

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



\_\_\_\_\_  
In the Matter of )

PUBLIC

LabMD, Inc., )  
a corporation, )  
Respondent. )  
\_\_\_\_\_)

Docket No. 9357

**RESPONDENT LabMD, Inc.'s MOTION TO COMPEL A PROPER PRIVILEGE LOG**

Respondent LabMD, Inc. pursuant to Commission Rule 3.38A, hereby respectfully moves the Court for an order compelling Complaint Counsel (CC) to provide a proper and legally sufficient privilege log which complies with the requirements of Rule 3.38A.

**BACKGROUND**

LabMD served its First Request for Production of Documents on CC on December 24, 2013. CC responded with a series of rolling productions, the last of which occurred on March 7, 2014. CC's Privilege Log Responsive to Respondent's First Requests for Production of Documents was served on March 5, 2014. The Privilege Log was deficient on its face, and legally insufficient. Ex. 1.

Accordingly, pursuant to Rule 3.38A and applicable case law, LabMD sent a letter dated March 21, 2014 to CC specifically outlining the deficiencies and insufficiencies in CC's Privilege Log. Ex. 2. A meet and confer teleconference occurred on March 24, 2014, at approximately 2:00 p.m. A Rule 3.22 Statement and corresponding e-mail are attached hereto as Exhibits 3 and 4.

## **STANDARD OF REVIEW**<sup>1</sup>

As a general rule, the burden of proving the existence of a privilege is on the party claiming it. *In re Schering-Plough Corp.*, 2001 FTC LEXIS 188, at \*15 (Oct. 23, 2001). As the party seeking to assert privilege over the documents at issue here, CC must do more than simply offer “conclusory statements” invoking the privilege. *Id.* at \*15-16 (citing *Alexander v. FBI*, 192 F.R.D. 42, 45 (D.D.C. 2000)). Moreover, “[t]his burden must be met on a document-by-document basis.” *Id.*

It is also true that CC is not permitted to importune this Court to alleged privileges to establish elements of its case, while simultaneously preventing LabMD the opportunity to challenge those assertions. “[A] litigant cannot use the [common interest, deliberative process, law enforcement, and work product doctrines] as both a sword and a shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.” *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 70, at \*4-5 (Mar. 19, 2012) (citing *In re Motor Up Corp.*, 1999 FTC LEXIS 262, at \*5 (Aug. 5, 1999)).

### **OVERVIEW OF THE LAW OF PRIVILEGE APPLICABLE TO THE DOCUMENTS WITHHELD PURSUANT TO CC’S PRIVILEGE LOG**

#### **A. Common Interest Doctrine**

CC claims a common interest “privilege” for the documents and communications between FTC and U.S. Department of Health and Human Services (HHS) employees, as well as employees from HHS’s Centers for Medicare and Medicaid Services (CMS). “The so called ‘common interest’ or ‘joint defense’ privilege prevents waiver of the attorney-client or work product privilege when communications pass from one party to a third person ‘who has a

---

<sup>1</sup> LabMD also includes standard of review applicable to each privilege claimed by CC in the Overview Section, *infra* 2-5.

common legal interest with respect to the subject matter of the communication.” *Abraham v. Armco Steel*, 559 F.2d 250, 253 (5<sup>th</sup> Cir. 1977). In determining the level of activity or common interest necessary to satisfy the common interest doctrine, the common interest must be **identical not similar, and be legal not solely commercial**. *Bank Brussels v. Credit Lyonnais*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (emphasis supplied); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1172 (D. S.C. 1975).

To qualify for the privilege, the communications must have been made in confidence. *United States v. Keplinger*, 776 F.2d 678, 701 (7<sup>th</sup> Cir. 1985). The party claiming the privilege must demonstrate that the documents were specifically intended and designed to further a common interest. *United States v. Bay State Ambulance*, 874 F.2d 20, 28 (1<sup>st</sup> Cir. 1989).

#### **B. Deliberative Process Privilege**

“The deliberative process privilege protects communications that are part of the decision-making process of a governmental agency.” *In re Hoechst Marion Roussel*, 2000 FTC LEXIS 134, at \*8-9 (Aug. 18, 2000) “This privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.” *Id.*

Deliberative process privilege must be accompanied by a formal privilege claim sworn by the head of the department having control over the information. *Id.* at 9. Moreover, the official must have “actual personal consideration” of the document, as well as a “detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.” *Id.* at 9-10).

Deliberative process is a qualified privilege and “can be overcome where there is a sufficient showing of need.” *Id.* at 10 (citations omitted).

**C. Work Product Privilege<sup>2</sup>**

“The well-recognized rule of *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) protects the work product of lawyers from discovery unless a substantial showing of necessity or justification is made. Under the Commission's rules, work product is discoverable ‘only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.’ 16 C.F.R. § 3.31(c)(3).” *In re Hoechst*, 2000 FTC 134, at \*10-11.

“Work product that reveals attorney client communications or the attorneys’ mental processes in evaluating the communications ‘cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.’” *Id.* at \*11 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981)).

“The work product doctrine protects written materials prepared in anticipation of litigation or for trial. *See United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). However, the privilege does not apply unless the document can fairly be said to have been prepared ‘because’ of the litigation. *See, e.g., Linde Thomson v. RTC*, 5 F.3d 1508, 1515 (D.C. Cir. 1993). Documents prepared in the ordinary course of business or which would have been created in the same manner regardless of the litigation fall outside the protection of the work-product doctrine. *See Adlman*, 134 F.3d at 1202.” *In re Schering*, 2001 FTC LEXIS 188, at \*26-27.

“As with attorney-client privilege, the proponent of work product privilege must establish all of the ‘essential elements’ of work product, . . . and must do so on a “document by document basis.’ . . . ***To carry this burden, the proponent must come forward with [objective] facts that***

---

<sup>2</sup> CC asserts an attorney-client privilege for document FIMGLMD00007087 at page two of the Log. This involves communications from HHS to FTC. CC is hereby requested to clarify the nature of the attorney-client privilege between HHS and FTC and/or CC.

*are sufficiently detailed to support a judicial determination that the elements of work-product privilege have been met for each document; conclusory assertions are insufficient to establish the privilege.”* *Id.* (internal citations and notes omitted) (emphasis supplied).

**D. Law Enforcement Privilege**

The law enforcement privilege “protects from disclosure investigatory files compiled for law enforcement purposes that would tend to reveal law enforcement techniques or sources” Such “privileges must be formally asserted and delineated in order to be raised properly,” so that the proponent “must have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced and state with specificity the rationale of the claimed privilege.” *In re Hoechst*, 2000 FTC LEXIS at \*6-7.

**ARGUMENT**

**I. Category One Documents: Communications By and Between Employees of HHS, CMS, and FTC**

CC’s Privilege Log contains a large subset of documents which contain communications by and between employees of HHS, CMS and FTC (Category One). Those documents have the following document ID nos.: 7073-75; 7077-78; 7080-81; 7086-87; 7091-93; 7095; 7097-98; 7100-01; 7104; 7109; 7112-15; 7122-27; 7130; 7133-34; 7136; 7201; 7203; 7240; 7243; 7245; 7249-52; 8705-13.

These Category One communications involve the following individuals from HHS/CMS: David Holtzman, Anne J. MacArthur, Andy M. McKee, Jennifer A. Trussell, Amitava Masumdar, Cathy T. Carter, Kathleen M. Kersell, Patricia A. Gill, Marilou King, Michael S. Wroblewski, Anne E. Hauswald, Raghu Akkapeddi, Paul Baranoski, Karen Brown, and Dinah L. Horton.

These Category One communications involve the following individuals from FTC:

**Alain Sheer, Ruth Yodaiken, and Laura Riposo VanDruff.**

LabMD asserts that CC has failed to provide the following as a threshold matter the following regarding Category One documents and Communications: (1) the subject matter of the document; (2) any and all copy recipients of the document; (3) the descriptive position each sender and recipient holds within his designated employing entity; (4) an affidavit/declaration by an individual having control over and personal knowledge of each document for which privilege is claimed; and (5) sufficient specificity for each claimed privilege and corresponding document/communication so LabMD's Counsel may evaluate the privilege. *In re Lab. Corp.*, 2011 FTC LEXIS 30, at\*3-12 (Feb. 24, 2011); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 264-68 (D. Md. 2008); *in re Certain Muzzle-Loading Firearms*, 2011 ITC LEXIS 2496, at \*19 20 (Nov. 29, 2011).

Category One documents and communications are dated June 21, 2001 through and including February 7, 2014. CC has failed to sustain its burden of asserting privilege by setting forth a boilerplate "description" of the Category One documents at issue, and little else, which is in no wise a proper description of the subject matter for each document or the necessary linkage between privilege and document. Accordingly, LabMD is unable to assess the asserted claims of privilege. *Victor Stanley*, 250 F.R.D. at 264-67.

Moreover, the language used by CC in its "description" of all Category One documents is nothing more than a series of conclusory statements which describe the privilege, not the documents.

It is also true that without any definition or description whatsoever of what “common interest” existed between HHS/CMS and FTC employees, LabMD cannot assess the viability of the asserted privileges. *Armco Steel*, 559 F.2d at 253; *Bay State*, 874 F.2d at 28.

Category One documents and communications numbered **7081, 7086, 7109, 7113, 7114, 7125, 7134, 7136, 7243, and 7245** are particularly problematic. These communications reference the Health Insurance Portability and Accountability Act. CC asserts Common Interest, Deliberative Process, Law Enforcement, and Work Product privileges in a vague and conclusory manner with respect to these particular documents. These assertions are wholly insufficient and improper. *Id.*; *In re Lab. Corp.*, 2011 FTC LEXIS 30, at \*3-12; *Victor Stanley*, 250 F.R.D. at 264-68; *Certain Muzzle*, 2011 ITC LEXIS 2496, at \*19-20.

CC asserts the following privileges with regard to Category One documents: common interest, deliberative process, work product, and law enforcement. However, there is no evidentiary, factual, or other basis by which LabMD can evaluate the propriety of the asserted privileges, and therefore the Log is deficient. CC’s conclusory statements do not contain a clear showing of why any privilege should attach to these documents. *United States v. Burns*, 162 F.R.D. 624, 627-28 (S.D. Cal. 1995). The Privilege Log in no way “demonstrate[s] careful analysis of each document by the government . . .” *Church of Scientology Int’l v. Dep’t of Justice*, 30 F.3d 224, 231 (1<sup>st</sup> Cir. 1994).

The deliberative process, work product, and law enforcement privileges are not facially or substantively applicable to Category One communications based upon CC’s Privilege Log. *In re Hoechst*, 2000 FTC LEXIS 134, at \*6-9; *In re Schering*, 2001 FTC LEXIS 188, at \*26-27.

## II. Category Three<sup>3</sup> Documents: Internal FTC Employee Documents

CC's Privilege Log contains a significant subset of putative internal documents as regards FTC employees. These documents have the following document ID nos.: **7070, 7072, 7253-63, 7319-21, and 7323-27.**

Category Three communications involve the following individuals from FTC: **Megan Cox, Alain Sheer, Laura Riposo VanDruff, Kevin Wilmer, and Ruth Yodaiken.**

LabMD asserts threshold deficiencies as follows: (1) the subject matter of the document; (2) any and all copy recipients of the document; (3) the descriptive position each sender and recipient holds within his designated employing entity; (4) an affidavit/declaration by an individual having control over and personal knowledge of each document for which privilege is claimed; and (5) sufficient specificity for each claimed privilege and corresponding document/communication so LabMD's Counsel may evaluate the privilege. *In re Lab. Corp.*, 2011 FTC LEXIS 30, at \*3-12; *Victor Stanley* 250 F.R.D. at 264-68; *In re Certain Muzzle*, 2011 ITC LEXIS 2496, at \*19-20.

CC's "description" of the documents embraces two main categories: (1) attorney notes regarding communications with the Sacramento Police Department; and (2) Kevin Wilmer's "[d]raft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or

---

<sup>3</sup> LabMD reserves the right to amend its instant motion to compel to include "Category Two" documents which are communications by and between employees of the Federal Bureau of Investigation (FBI) and FTC. Complaint Counsel has agreed to withdraw the law enforcement and other privileges from these documents and produce them *in toto*. Accordingly, LabMD leaves its "Category Three" designation in place for purposes of this motion.



legal theories.” The “representative” of the FTC is not identified. This person may or may not be Mr. Wilmer.

Category Three documents are dated January 29, 2012 through and including December 12, 2013. The “description” of these documents is yet another set of conclusory assertions of privilege, rather than a proper description of the documents at issue. Accordingly, these asserted privileges are facially deficient and improper. *In re Schering*, 2001 FTC LEXIS 188, at \*15. CC has not sustained its burden with regard to the asserted privileges for Category Three documents. *Id.*

CC asserts work product privilege with regard to Category Three Documents. However, there is no evidentiary, factual, or other basis by which LabMD can evaluate the propriety of the asserted privilege, and therefore the Log is deficient. CC’s conclusory statements do not contain a clear showing of why the work product privilege should attach to these documents. *Burns*, 162 F.R.D. at 627-28. The Privilege Log in no way “demonstrate[s] careful analysis of each document by the government.” *Church of Scientology v. Dep’t of Justice*, 30 F.3d 224, 231 (1<sup>st</sup> Cir. 1994); *see* Rule 3.31(c)(5).

The purpose of the doctrine is to guard the “mental processes of the attorney.” *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (declining to extend work product protections of an attorney’s communications with an investigator where the investigator was called as a witness). “Because the work product doctrine is intended only to guard against divulging the attorney’s strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product.” *RTC v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995). The privilege, then, is qualified, not absolute.


The work product privilege is not facially or substantively applicable to Category Three communications based upon CC's Privilege Log. *In re Hoechst*, 2000 FTC LEXIS 134, at \*6-9; *In re Schering*, 2001 FTC LEXIS 188, at \*26-27.

**CONCLUSION**

For the reasons stated above, this Court should grant in its entirety Respondent LabMD, Inc's motion to compel a proper privilege log.

Dated: March 25, 2014

Respectfully submitted,

  
\_\_\_\_\_  
William A. Sherman, II, Esq.  
Reed D. Rubinstein, Esq.  
Sunni R. Harris, Esq.  
Dinsmore & Shohl, LLP  
801 Pennsylvania Ave., NW Suite 610  
Washington, DC 20004  
Phone: (202) 372-9100  
Facsimile: (202) 372-9141  
Email: [william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com)

Daniel Z. Epstein  
Cause of Action  
1919 Pennsylvania Ave., NW, Suite 650  
Washington, D.C. 20006  
Phone: (202) 499-4232  
Facsimile: (202) 330-5842  
Email: [daniel.epstein@causeofaction.org](mailto:daniel.epstein@causeofaction.org)  
*Counsel for Respondent*

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

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

**[PROPOSED] ORDER GRANTING LabMD, Inc.’s MOTION TO COMPEL A PROPER  
PRIVILEGE LOG**

Upon consideration of Respondent LabMD, Inc.’s Motion to Compel A Proper Privilege Log and CC’s Opposition thereto, and in consideration of the entire Record in this matter, IT IS HEREBY ORDERED that LabMD, Inc.’s Motion to Compel is GRANTED.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that on March 25, 2014, I delivered via electronic mail and hand-delivered a copy 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

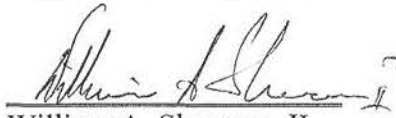
I further certify that on March 25, 2014, I delivered via electronic mail and hand-delivered a copy of the foregoing document to:

Alain Sheer, Esq.  
Laura Riposo VanDruff, Esq.  
Megan Cox, Esq.  
Margaret Lassack, Esq.  
Ryan Mehm, Esq.  
John Krebs, Esq.  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Mail Stop NJ-8122  
Washington, D.C. 20580

**CERTIFICATE OF ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: March 25, 2014

By:   
William A. Sherman, II

# **EXHIBIT**

**1**

Complaint Counsel's Log of Privileged Documents Responsive to Respondent's First Requests for Production

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007070	12/12/2013	Megan Cox		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007072	10/9/2012-10/10/2012	Alain Sheer		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007073	7/3/2012	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007074	2/21/2013	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007075	2/26/2013	Andy M. McKee, HHS	Jennifer A Trussell, HHS; Anne L. MacArthur, HHS; Amitava Masumdar, HHS; Alain Sheer; Ruth Yodaiken; Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007077	7/6/2012	Alain Sheer	Cathy T. Carter, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007078	11/18/2011	David Holtzman, HHS	Anne L. MacArthur, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007080	7/5/2012	Kathleen M. Kersell, HHS	Patricia A. Gill, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007081	12/17/2013	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007086	6/21/2011	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007087	1/30/2014	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC relaying analysis of a current legal proceeding and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party; and communication made to an attorney by an intra-agency client for the purpose of securing an opinion on the law, legal services, or assistance in a legal proceeding.	Common Interest; Work Product; Attorney-Client



Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007091	7/10/2013	Alain Sheer	Michael S. Wroblewski, HHS; Anne E. Hauswald, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007092	7/5/2012	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007093	2/21/2013	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007095	11/21/2011	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007097	2/21/2013	Alain Sheer	Andy M. McKee, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007098	2/26/2013	Alain Sheer	Jennifer A. Trussell, HHS; Anne L. MacArthur, HHS; Amitava Mazumdar, HHS; Andy M. McKee, HHS; Ruth Yodaiken; Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007100	7/5/2012	Alain Sheer	Kathleen M. Kersell, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007101	7/11/2012	Alain Sheer	Raghu Akkapeddi, HHS; Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007104	7/12/2012	Alain Sheer	Raghu Akkapeddi, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007109	6/24/2011	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007112	2/3/2014	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007113	11/26/2013	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007114	9/27/2010	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007115	7/6/2012	Alain Sheer	Cathy T. Carter, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007122	2/21/2013	Alain Sheer	Anne L. MacArthur, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007123	2/21/2013	Andy M. McKee, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007124	2/3/2014	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007125	11/26/2013	Alain Sheer	Marilou King, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007126	6/23/2011	Alain Sheer	David Holtzman, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007127	7/11/2012	Raghu Akkapeddi, HHS	Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007130	7/11/2012	Raghu Akkapeddi, HHS	Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007133	7/11/2012	Raghu Akkapeddi, HHS	Paul Baranoski, HHS; Karen Brown, HHS; Dinah L. Horton, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007134	6/24/2011	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007136	6/22/2011	David Holtzman, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007201	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007203	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007240	2/25/2013	Alain Sheer	Andy M. McKee, HHS	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007243	11/25/2013	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007245	11/26/2013	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding compliance with HIPAA and other statutes that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007249	2/21/2013	Anne L. MacArthur, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predecisional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007250	2/21/2013	Anne L. MacArthur, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predicional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007251	2/25/2013	Andy M. McKee, HHS	Jennifer A. Trussell, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC that is predicional and deliberative in nature regarding the availability of certain witness(es) and containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00007252	7/10/2012	Cathy T. Carter, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding jurisdiction and venue that is predecisional and deliberative in nature, contains information that would reveal law enforcement techniques and procedures, and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Law Enforcement; Work Product
FIMGLMD00007253	Undated	Laura Riposo VanDruff		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation or in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007254	12/5/2013	Laura Riposo VanDruff		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007255	5/2/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007256	5/2/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007257	5/8/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007258	5/9/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007259	5/20/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007260	5/9/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007261	6/5/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007262	5/30/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007263	7/24/2013	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007319	Undated	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation or for an administrative hearing and containing mental impressions, conclusions, opinions, or legal theories	Work Product



Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007320	Undated	Kevin Wilmer		Draft trial preparation materials prepared by a representative of the FTC at the direction of an attorney in anticipation of litigation or for an administrative hearing and containing mental impressions, conclusions, opinions, or legal theories	Work Product
FIMGLMD00007321	10/11/2012	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007323	Undated	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007324	1/8/2013	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007325	1/16/2013	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007326	Undated	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007327	1/29/2012	Ruth Yodaiken		Attorney notes regarding communication with Sacramento Police Department prepared in anticipation of litigation and containing mental impressions, conclusions, opinions, or legal theories.	Work Product
FIMGLMD00007328	2/21/2013	Ruth Yodaiken	Patricia Curran, FBI	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007329	3/7/2013	Sammy Batra, FTC	Patricia Curran, FBI; Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007330	3/8/2013	Ruth Yodaiken	Patricia Curran, FBI; Laura Riposo VanDruff	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007331	2/21/2013	Ruth Yodaiken	Patricia Curran, FBI	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007332	3/8/2013	Ruth Yodaiken	Patricia Curran, FBI	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007333	3/8/2013	Patricia Curran, FBI	Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007334	2/21/2013	Patricia Curran, FBI	Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007335	2/28/2013	Ruth Yodaiken	Patricia Curran, FBI; William P. Golden, FTC	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007336	2/28/2013	Ruth Yodaiken	Patricia Curran, FBI	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007337	3/6/2013	Patricia Curran, FBI	Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007339	2/28/2013	Patricia Curran, FBI	William P. Golden, FTC, Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007340	3/5/2013	Ruth Yodaiken	Patricia Curran, FBI; Laura Riposo VanDruff	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007341	3/7/2013	Patricia Curran, FBI	Laura Riposo VanDruff, Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00007342	3/7/2013	Ruth Yodaiken	Patricia Curran, FBI; Laura Riposo VanDruff	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007343	3/7/2013	Ruth Yodaiken	Patricia Curran, FBI; Laura Riposo VanDruff	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007344	2/20/2013	Patricia Curran, FBI	Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007345	2/20/2013	Patricia Curran, FBI	Ruth Yodaiken	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00007346	3/8/2013	Ruth Yodaiken	Patricia Curran, FBI	Communication with a federal agency whose legal interests coincide with the FTC regarding a federal law enforcement information request and information sharing that is pre-decisional and deliberative in nature and contains information that would reveal law enforcement techniques and procedures.	Common Interest; Deliberative Process; Law Enforcement
FIMGLMD00008705	2/5/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00008706	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00008707	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00008708	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00008709	2/3/2014	Marilou King, HHS	Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00008710	2/8/2014	Marilou King, HHS	Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00008711	2/7/2014	Marilou King, HHS	Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

Doc ID No.	Doc. Date	Author	Recipient(s)	Description	Privileges Asserted
FIMGLMD00008712	2/7/2014	Marilou King, HHS	Laura Riposo VanDruff	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product
FIMGLMD00008713	2/7/2014	Laura Riposo VanDruff	Marilou King, HHS; Alain Sheer	Communication in anticipation of litigation with a federal agency whose legal interests coincide with the FTC regarding litigation strategy that is predecisional and deliberative in nature and contains mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.	Common Interest; Deliberative Process; Work Product

# **EXHIBIT**

**2**



*Legal Counsel.*

DINSMORE & SHOHL LLP  
801 Pennsylvania Avenue, N.W. ^ Suite 610  
Washington, DC 20004  
www.dinsmore.com

William A. Sherman, II  
(202) 372-9117 (direct) ^ (202) 372-9141 (fax)  
william.sherman@dinsmore.com

March 21, 2014

**VIA ELECTRONIC MAIL**  
**lvandruff@ftc.gov**

Laura Riposo VanDruff  
Attorney  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Mail Stop NJ-8100  
Washington, D.C. 20580

**Re: In the Matter of LabMD, Inc., FTC Docket No. 9357**

Dear Ms. VanDruff:

This is in response to the Megan Cox letter of March 20, 2014 requesting verification of Respondent's supplemental responses to Complaint Counsel's interrogatories 2 and 19. Please see the attached verification.

This letter also relates to your verification of Complaint Counsel's Response to LabMD, Inc.'s First Set of Interrogatories (Numbers 1-22) and Complaint Counsel's Response to LabMD, Inc.'s Second Set of Interrogatories (Numbers 1-3).

Your responses to LabMD's first and second sets of interrogatories contain varied and numerous objections. No attorney, however, has signed the objections pursuant to Rule 3.35(a)(2), which requires that the interrogatory answers "be signed by the person making them, and the objections signed by the attorney making them." Accordingly, Respondent respectfully requests that Complaint Counsel supplement its responses to both sets of interrogatories by providing the proper signature for all objections.

While you failed to verify your objections, you did verify your responses to both sets of interrogatories, stating that "[t]he answers to the interrogatories are true and correct to the best of my knowledge, information and belief." By verifying your responses to the interrogatories, you have indicated that you have personal knowledge of important facts relating to this case.



Based on your verification of the interrogatory responses, you have made yourself a necessary witness under Rule 3.7 of the D.C. Rules of Professional Conduct, and therefore your participation in this case should be limited. Rule 3.7 prohibits a lawyer from acting in her professional capacity in a case where she is likely to be a witness. The Rule states:

A lawyer *shall not* act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client.

District of Columbia Rule of Professional Conduct 3.7 (emphasis added).

Rule 3.7 is intended to avert conflicts of interest created and prejudice caused to the opposing party when the roles of advocate and witness are combined. For example, “[i]t may not be clear whether a statement by an advocate-witness should be taken as proof or an analysis of the proof.” Rule 3.7 cmt. 2. Since your verification of the interrogatory responses has rendered you a material fact-witness, we fully expect that you will now recognize your professional responsibility to limit your participation as counsel in the above referenced matter.<sup>1</sup>

Thank you for your immediate attention to this matter.

Sincerely,



William A. Sherman, II  
Dinsmore & Shohl, LLP  
801 Pennsylvania Ave., NW, Suite 610  
Washington, D.C. 20004  
Phone: 202.372.9100  
Fax: 202.372.9141  
William.Sherman@dinsmore.com

---

<sup>1</sup> See, e.g., *In re Asbestos Prods. Liab. Litig. v. A.C.*, 2012 U.S. Dist. LEXIS 165332, at \*22 (E.D. Pa. Nov. 16, 2012) (“When [interrogatory] responses are only signed by an attorney, and not by the client, the attorney has effectively been made a witness.”); *United States v. Morris*, 714 F.2d 669, 671 (7th Cir. 1983) (explaining that the general prohibition against counsel acting both as an advocate and as a witness “eliminates the possibility that the attorney will not be a fully objective witness”).

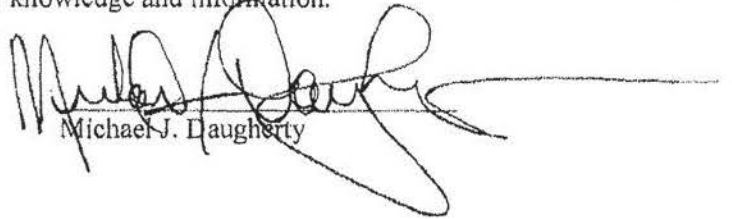
Laura Riposo VanDruff  
March 21, 2014  
Page 3

cc (via e-mail)

Alain Sheer  
Megan Cox  
Margaret Lassack  
Ryan Mehm

**VERIFICATION**

I, Michael J. Daugherty, hereby verify that the supplemental responses to Interrogatories 2 and 19 are true and accurate to the best of my knowledge and information.

  
Michael J. Daugherty

# **EXHIBIT**

**3**

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

\_\_\_\_\_ )  
In the Matter of )

PUBLIC

LabMD, Inc., )  
a corporation, )  
Respondent. )  
\_\_\_\_\_ )

Docket No. 9357

**COMMISSION RULE 3.22(g) MEET AND CONFER STATEMENT**

Pursuant to 16 CFR § 3.22(g) and Commission Rule 3.22(g), Counsel for the moving party, Respondent, LabMD, Inc. (LabMD), hereby certifies that Counsel conferred with Complaint Counsel by telephone<sup>1</sup> on March 24, 2014 at approximately 2:00 p.m. in a good-faith effort to resolve by agreement the issues set forth in LabMD's March 21, 2014 letter (attached hereto as Exhibit 2) , and Complaint Counsel's March 24, 2014 e-mail (attached hereto as Exhibit 4) regarding LabMD's motion to compel a proper privilege log, but the parties were unable to reach agreement.

Respectfully submitted,

/s/ William A. Sherman, II  
William A. Sherman, II, Esq.  
Reed D. Rubinstein, Esq.  
Sunni R. Harris, Esq.  
Dinsmore & Shohl, LLP  
801 Pennsylvania Ave., NW Suite 610  
Washington, DC 20004  
Phone: (202) 372-9100  
Facsimile: (202) 372-9141  
Email: william.sherman@dinsmore.com

*Counsel for Respondent*

<sup>1</sup> On the call, for Complaint Counsel: Maggie Lassack, Ryan Mehm, and Megan Cox. For LabMD: William Sherman II.

# **EXHIBIT**

**4**

**From:** Lassack, Maggie [<mailto:mlassack@ftc.gov>]

**Sent:** Monday, March 24, 2014 4:46 PM

**To:** Sherman, William

**Cc:** Rubinstein, Reed; "michael.pepson@causeofaction.org" ([michael.pepson@causeofaction.org](mailto:michael.pepson@causeofaction.org)); 'hallee.morgan@causeofaction.org'; "lorinda.harris@causeofaction.org" ([lorinda.harris@causeofaction.org](mailto:lorinda.harris@causeofaction.org)); 'Kent Huntington'; 'robyn.burrows@causeofaction.org'; Harris, Sunni; "daniel.epstein@causeofaction.org"; Cox, Megan; Mehm, Ryan; Sheer, Alain; VanDruff, Laura Riposo; Brown, Jarad; Krebs, John

**Subject:** FTC Docket No. 9357 -- Today's Meet and Confer re Privilege Logs

William,

I am writing to memorialize the discussion during our teleconference earlier this afternoon regarding (1) your letter to my colleague, Laura Riposo VanDruff, dated March 21, 2014, regarding the sufficiency of Complaint Counsel's privilege log ("March 21 Letter"), and (2) Ms. VanDruff's letter to you, dated March 7, 2014, regarding the sufficiency of Respondent's privilege log ("March 7 Letter").

During that discussion, Complaint Counsel explained that we asserted privilege over the communications with HHS, CMS, and the FBI referenced on page 2 of your March 21 Letter in good faith. We further explained that we are nonetheless willing to withdraw Complaint Counsel's claim of privilege as to communications with the FBI. We will accordingly supplement our production as soon as possible, which we anticipate will be on or before Friday, March 28, 2014. We will inform you promptly if that timeline changes.

We also explained that, with respect to Complaint Counsel's assertions of the deliberative process privilege and the law enforcement privilege, we will provide a declaration that satisfies our obligations under applicable law as soon as possible. We anticipate that we will be able to provide that declaration on or before Friday, March 28, 2014. As we discussed, we will inform you promptly if we have an update on that timeline. When we provide the declaration, we also will provide a supplemental privilege log.

With respect to Complaint Counsel's assertions of work product protection, we explained our position that Complaint Counsel's privilege log provides sufficient detail to validly assert work product protection, and you noted Respondent's disagreement with that position.

With respect to Respondent's privilege log, we understand that, later today, you will be sending Complaint Counsel a letter responding to Ms. VanDruff's March 7 Letter. We have tentatively scheduled a call at 10:00 a.m. tomorrow, Tuesday, March 25, 2014, to discuss your letter. We will confirm by email whether we would like to go forward with that call after we have had an opportunity to review your letter.

To the extent that this e-mail mischaracterizes in any respect our discussion earlier this afternoon regarding Complaint Counsel's and Respondent's privilege logs, please advise me by 10:00 a.m. tomorrow, Tuesday, March 25, 2014.

Regards,  
Maggie

Maggie Lassack  
Federal Trade Commission  
Division of Privacy and Identity Protection  
600 Pennsylvania Ave. NW  
Mail Stop NJ-8100  
Washington, DC 20580  
Telephone: 202-326-3713  
Fax: 202-326-3062