondent has not asserted that Complaint Counsel's responses or production was inadequate.

On January 30, 2014, the last date on which this Court's Revised Scheduling Order (Oct. 22, 2013) permits the parties to serve routine "document requests, interrogatories and subpoenas *duces tecum*," Respondent filed its Motion for a Rule 3.36 Subpoena. While it is difficult to ascertain the relief Respondent seeks in its motion—it cites five discovery topics in its introduction, Mot. at 1-2, and addresses four slightly different topics in the body of its Motion, Mot. at 3-6—it appears to seek all communication among FTC employees relating to LabMD, the 1,718 File, and the Sacramento incident, as well as documents relating to the Commission's P2P warnings and the Commission's statements on data security. Rule 3.22 requires that Complaint Counsel file its Opposition by today (Rule 3.22(d)), and it permits the Court to rule "within 14 days after the filing of all motion papers" (Rule 3.22(e)). Accordingly, any ruling on the Motion will necessarily issue long after the deadline for serving written discovery has passed.¹

¹ Notwithstanding the requirements of Rule 3.22, Respondent nonetheless requests production of documents by "no later than February 21, 2014." Mot. at 6.

ARGUMENT

The relevant sections of Rule 3.36, 16 C.F.R. § 3.36, require that Respondent show the material sought: be reasonable in scope (Rule 3.36(b)(1)) and meet the requirements of Rule 3.37 (Rule 3.36(b)(5)); falls within the limits of discovery under Rule 3.31(c)(1) (Rule 3.36(b)(2)); and cannot reasonably be obtained by other means (Rule 3.36(b)(3)). In its most recent revision to Rule 3.36, the Commission observed that the burden of complying with discovery “should not be imposed” on the Commissioners, the General Counsel, or any Bureau or Office not involved in the matter “without strong justification” given “the lack of useful additional information likely to be available.” 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009). In adopting Rule 3.36, the Commission established this Court as a gatekeeper to prevent the issuance of frivolous subpoenas, such as the one sought here, to the Commissioners, the General Counsel, and Bureaus and Offices not involved in the matter.

I. RESPONDENT’S REQUESTS DO NOT MEET THE SCOPE OR REASONABLE PARTICULARITY REQUIREMENT OF RULE 3.36(B)(1) OR 3.36(B)(5)

Rule 3.36(b)(1) first requires that the material sought be reasonable in scope. As discussed in the Background section, *supra*, Respondent’s motion does not set forth with clarity the relief that it seeks, making it difficult to evaluate the scope of its request. However, to the extent its scope can be discerned, it is impermissibly broad. For example, the first request cited by Respondent in its Motion seeks “all communications to, from, or between FTC employees, including the FTC’s Office of Public Affairs, relating to LabMD and/or the 1718 File.” Mot. at 1. This spectacularly broad request encompasses every single intra-agency communication about this proceeding and is patently unreasonable in scope.

Respondent has likewise failed to specify with “reasonable particularity” the documents sought, as required by Rule 3.37(a), 16 C.F.R. § 3.37(a), incorporated by reference in Rule 3.36(b)(5). While its Motion states that it² seeks discovery from Federal Trade Commission (“FTC”) Commissioners and the Office of Public Affairs (“OPA”), Respondent’s requests relate to “FTC employees,” and are not limited to the Commissioners and OPA. Respondent has not described its requests with reasonable particularity by, for instance, attaching the subpoenas it requests that the Court permit it to issue, or describing such subpoenas in the proposed order attached to its Motion. *See, e.g., Associated Merchandising Corp. et al.*, 72 F.T.C. 1030, 1967 WL 94071, at *2 (F.T.C. Dec. 11, 1967) (broad discovery requests “can only be evaluated with difficulty, if at all, against the standards of the rule”). The Court should deny this Motion for failing to comply with Rule 3.36(b)(5).

² Respondent’s motion states that “Complaint Counsel requested” the discovery it describes; however, for the purposes of this submission, Complaint Counsel presumes that Respondent’s Motion is intended to refer to its own discovery served on Complaint Counsel. Mot. at 1.

II. THE SUBJECTS ON WHICH RESPONDENT SEEKS DISCOVERY ARE NOT WITHIN THE LIMITS OF DISCOVERY AS REQUIRED BY RULE 3.36(b)(2)

A. INTRA-AGENCY COMMUNICATIONS INVOLVING OPA ARE NOT DISCOVERABLE

Respondent's Motion seeks a Rule 3.36 subpoena for "all communications to, from, or between FTC employees, including the FTC's Office of Public Affairs, relating to LabMD and/or the 1718 file" or "the Sacramento Incident." Mot. at 1-2. Respondent argues that OPA's statements had a negative commercial impact on the company and that the requested discovery would show "that the FTC violated Daugherty's First Amendment rights" and "would go to prove that the FTC was motivated to retaliate because of Daugherty's speech." Mot. at 3.

Respondent has not asserted a First Amendment defense in this administrative proceeding. However, Mr. Daugherty's First Amendment claims are the subject of a separate lawsuit. *See LabMD, Inc. v. F.T.C. et al.*, 13-cv-01787 (D.D.C. filed Nov. 14, 2013). Responsive pleadings in that matter are not due until February 20, 2014. Respondent's Motion before this Court is an attempt to circumvent the Federal Rules of Civil Procedure and seek impermissible discovery in that case during discovery in this adjudicative proceeding. To the extent Respondent is implicitly attempting to tie its First Amendment claims to its Third Affirmative Defense, discovery on this matter has been precluded by the Court's Order on Complaint Counsel's Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order (Jan. 30, 2014), as discussed below. *See II.C, infra.*

Additionally, Rule 3.31(c)(2), 16 C.F.R. § 3.31(c)(2), creates a default rule that materials generated and transmitted between Complaint Counsel and non-testifying Commission employees are not discoverable absent a ruling that there is good cause to provide these

materials. Respondent made no showing of good cause, and the Court should deny its Rule 3.36 Motion as to intra-agency communications to, from, or between FTC employees relating to LabMD, the 1,718 file, or the Sacramento Incident.

B. DISCOVERY OF THE COMMISSION’S WARNINGS REGARDING P2P APPLICATIONS IS IRRELEVANT TO RESPONDENT’S FIFTH AFFIRMATIVE DEFENSE

Respondent argues that discovery from the Commissioners of “all documents sufficient to show that since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks,” Mot. at 1, 4, is relevant to its Fifth Affirmative Defense, that “the Commission has not published any rules, regulations, or other guidelines clarifying and providing any notice . . . of what data-security practices the Commission believes Section 5 of the FTC Act forbids” (“fair notice”). Resp.’s Ans. at 7 (Fifth Aff. Defense). The Commission’s January 16, 2014, Order Denying Respondent LabMD’s Motion to Dismiss (“January 16 Commission Order”) rejected Respondent’s contention that the Commission has failed to give fair notice of what data-security practices it believes Section 5 forbids. *See* Respondent LabMD, Inc.’s Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings (Nov. 12, 2013) at 22-28. The January 16 Commission Order affirms that the Commission may enforce Section 5 in data security cases without issuing “regulations addressing the specific conduct at issue.” January 16 Commission Order at 14; *see generally id.* at 14-17. The Commission concluded that “the three-part statutory standard governing whether an act or practice is ‘unfair,’ set forth in Section 5(n), should dispel LabMD’s concern about whether the statutory prohibition . . . is sufficient to give fair notice of what conduct is prohibited.” *Id.* at 16. Because this request

relates to Respondent's "fair notice" defense, it is foreclosed by the January 16 Commission Order.

C. DISCOVERY OF THE COMMISSION'S STATEMENTS ON DATA SECURITY IS IRRELEVANT TO RESPONDENT'S THIRD AND FIFTH AFFIRMATIVE DEFENSES

Respondent argues that its discovery requests to the Commissioners of "all documents sufficient to show the standards the FTC used in the past and is currently using, to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act,"³ Mot. at 1, 4, relates to its Third Affirmative Defense and its "fair notice" Fifth Affirmative Defense. As discussed above, discovery on its "fair notice" defense is precluded. See January 16 Commission Order and II.B, *supra*.

The Court has likewise precluded discovery on Respondent's Third Affirmative Defense that the Commission's actions are "arbitrary, capricious, an abuse of discretion . . ." ("arbitrary and capricious"). The Court's January 30, 2014 Order on Complaint Counsel's Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order ("January 30 Order") held: "It is beyond dispute that Respondent's purpose in eliciting information concerning the . . . Commission's decision making in issuing the Complaint is to challenge the bases for the Commission's commencement of this action. Precedent dictates that such matters are not relevant for purposes of discovery in an administrative adjudication." January 30 Order at 6 and cases cited therein. Respondent's request for these documents is not discoverable because it is

³ This request closely mirrors Respondent's eight, ninth, and tenth Requests for Production to Complaint Counsel. See Complaint Counsel's Answers and Objections to Respondent's First Set of Requests for Production of Documents (Numbers 1-17) at 9-10, attached hereto as Exhibit A. Complaint Counsel has produced nearly 10,000 pages of responsive, discoverable, and non-privileged documents in response to these requests. See n. 6 & 7, *infra*.

law of the case that discovery of Respondent’s “arbitrary and capricious” defense is not permissible. *See id.*

D. DISCOVERY OF INTRA-AGENCY COMMUNICATION RELATING TO THE 1,718 FILE AND THE SACRAMENTO INCIDENT IS IRRELEVANT⁴

Respondent argues that discovery of “all communications to, from, or between employees of the FTC and/or Commissioners relating to the 1718 File and the Sacramento Incident,” Mot. at 2, 5, is relevant to its “arbitrary and capricious”⁵ defense. As discussed above, discovery on this issue has been precluded by the Court’s January 30 Order. *See II.C, supra.* Additionally, as noted above, *see II.A supra*, Respondent has not shown good cause to abrogate the default rule set forth in Rule 3.31(c)(2) that materials generated and transmitted between Complaint Counsel and non-testifying Commission employees are not discoverable.

III. RESPONDENT FAILED TO SHOW THAT THE DOCUMENTS SOUGHT CANNOT BE OBTAINED BY OTHER MEANS AS REQUIRED BY RULE 3.36(B)(3)

For the requests for which Respondent is entitled to discovery, the information can reasonably be obtained by other means—indeed, Complaint Counsel has already produced thousands of pages of documents to Respondent’s counsel relating to the Commission and its

⁴ As noted in the “Background” section, *supra*, this action relates to LabMD’s unreasonable and inappropriate security practices, one consequence of which was the exposure of sensitive consumer data over P2P networks. *See* Compl. ¶ 10.

⁵ In its Motion, Respondent identifies this as its “Fourth Defenses [sic],” Mot. at 5. For the purposes of this submission, Complaint Counsel presumes Respondent intended to reference its Third Affirmative Defense.

staff's P2P warnings,⁶ *see* II.B *supra*, and data security statements,⁷ *see* II.C *supra*, is continuing to produce documents in response to Respondent's Requests for Production, will produce expert witnesses as set forth in the Revised Scheduling Order, and will answer contention interrogatories as required by Rule 3.35(b)(2), 16 C.F.R. § 3.35(b)(2). *See* Complaint Counsel's Response to LabMD, Inc.'s First Set of Interrogatories (Numbers 1-22) at 6-7 and Complaint Counsel's Answer and Objections to Respondent's First Set of Requests for Production of Documents (Numbers 1-17) at 9-10, Ex. A. Respondent has made no showing that the materials it seeks cannot reasonably be obtained through ordinary discovery, and the Court should deny its Motion. *See, e.g., Koppers Co., Inc.*, 74 F.T.C. 1579, 1968 WL 95008, at *4 (F.T.C. July 2, 1968) (denying motion where "a more orderly procedure would be for respondent to wait for the disclosure of all complaint counsel's evidence and on the basis of these documents frame an application for discovery"). *Cf. In the Matter of Intel Corp.*, 2010 WL 2544424, at *4 (permitting subpoena where respondent adequately showed that information was not available from any other source).

⁶ On September 24, 2013, Complaint Counsel produced to Respondent 208 pages of documents. Bates-stamped FTC-000685 to FTC-000893 consisting of publications and statements of the Commission relating to the dangers posed by P2P file-sharing, including business and consumer education, testimony before Congress, and a staff report.

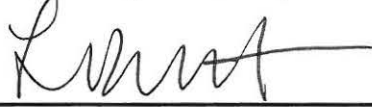
⁷ On January 27, 2014 Complaint Counsel produced to Respondent 9,758 pages of documents, Bates-stamped FTC-000894 to FTC-010652 consisting of publications and statements of the Commission and its staff relating to data security, including cases, testimony before Congress and state agencies, speeches, business and consumer education, staff reports, and workshop materials.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion for a Rule 3.36 Subpoena.

Dated: February 10, 2014

Respectfully submitted,



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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system.

I also certify that I caused a copy of the foregoing document to be delivered *via* electronic mail and by hand to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-110
Washington, DC 20580

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:


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CERTIFICATE FOR 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.

February 10, 2014

By: 

Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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

COMPLAINT COUNSEL’S ANSWER AND OBJECTIONS TO RESPONDENT’S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NUMBERS 1-17)

Pursuant to Sections 3.31 and 3.37 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent LabMD, Inc.’s First Set of Requests for the Production of Documents (“Respondent’s Requests”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

General Objections

The following General Objections apply to each request for documents in Respondent’s Requests and are hereby incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual request does not waive any of Complaint Counsel’s General Objections as to the other requests.

1. Complaint Counsel objects to Respondent’s Requests to the extent they seek to impose duties and obligations upon Complaint Counsel beyond those imposed by the Commission’s Rules of Practice for Adjudicative Proceedings, including seeking documents that are beyond the scope of permissible discovery under Rule 3.31(c)(2).

Complaint Counsel is limiting its responses to the scope of discovery set forth in Rule 3.31(c)(2) of the Commission's Rules of Practice for Adjudicative Proceedings.

2. Complaint Counsel objects to Respondent's Requests to the extent the requests seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any request, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Requests to the extent they seek information that relates to expert testimony prior to the dates prescribed by the October 22, 2013 Scheduling Order.
4. Complaint Counsel objects to Respondent's Requests to the extent they are overly broad, vague, ambiguous, unduly burdensome, and oppressive.
5. Complaint Counsel objects to Respondent's Requests as unduly burdensome and oppressive to the extent they ask Complaint Counsel to produce documents that are already in Respondent's possession or control, are in the public record, or can be obtained from some other source that is more convenient to Respondent, less burdensome to Complaint Counsel, and less expensive for both parties. Complaint Counsel will not undertake to catalogue and organize these materials for Respondent.
6. Complaint Counsel objects to Respondent's Requests to the extent that they seek information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

7. Complaint Counsel objects to Respondent's Requests to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of the Respondent.
8. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to undertake legal research for Respondent.
9. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to analyze or organize information for Respondent.
10. Complaint Counsel objects to Respondent's Requests to the extent that they seek information or documents Complaint Counsel has already provided to Respondent.
11. Complaint Counsel has not completed its discovery or its preparation for trial. Complaint Counsel's answers to Respondent's Requests are given without prejudice to Complaint Counsel's right to produce information relating to any subsequently discovered facts. Complaint Counsel reserves the right to assert additional objections to Respondent's Requests, and to amend or supplement these objections and responses as necessary after the close of discovery.
12. The failure of Complaint Counsel to object to any document request on a particular ground may not be construed as a waiver of its right to object on any additional ground(s).
13. Complaint Counsel reserves all of its evidentiary or other objections to the introduction, admissibility, or use of any document produced or response herein at the hearing in this action, and does not, by any response to any request, waive any objection, stated or unstated.

14. Pursuant to Rule 3.31(g), the inadvertent production of any privileged document or information shall not constitute a waiver of the applicable privilege.

Responses

1. All documents referring or relating to the 1,718 File.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks information relating to non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents pursuant to Paragraph 14 of the Scheduling Order and at FTC-PRI-000001 to FTC-PRI-001724.

2. All communications between Dartmouth College and FTC.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to its General and Specific objections, Complaint Counsel has no responsive, discoverable, non-privileged documents.

3. All communications between M. Eric Johnson and FTC.

Complaint Counsel refers Respondent to its response to Document Request 2.

4. All communications between Tiversa and FTC.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-PRI-000001 to FTC-PRI-001724, and will produce additional responsive, discoverable, and non-privileged documents.

5. All communications between FTC and any third person not employed by FTC referring or relating to LabMD or the 1,718 File.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint

Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks information relating to non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents pursuant to Paragraph 14 of the Scheduling Order and at FTC-PRI-000001 to FTC-PRI-001724, and will produce additional responsive, discoverable, and non-privileged documents.

6. All communications between FTC and any federal Government agency, including the U.S. Department of Homeland Security, concerning LabMD generally and/or the 1,718 File specifically.

Complaint Counsel refers Respondent to its response to Document Request 5.

7. All communications between FTC employees referring or relating to LabMD or the 1,718 File that is not protected as attorney work product, including

communications between the FTC and the FTC's Office of Public Affairs (including communications between the FTC and the Office of Public Affairs's current and former employees).

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged documents.

8. All documents sufficient to show what data-security standards are currently used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act.

Complaint Counsel refers Respondent to its response to Document Request 10.

9. All documents sufficient to show what changes occurred in the data-security standards used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act from 2005 to the present and the dates on which these standards changed.

Complaint Counsel objects to this Document Request as vague and ambiguous.

Complaint Counsel refers Respondent to its response to Document Request 10.

10. All documents sufficient to show the standards or criteria the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act from 2005 to the present.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the

possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request as vague and ambiguous.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-000685 to FTC-000893 and will produce responsive, discoverable, and non-privileged documents.

11. All documents provided to the FTC pursuant to any Civil Investigation Demand regarding its investigation of LabMD.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process

privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent the requested documents that were provided by Respondent can be obtained directly by Respondent through less burdensome means.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-PRI-000001 to FTC-PRI-001724 and refers Respondent to the documents Respondent produced, which have been Bates labeled FTC-LABMD-000001 to FTC-LABMD-003851.

12. All documents identifying LabMD and other companies whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information and or Protected Health Information that were provided to FTC.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents pursuant to Paragraph 14 of the Scheduling Order and at FTC-PRI-000001 to FTC-PRI-001724.

13. All documents identifying consumers that were harmed, or that are substantially likely to be harmed, as result of the claims alleged against LabMD in the Complaint.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks information relating to non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request as overly broad and unduly burdensome because any underlying relevant information contained in the requested documents can be obtained directly by Respondent through less burdensome means.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents, at FTC-SAC-000001 to FTC-SAC-000044, FTC-000661 to FTC-000684, and FTC-PRI-000001 to FTC-PRI-001724, and will produce responsive, discoverable, and non-privileged documents.

14. All documents that are utilized by FTC to determine whether to pursue an investigation or complaint against an entity or individual, including but not limited to evaluation standards and scoring systems.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as vague and ambiguous. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the

discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

15. All communications and all documents relating to communications between FTC and the Sacramento Police Department from October 5, 2012 to the present.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications or documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this

matter, Complaint Counsel objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged documents.

16. All communications—including letters—between FTC and the Persons identified in the documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-000661 to FTC-000684.

17. All documents relating to communications between the Bureau of Competition and the Persons identified in documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.

Complaint Counsel objects to this Document Request, which seeks information in the possession, custody, or control of a Bureau not involved in this matter. Documents in the possession, custody, or control of that Bureau must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Dated: January 24, 2014

Respectfully submitted,



Laura Riposo VanDruff
Complaint Counsel

Federal Trade Commission
600 Pennsylvania Ave., NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2999
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Electronic mail: lvandruff@ftc.gov

CERTIFICATE OF SERVICE


I hereby certify that on January 24, 2014 I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Respondent LabMD, Inc.

January 24, 2014

By: 
Laura Riposo VanDruff
Attorney

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

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

**COMPLAINT COUNSEL’S RESPONSE TO LABMD, INC.’S FIRST SET OF
INTERROGATORIES (NUMBERS 1-22)**

Pursuant to Sections 3.31 and 3.35 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent LabMD, Inc.’s First Set of Interrogatories (“Respondent’s Interrogatories”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

General Objections

The following General Objections apply to each of Respondent’s Interrogatories and are hereby incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsel’s General Objections as to the other interrogatories.

1. Complaint Counsel objects to Respondent’s Interrogatories to the extent they seek to impose duties and obligations upon Complaint Counsel beyond those imposed by the Commission’s Rules of Practice for Adjudicative Proceedings, including seeking documents that are beyond the scope of permissible discovery under Rule 3.31(c)(2), and/or are expressly excluded from interrogatory responses by Rule 3.35(a)(1).

Complaint Counsel is limiting its responses to the scope of discovery set forth in Rule 3.31(c)(2) of the Commission's Rules of Practice for Adjudicative Proceedings.

2. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any interrogatory, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek information that relates to expert testimony prior to the dates prescribed by the October 22, 2013 Scheduling Order.
4. Complaint Counsel objects to Respondent's Interrogatories to the extent they are overly broad, vague, ambiguous, unduly burdensome, and oppressive.
5. Complaint Counsel objects to Respondent's Interrogatories as unduly burdensome and oppressive to the extent they call for information previously provided to Respondent, already in Respondent's possession or control, are in the public record, or can be obtained from some other source that is more convenient to Respondent, less burdensome to Complaint Counsel, and less expensive for both parties. Complaint Counsel will not undertake to catalogue and organize these materials for Respondent.
6. Complaint Counsel objects to each interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

7. Complaint Counsel objects to Respondent's definition of the term "identify." The burden of deriving or ascertaining the information requested is substantially the same for Respondent and Complaint Counsel. Complaint Counsel will include sufficient detail to permit the Respondent to identify readily individual documents, written or oral communication, and publications; and sufficient contact information to permit Respondent to locate natural persons.
8. Complaint Counsel objects to Respondent's Interrogatories to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the thirty (30) days allotted for its responses and objections when such facts are known to Respondent and/or contained in the several thousand pages of documents already produced by Respondent.
9. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response herein at the hearing in this action, and does not, by any response to any interrogatory, waive any objection to that interrogatory, stated or unstated.
10. Complaint Counsel has not completed its discovery or its preparation for trial. Complaint Counsel's answers to Respondent's Interrogatories are given without prejudice to Complaint Counsel's right to produce information relating to any subsequently discovered facts. Complaint Counsel reserves the right to assert additional objections to Respondent's Interrogatories, and to amend or supplement these objections and responses as necessary after the close of discovery.

11. Complaint Counsel objects to Respondent's Interrogatories to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of the Respondent.
12. Complaint Counsel objects to Respondent's Interrogatories to the extent that they require Complaint Counsel to undertake legal research for Respondent.
13. Complaint Counsel objects to Respondent's Interrogatories to the extent that they require Complaint Counsel to analyze or organize information for Respondent.
14. The failure of Complaint Counsel to object to any interrogatory on a particular ground may not be construed as a waiver of its right to object on any additional ground(s).
15. Complaint Counsel reserves all of its evidentiary or other objections to the introduction, admissibility, or use of any response herein at the hearing in this action, and does not, by any response to any interrogatory, waive any objection, stated or unstated.
16. Pursuant to Rule 3.31(g), the inadvertent production of any privileged document or information shall not constitute a waiver of the applicable privilege.

Responses

1. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 10 of the Complaint that Respondent "failed to provide reasonable and appropriate security for personal information and its computer networks."

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged information at FTC-000001 to FTC-000376 and FTC-000424 to FTC-000656.

2. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 11 of the Complaint that "Respondent could have corrected its security failures at relatively low cost using readily available security measures."

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

3. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 12 of the Complaint that “[c]onsumers have no way of independently knowing about respondent’s security failures and could not reasonably avoid possible harms of such failures.”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

4. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 16 of the Complaint that “since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks.”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

To the extent this Interrogatory seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel objects to this Interrogatory. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Complaint Counsel further objects to this Interrogatory to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged information, at FTC-000685 to FTC-000893.

5. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegations in

Paragraph 21 of the Complaint that “[a] number of the SSNs in the Day Sheets are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves”;

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it identified relevant witness(es) in its initial disclosures:

Kevin Wilmer
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

6. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegations in Paragraph 22 of the Complaint that “respondent’s failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information”: (1) “caused, or is likely to cause, substantial injury to consumers. . .”, and (2) “was, and is, an unfair act or practice.”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel objects to this Interrogatory to the extent it seeks a legal conclusion.

To the extent this contention Interrogatory addresses “unfair act or practice” and seeks all fact supporting Complaint Counsel’s entire claim, Complaint Counsel objects to this Interrogatory as overbroad, burdensome, and oppressive.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 13.

7. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 23 of the Complaint that “the acts and practices of respondent as alleged in this Complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 16 U.S.C. § 45(a).”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent it seeks a legal conclusion.

To the extent this contention interrogatory seeks all fact supporting Complaint Counsel's entire claim, Complaint Counsel objects to this Interrogatory as overbroad, burdensome, and oppressive.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

8. Identify all communications between the FTC and the Sacramento Police Department regarding the LabMD documents found at 5661 Wilkinson Street, Sacramento, California on October 5, 2012.

RESPONSE:

Complaint Counsel refers Respondent to its responses to Document Requests 5 and 15.

9. Identify all individuals at the FTC who communicated with the Sacramento Police Department regarding the LabMD documents found at 5661 Wilkinson Street, Sacramento, California on October 5, 2012.

RESPONSE:

Megan Cox
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Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

Leslie Melman
Federal Trade Commission
Office of General Counsel
600 Pennsylvania Avenue NW
Washington, DC 20580

Alain Sheer
Federal Trade Commission
Division of Privacy and Identity Protection

601 New Jersey Avenue NW
Washington, DC 20001

Laura Riposo VanDruff
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

Ruth Yodaiken
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

10. Identify all communications between the FTC and Dartmouth College.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 2.

11. Identify all communications between the FTC and Tiversa.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Requests 1, 4, 11, and 12.

12. Identify all communications between the FTC and M. Eric Johnson.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 2.

13. Identify all individuals who participated in and, or worked with M. Eric Johnson and Tiversa gathering, compiling, analyzing and writing the article/study known as "Data Hemorrhages In The Health Care Sector."

RESPONSE:

Complaint Counsel has no knowledge of information responsive to Interrogatory 13.

14. Identify companies (other than LabMD) whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information (“PIP”) and/or Protected Health Information (“PHI”) that was provided to FTC.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission’s Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC’s investigation of LabMD and preparations for this hearing is not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 12.

15. If any company listed in your response to Interrogatory 14 was not investigated by the FTC, or a complaint has not been filed against them, please explain why the FTC has not done so.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC's investigation of LabMD and preparations for this hearing is not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

16. Identify the number of consumers harmed as a result of the PII and PHI identified in your response to interrogatory 14, and state the nature of the harm.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory as overly broad, unduly burdensome, not reasonably calculated to lead to the

discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

17. Identify the consumers harmed as a result of respondent's alleged failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information, and state the nature of the harm.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 13.

18. Identify all companies you have investigated and/or filed complaints against since 2005 for alleged data security failures.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. Complaint Counsel further objects to this Interrogatory as overly broad, unduly

burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged information pursuant to Rule 3.35(c).

19. Identify all publications and documents relating to the data security standards, regulations and guidelines the FTC seeks to enforce against LabMD.

RESPONSE:

Subject to and without waiving any objections, Complaint Counsel refers Respondent to its response to Document Request 10.

20. Identify any and all changes in the data security standards, regulations and guidelines the FTC uses to enforce section 5 of the FTC Act.

RESPONSE:

Complaint Counsel objects to this Interrogatory as vague and ambiguous. Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

21. Identify all data security standards, regulations and guidelines the FTC will use to determine whether LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of

expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

22. Identify the time frame in which the FTC claims that LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory to the extent it seeks a legal conclusion.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome, as discovery relating to LabMD's security practices is ongoing.

Subject to and without waiving any General or Specific objections, Complaint Counsel identifies the time period of January 1, 2005 through the close of evidence at the Hearing in the above-captioned matter.

VERIFICATION OF LAURA RIPOSO VANDRUFF

I am an attorney of record in this matter and am authorized to make this verification for and on behalf of Complaint Counsel. I have read the foregoing Complaint Counsel's Response to Respondent's First Set of Interrogatories, and am familiar with the contents thereof. The answers to the interrogatories are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the statements made in this Verification are true and correct.

Executed on January 24, 2014



Laura Riposo VanDruff

CERTIFICATE OF SERVICE

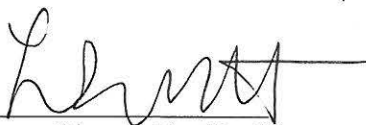
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