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.	)	PUBLIC

RESPONDENT'S SUR REPLY IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION FOR DISCOVERY SANCTIONS

Comes Respondent, LabMD, Inc. ("LabMD"), by and through its attorneys, opposing Complaint Counsel's Motion for Discovery Sanctions, and responding only to factual matters within Complaint Counsel's Reply as permitted by the Court's order dated February 20, 2014.

Introduction

As discussed in its response, Respondent believes that Complaint Counsel's Motion for Sanctions is unnecessary and premature. For example, given Complaint Counsel's Reply, it wishes to sanction LabMD for the oversight of assuming like most other LabMD employees, that deponent Nicotra Harris signed one Employee Handbook Agreement, when it was discovered that she actually signed three. This was merely an oversight on Respondent's part that is not sanction worthy. Respondent is working as diligently as it possibly can to comply with its discovery obligations and the Court's Order dated January 10, 2014. The deficiencies, if any, which Complaint Counsel cites, are not prejudicial in light of: (1) Respondent's willingness to comply with its discovery obligations, (2) the fact that the discovery period has not ended, and (3) the parties are months away from trial. Moreover, Complaint Counsel's position is especially precarious in light of the fact that it has failed to complete its production of documents, and continues to produce documents to Respondent on a rolling basis. *See* Deficiency Ltr. sent to

FTC, dated 2/21/14, attached hereto as Exh. 1 (involving the FTC's discovery deficiencies to which no response has been received).

Response to Factual Matters

A.   Respondent is willing to comply with its discovery obligations.

Complaint Counsel argues that Respondent refuses to comply with its discovery obligations. Reply, at p. 1-2. However, Respondent has consistently represented to Complaint Counsel both verbally and in writing its willingness and its efforts to comply with its discovery obligations. *See* Exh. D to Complaint Counsel's Motion for Sanctions (ltr. dated January 27, 2014 from Respondent stating that it planned to continue to produce responsive documents "on a rolling basis until complete."). Consistent with its representation, Respondent has produced an additional document production today, as further outlined below.

B.   Respondent will produce further documents relating to Interrogatory 9 and Request 28.

Respondent received responsive documents to Interrogatory 9 and Request 28 from LabMD on the morning of February, 25 2014, and will attempt to review and produce the documents as quickly as possible, with the first (of possibly several productions) to be made on February 26, 2014.

C.   Respondent has produced documents noted in Complaint Counsel's Reply relating Request 13.

On February 25, 2014, Respondent produced 7 unique quarterly network vulnerability scans at FTC-LabMD 004594-004677, 007463, 09955-009958, 009960, 015562-01556265, 015953-015962, as referenced in Jeff Martin's deposition. It also produced over two hundred monthly computer inspection reports at FTC-LabMD 005259-05680, 006638-007211, 007508-

009740, 010662-015541, as referenced in Brandon Bradley's deposition. Lastly, it produced several monthly server scan reports at FTC-LabMD 006551-006637,007212-007240, 009741-009804 as referenced in Jennifer Parr's deposition.

D.   The sufficiency of Respondent's response to Interrogatories 1 and 2 is not subject the Court's January 10, 2014 Order.

Importantly, the crux of this Court's January 10, 2014 Order settled the parties' dispute over the interpretation of the Commission's discovery rules, and required that Respondent produce certain information and documents. Respondent made two good faith efforts to comply with its discovery obligations regarding Interrogatories 1 and 2 – one on January 27, 2014 and the other on February 20, 2014. However, Respondent argues that these responses are insufficient.

First, Complaint Counsel states that LabMD failed to identify each individual's job title. However, Complaint Counsel did not mention this in their letter dated January 29, 2014, or their initial motion for sanctions. *See* Exh. F to the Motion for Sanctions; Motion for Sanctions at p. 6. The first time that Complaint Counsel raised an issue with the job titles provided was in its Reply Motion filed yesterday. Job titles were provided for each person except those employed in the IT department. To the extent the information is available, Respondent agrees to provide Complaint Counsel with job titles for those in the IT Department by February 26, 2014.

Second, Complaint Counsel argues that Respondent's response regarding each employee's access to specific types of Personal Information as defined by Complaint Counsel is insufficient. During numerous depositions of LabMD employees, Complaint Counsel has asked about the limited access to information given to certain employees. The answers have varied from a simple explanation to the complex, depending upon who was asked. No one, however,

was able to give an exact answer as to precisely what information employees had access to at any given time. Most were aware they had access to sufficient information to perform their jobs but that they did not have access to all information on the system. Chris Maire's deposition confirms, for example, that the billing department's access to information was limited, but is unable to explain exactly how it was limited. Deposition of Chris Maire, dated 1/9/14, at 110-113, attached hereto as Exh. 2. John Boyle indicates that the access was also limited but could not give a precise list of who had access to what information. Deposition of John Boyle, dated 1/28/14, at 21-24, 145-148, attached hereto as Exh. 3. *See also* Deposition of Allison Simmons, dated 2/5/14, at 58, attached hereto as Exh. 4 (stating that lab, pathology, and billing employees had limited access to information); Deposition of Sandra Brown, dated 1/11/2014, at 32-33, attached hereto as Exh. 5 (stating she was unsure what information she had access to); Deposition of Patrick Howard, dated 1/24/14, at 76, attached hereto as Exh. 6 (stating that employee's limitations to information were on the work stations themselves). Respondent's responses to Interrogatories 1 and 2 correspond with the knowledge it has, and the deposition testimony that has been given. To answer precisely as Complaint Counsel desires would be to fabricate and speculate.

To the extent that this Court finds Respondent's responses to Interrogatories 1 and 2 are insufficient, Respondent argues that their sufficiency is not before the court at this moment. Rather, this Court's determination should be based on whether Respondent has responded to these interrogatories in good faith – which it has.

E. **Respondent has produced documents noted in Complaint Counsel's Reply relating to Request 21.**

No negative evaluations, written duties, or written job descriptions exist for Jeff Martin, Matt Bureau, Curt Kaloustian, John Boyle, or Chris Maire. Importantly, as John Boyle was the COO, no personnel file was kept regarding him. On February 20, 2014 LabMD produced responsive documents relating to seven individuals at FTC-LabMD 004537-004575. Moreover, on February 25, 2014 at FTC-LabMD 015963-015965, LabMD made a good faith effort to produce documents responsive to this request by producing the employee agreements for Jeff Martin and Chris Maire and the job advertisement that was used to promote the position for which it hired Curt Kaloustian.

F. **Respondent has produced documents noted in Complaint Counsel's Reply relating to Request 23.**

During the recent deposition of Nicotra Harris, it became apparent that Ms. Harris signed LabMD's employee handbook on three separate occasions – once in October 2006, once in May 2007, and once in November 2007. On December 9, 2013, Respondent produced Ms. Harris' May 2007 signature page, which at the time it assumed was the only one. *See* FTC-LabMD 003844. The October 2006 and November 2007 signature pages were produced on February 25, 2014 at FTC-LabMD 015966-015968.

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
Counsel for Petitioner

Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842
Email: michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and administrative proceedings before federal agencies.

CERTIFICATE OF SERVICE

I hereby certify that on February 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 I delivered via electronic mail and first-class mail 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
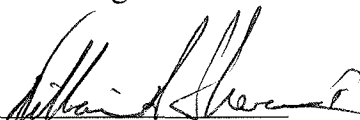> Washington, DC 20580

I further certify that I delivered via electronic mail and first-class mail 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: February 25, 2014

By: _____
William A. Sherman, II

EXHIBIT

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Dinsmôre

Legal Counsel.

DINSMORE & SHOHL LLP
801 Pennsylvania Ave., N.W. ^ Suite 610
Washington, D.C. 20004
www.dinsmore.com

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

February 21, 2014

VIA ELECTRONIC MAIL

Laura VanDruff
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8100
Washington, DC 20580

> **RE:** *In the Matter of LabMD, Inc.*
> *Discovery Deficiencies*

Dear Laura:

The primary purpose of this letter is to address deficiencies in certain of Complaint Counsel's Answers and Objections to Respondent's First Set of Discovery Requests, and to confer in good faith in an effort to resolve the dispute without the need for court intervention. We note the following deficiencies with your discovery responses and request that you supplement your discovery responses as follows:

1.   You have not answered Interrogatory 7. You have failed to list any fact or evidence which supports Paragraph 23 of Complaint Counsel's Complaint which alleges that the acts or practices of LabMD constitute unfair acts or practices in violation of Section 5(a) of the Federal Trade Commission Act. In your response you indicate that this is a contention interrogatory. Please advise as to whether you will answer this interrogatory at the appropriate time after the close of discovery.

2.   Complaint Counsel has not responded to Request for Production Nos. 5, 6, 7, 8, or 9 These Requests seek relevant and discoverable information. Complaint Counsel has agreed to supplement its responses to each of these requests and interrogatories; however, it has yet to produce any additional responsive documents. If there are not any responsive documents, Complaint Counsel should supplement its response to indicate as much. If there are additional responsive documents, produce those documents immediately.

3.   Complaint Counsel's responses to numerous requests suggest that there are documents in Complaint Counsel's possession which are responsive to the

corresponding requests but which are privileged. Please produce a privilege log identifying the documents and the privilege being claimed.

4. You have provided some information relevant to Interrogatory Nos. 8, 11, 17, 18 and Request for Production Nos. 4, 13, 15, 10; however, since you are producing documents on a rolling basis, it is unclear whether all of the responsive documents have been provided. If there are additional documents and information responsive to either requests or interrogatories listed above, please supplement your responses or indicate that your response is complete.

It is our desire that we resolve this dispute without judicial intervention, and in that regard, we request that you provide a privilege log and complete responses to the discovery requests above and produce the requested documents no later than Monday, March 3, 2014.

In light of the delay in receiving the documents requested and the documents that will be produced in response to Respondent's second set of discovery requests, it may be in the interest of justice for the parties to consider an extension of the discovery period so that adequate review and analysis of this discovery information can be conducted. Should you have any questions, please feel free to contact me.

Sincerely,

William A. Sherman, II

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EXHIBIT

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In the Matter of:

LabMD, Inc.

January 9, 2014
Christopher Matthew Maire

Condensed Transcript with Word Index

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1 generally?
2   A. No.
3   Q. So there were billing clerks in the
4 billing department, and we've described what access
5 they had.
6   A. Yes.
7   Q. There were also managers in the billing
8 department; is that correct?
9   A. That is correct.
10   Q. Do you recall how many managers were in
11 the billing department during your tenure?
12   A. At the start, two.
13   Q. There were two. And by the time you left,
14 how many were there?
15   A. One.
16   Q. And did the managers in the billing
17 department have access to the Internet?
18   A. Yes.
19   Q. And that access was unlimited?
20   A. Correct.
21   Q. Did the employees in the LabMD billing
22 department have access to information concerning lab
23 results?
24   A. Particular results, I'm not sure.
25 However, they did have access to know what to bill

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1 for.
2   Q. I see. And was the information which
3 they, meaning the persons in the billing department,
4 had access to with regard to lab information, was that
5 limited?
6   A. Repeat the question. I'm sorry.
7   Q. In terms of the information that the
8 employees in the billing department had with regard to
9 information from the lab side of the business, was
10 that access limited?
11   A. Yes.
12   Q. How was that access limited?
13   A. They were not given permission to, say,
14 the actual lab results and that software. The results
15 should have -- should not have resided anywhere else
16 other than in the database and the laboratory software
17 where it resided.
18   Q. And so what portion of that information
19 could the persons working in the billing department
20 access?
21   A. The information essentially to do --
22 establish the billing.
23   Q. Okay.
24   A. Contact information of the patient in
25 order to, say, process the payment or to process the

111

1 bill.
2   Q. In terms of employees in the billing
3 department, would they have access to any sales
4 information that was accumulated by the sales staff?
5   A. I don't believe so.
6   Q. Was there a policy or an intent on behalf
7 of LabMD to restrict any access by the billing
8 department to sales information?
9   A. My knowledge, yes, is they didn't deal
10 with sales reps going out and establishing the client,
11 essentially.
12   Q. So because those -- because persons in the
13 billing department did not deal with any sales
14 function of the company, is it your understanding that
15 access to information between those two departments in
16 the company was limited or prevented?
17   A. Yes.
18   Q. And is it your understanding that that was
19 done from a technical or technological aspect of the
20 way that the network was configured?
21   A. Intentionally configured to prevent, no,
22 naturally -- you know, it naturally occurs that way.
23 If you're not giving sales access to a particular
24 section, they can't access it. And if you're not
25 giving your billing access to someone, they don't get

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1 it.
2   Q. Okay.
3   A. If you don't allow the access, I should
4 say, so --
5   Q. So is it fair then to say that employees
6 in the billing department did not have access to
7 information from the sales department?
8   A. I would say that's a fair assumption.
9   Q. Well, is it an assumption, or was that
10 actually the case during your tenure?
11   A. Yes. I know of no instance where billing
12 could access sales, essentially.
13   Q. Was it also true that sales could not
14 access billing information?
15   A. That is correct.
16   Q. Is it also true that persons involved in
17 sales could not access laboratory information?
18   A. That is correct.
19   Q. Is it also your understanding based on
20 your involvement at LabMD that persons employed in the
21 laboratory department did not have access to sales
22 information?
23   A. Correct.
24   Q. Is it also your understanding that persons
25 involved in the laboratory department did not have

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28 (Pages 109 to 112)

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1 access to information in the billing department?
2   A. Correct.
3   Q. You indicated that -- let me go back then.
4 Did employees in the laboratory department have access
5 to the Internet?
6   A. Limited.
7   Q. And what was that limited to?
8   A. A similar white list of approved --
9 pre-approved sites.
10   Q. And are you aware of the subject matter of
11 the pre-approved sites, as you call it, the white list
12 that was pre-approved by management for the laboratory
13 employees to access?
14   A. I can't recall the specifics.
15   Q. Are you aware of whether or not those
16 sites were specifically approved to enable them to
17 better perform their duties in the laboratory?
18   A. I'd say so, yes.
19   Q. And so was it your general understanding
20 that they had limited access to the Internet, other
21 than to sites approved by management, which would
22 better enable them to do their jobs?
23   A. Correct.
24   Q. During your tenure at LabMD, were you
25 aware of any incidents in which you would consider to

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1 be a security breach of information in terms of
2 information that was transferred between LabMD and its
3 customers?
4   A. Information transfer between LabMD and its
5 customers, no.
6   Q. During your tenure at LabMD, other than
7 the peer-to-peer incident which you discussed earlier,
8 are you aware of any --
9   MR. KREBS: We should go off the record
10   right now.
11   (Deposition in recess, 1:00 p.m. to
12   1:03 p.m.)
13   Q. (By Mr. Sherman) During your tenure at
14 LabMD, were you aware of any incident where internal
15 information was discovered to have left the possession
16 of LabMD?
17   A. Other than the peer-to-peer incident, no.
18   Q. During the questioning earlier, you were
19 asked about individuals having administrative access
20 to their own computers. Do you recall that?
21   A. Yes.
22   Q. Did individuals have administrative access
23 to other individual's computers?
24   A. Not without their user name and password.
25   Q. So administrative access was generally

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1 limited to one's own computer?
2   A. Yes.
3   Q. At some point during your tenure at LabMD,
4 there was an attempt to limit that administrative --
5 that individual administrative access; is that
6 correct?
7   A. That's correct.
8   Q. Your involvement in that was with the
9 employees in the billing department; is that correct?
10   A. That's correct.
11   Q. And it's your understanding that due to
12 the billing software that was being used at that time,
13 individual administrative access could not be achieved
14 because it would cause the billing software not to
15 function correctly?
16   A. I think the question might be misstated.
17   Q. I'm sure it is.
18   A. Can you restate the question?
19   Q. I'm not sure that I can. But as a result
20 of LabMD's attempt to limit administrative access to
21 each individual's computer by that individual in the
22 billing department, the result was that the billing
23 software would indicate that there was an error?
24   A. Yes.
25   Q. Is that correct?

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1   A. That's correct, upon trying the limited
2 profile with the billing software, the user could not
3 complete a business -- a standard business procedure
4 that they were trying to complete.
5   Q. So in normal people talk, they couldn't do
6 their jobs?
7   A. Right, under a limited profile, they could
8 not do their job.
9   Q. Using the software that was in place at
10 that time?
11   A. Correct.
12   Q. Your testimony was that all users
13 throughout LabMD had administrative access to their
14 own computers; is that correct?
15   A. Correct.
16   Q. And while you only worked on trying to
17 remedy that for employees in the billing department,
18 are you aware of whether or not there was an attempt
19 to limit administrative access in the other
20 departments as well?
21   A. I'm not sure what the specific attempts
22 were, but that was the goal.
23   Q. And are you aware of whether or not that
24 goal was accomplished in other departments outside of
25 the billing department?

EXHIBIT

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In the Matter of:

LabMD, Inc.

January 28, 2014
John Boyle

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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1 on what got you to the proper person?
2   A. Correct.
3   Q. Once the laboratory personnel did their work, was
4 the process that that information went to the pathologist?
5   A. Some of the work required that, yes.
6   Q. We'll start with the work that didn't. For the
7 work that didn't, were the results of that work entered into
8 the SQL database that we were discussing?
9   A. Yes.
10   Q. For the results that did require the pathology
11 department, how did that process work? Were results -- for
12 those results entered into the same SQL database and then
13 the pathology department would look at those to render their
14 medical conclusion?
15   A. I don't -- was there a question?
16   Q. There was.
17   (Last question read by reporter.)
18   Q. (BY MR. KREBS) So there was not a question there.
19 I apologize for that.
20   Would the pathologist look into that SQL database
21 to get the results for them to do their work?
22   A. They could do that, yes.
23   Q. Were there other processes besides doing that?
24   A. Yes.
25   Q. What were they?

22

1   A. They performed diagnostic services. They did not
2 have to look into the system for results to do that.
3   Q. Okay.
4   A. They were part of that process.
5   Q. So when the pathologists finished their work, were
6 there conclusions, results, diagnoses inputted into that SQL
7 database?
8   A. Yes.
9   Q. When the reports, as you described them before,
10 were sent to the doctors' offices -- when the reports were
11 accessed by the doctors' offices through the LabMD web
12 portal, did the web portal use that SQL database to provide
13 that information for the reports?
14   A. Yes.
15   Q. Were the reports formatted in some way for
16 presentation to the doctors?
17   A. Yes.
18   Q. How was that done? Was there a software product
19 you used to create those reports?
20   A. Yes. Those were done, I believe, in Crystal
21 Reports.
22   Q. And who created those reports?
23   A. IT department.
24   Q. My next goal is trying to figure out how that
25 information that we've talked about went to the billing

23

1 department so that they could bill the appropriate insurance
2 company, person, doctor's office.
3   How did the billing company access the information
4 that they needed in order to do their job?
5   A. Say that again.
6   Q. Would the billing department use LabSoft to access
7 that SQL database to get information that they needed in
8 order to do -- to bill the appropriate party?
9   A. No.
10   Q. What software would the billing department use to
11 access that information?
12   A. Information from the lab system went into the
13 billing system.
14   Q. Will you describe to me how the information from
15 the lab system went into the billing system.
16   A. The manager had a process that would pull specific
17 information into files to go into the billing system.
18   Q. Do you recall what the specific information that
19 was provided from the LabSoft SQL database into the billing
20 system was?
21   A. I do not recall all of them, only that it was a
22 very small subset.
23   Q. Did the billing software have its own database?
24   A. Yes.
25   Q. What kind of database was that?

24

1   A. I believe it to be SQL as well.
2   Q. When the billing department took the information
3 that they needed in order to do their jobs, would they also
4 input information when they completed a task or a bill was
5 paid and update information in that same billing software
6 SQL database?
7   A. I believe they did.
8   Q. In the documents we've looked at, there's
9 reference to a Mapper. What is Mapper?
10   A. Mapper was the name of a server.
11   Q. What did the Mapper server do?
12   A. And the Mapper could configure data into a
13 specific structure.
14   Q. So was the Mapper server used to configure data
15 received from doctors' offices into the LabSoft Microsoft
16 SQL database?
17   A. Yes, I believe it was.
18   Q. Did LabMD have a process for removing consumers
19 from the LabSoft Microsoft SQL database?
20   A. I don't understand.
21   Q. Once patient information was in the LabSoft SQL
22 database, did it ever get deleted?
23   A. I can't say that it never got deleted or what was
24 deleted.
25   Q. Was there a retention process for how long those

6 (Pages 21 to 24)

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1   manager and get access to the software and the data and the
2   database.
3   Q. Using the billing manager's computer or the
4   billing manager's profile?
5   A. Or the billing manager's permission, giving them
6   permission to do that. There are license counters and
7   limitations. Everyone can't do that all at one time.
8   Q. Were there license limitations with LabSoft?
9   A. Yes.
10   Q. Do you recall what the license number was -- how
11   many licenses LabMD owned?
12   A. No.
13   Q. Do you recall how many licenses for Lytec LabMD
14   owned?
15   A. No.
16   Q. Let's start with the billing department employee.
17   When a billing department employee logs into the LabMD
18   network, could they click on Lytec and open it up?
19   A. I don't know what their process was, but I -- I
20   don't know.
21   Q. What I'm trying to get at is, once a billing
22   employee had logged into their computer, into the LabMD
23   network, did they have to provide an extra set of
24   credentials to access the Lytec billing software?
25   A. Yes.

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1   Q. For the LabSoft software, once an employee who had
2   that software on their computer or on their profile logged
3   into LabMD, did they need to present a second set of
4   credentials to access LabSoft?
5   A. Yes.
6   Q. I may have asked you this already, so if I did, I
7   apologize. Was Lytec being used when you arrived at LabMD?
8   A. Yes.
9   Q. Are you familiar with user profiles such as
10   administrative user profiles that are available through
11   Microsoft operating system?
12   A. Yes.
13   Q. It's not a trick question.
14   A. No.
15   Q. What types of user profiles did LabMD use?
16   A. For everything? Could you be more specific as
17   to . . .
18   Q. Did the LabMD IT employees -- did they have
19   administrative access?
20   A. Yes.
21   Q. Did the LabSoft -- did the employees in the
22   laboratory -- did they have administrative access?
23   A. Some may, some may not.
24   Q. Do you know what the distinction was between those
25   who did and didn't, as far as their roles or their position?

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1   A. I would have to research to tell you those
2   distinctions.
3   Q. For the employees in the billing department, did
4   they have administrative user profiles?
5   A. I don't know.
6   Q. Were you aware of an issue of trying to create
7   limited user profiles for billing employees using Lytec?
8   A. Ask me again, please.
9   Q. Are you aware of an attempt to limit user profiles
10   for employees in the billing department?
11   A. I would have to go refresh.
12   Q. Do you remember any issues that caused Lytec not
13   to work?
14   A. There was a hardware issue with the server that I
15   recall. I don't know whether there were or were not other
16   issues.
17   Q. And what was the hardware issue with the server?
18   A. I think there was a drive failure. I would have
19   to go verify that.
20   Q. Do you recall what LabMD did to resolve that
21   failure?
22   A. I believe that was during a time that Alan Truett
23   was involved. Mr. Kaloustian worked on it.
24   Q. But you don't recall what was done?
25   A. The drive was fixed.

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1   Q. Did LabMD have a policy regarding what employees
2   could access protected health information?
3   A. Yes.
4   Q. What was the policy?
5   A. I would have to look to provide exact information.
6   There were controls by department, by function, involving
7   both lab and billing.
8   Q. Who would have implemented the controls? If not
9   by person, then by department or by role.
10   A. Managers would have implemented policies.
11   Q. So the managers for the lab would have implemented
12   policies for the lab?
13   A. And billing for billing.
14   Q. Did IT have a role in that?
15   A. A role in that what?
16   Q. A role in creating or implementing the -- either
17   creating the policies or implementing the controls to --
18   A. Yes.
19   Q. What would IT's role have been?
20   A. It could have been any number of pieces. I can't
21   tell you right here.
22   Q. Did LabMD have any requirements for passwords?
23   A. Yes.
24   Q. What were they?
25   A. I believe they changed over time.

37 (Pages 145 to 148)

EXHIBIT

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In the Matter of:

LabMD, Inc.

February 5, 2014
Alison Simmons

Condensed Transcript with Word Index

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1 condition?
2   A. Not specifically, it would have included
3 diagnosis codes that the doctors used to order their
4 tests.
5   Q. Anything else?
6   A. This is information we received from
7 doctors' offices?
8   Q. Yes.
9   A. I don't think so.
10   Q. Where was the consumer information
11 received from doctors and doctors' offices stored on
12 LabMD's network?
13   MS. HARRIS: Objection, assumes facts not
14 in evidence.
15   THE WITNESS: It was stored in a database
16 on one of our servers.
17   Q. (By Mr. Sheer) How do you know that?
18   A. Because I saw it.
19   Q. When you say, because I saw it, what do
20 you mean?
21   A. There were times that we would have to do
22 maintenance on the actual servers that controlled the
23 databases, and when that would happen, we would have
24 to make sure to do it after hours.
25   There were instances where the server

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1 would overheat and crash during the middle of the day,
2 and the doctors' offices would start calling me
3 frantically because their patient information wasn't
4 loading. So, yeah.
5   Q. What applications were used to access the
6 information?
7   A. From who? Like from which side?
8   Q. From LabMD's side.
9   A. We would use Windows SQL Server 2003, I
10 think, to access the information from the database.
11   Q. When you say we, who do you mean?
12   A. We meaning Curt and myself and anyone else
13 like Mrs. Daugherty if she had a script. She didn't
14 access the database in its entirety. She would run a
15 program that would pull information from the database.
16   Q. When you said Curt, you mean Curt
17 Kaloustian; is that right?
18   A. I do.
19   Q. Were there any other applications that
20 could access the database?
21   A. Yes. And I can't remember the name of it,
22 but there was a program that the people in the lab and
23 our pathologist and the billing employees used that
24 gave limited access. They could look people up on a
25 case-by-case basis.

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1   Q. Is that LabSoft?
2   A. Possibly.
3   Q. Is it Lytec?
4   A. I don't remember.
5   Q. Turning back to the SQL database, who
6 could access that database apart from people in the IT
7 department?
8   MS. HARRIS: Objection, overbroad as to
9 time frame.
10   THE WITNESS: If they told us they wanted
11 to, Mike or John, we could have set them up to
12 access the entirety of the database. But I
13 don't believe they ever did.
14   We had somebody when I first started
15 working there who was a database consultant.
16 His name was Brian, but I don't remember his
17 last name.
18   Q. (By Mr. Sheer) Bissell?
19   A. Yes. So he would have been able to access
20 the database. Jeremy was also an IT person.
21   Q. That's Jeremy Dooley?
22   A. Yes. He would have been able to access it
23 while he was at LabMD as well.
24   Q. Anybody else?
25   A. Not that I'm aware of.

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1   Q. Now, just so I'm clear, you did say people
2 could access the database using scripts?
3   A. Correct.
4   Q. And I think that you've testified that
5 that was Mr. Daugherty's mom?
6   A. Uh-huh (affirmative).
7   Q. Anyone else?
8   A. John or Mike would have been able to as
9 well or anyone they had told us to set up scripts for.
10 But I don't remember if anyone else ever had that,
11 those scripts set up.
12   Q. Are you familiar with an application
13 called AutoMate?
14   A. I am.
15   Q. What is it?
16   A. It was actually very cool. You could
17 program it to basically AutoMate screen clicks,
18 typing, anything you wanted it to do, to pull
19 information or -- you know, if you wanted to have your
20 computer like check the time every 30 minutes, you
21 could have that program actually, you know, click on
22 your clock and open the time every 30 minutes.
23   Q. Is this a program that you used while at
24 LabMD?
25   A. Yes.

15 (Pages 57 to 60)

EXHIBIT

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In the Matter of:

LabMD, Inc.

January 11, 2014
Sandra Brown

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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1 post -- the copy of the check and whatever
2 correspondence that the patient sent in or the
3 insurance company sent in.
4   Q.   So I hear you saying that copies were made
5 of the checks.
6   A.   Right.
7   Q.   The copies were made. I'm assuming that
8 the copies were not scanned. They were just made on a
9 Xerox or a copier machine?
10   A.   Yes.
11   Q.   Were they scanned into the computer?
12   A.   No, not that I'm aware of because there
13 wouldn't be a need -- we didn't have scanners back
14 then.
15   Q.   Were the copied checks stored or retained
16 by LabMD?
17   A.   No. They were deposited into the bank, I
18 suppose.
19   Q.   Those are the original checks. The copies
20 that you made --
21   A.   Oh, the copies of the check, they were put
22 in payment batches.
23   Q.   And what happened to the payment batches?
24   A.   The payment batches had to be posted by
25 the payment poster. And then once they were posted,

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1 then they were, yes, put in the storage, in the file
2 cabinet.
3   Q.   Where is the file cabinet located?
4   A.   I don't know where it is now.
5   Q.   When you were working.
6   A.   When I was the manager, the file cabinet
7 was in the manager's office. And then we also had to
8 expand out into the little storage area where the copy
9 shredder was.
10   Q.   Were either of those storage areas locked?
11   A.   They would be locked at the end of the
12 day.
13   Q.   And --
14   A.   And then the whole office was locked
15 because you couldn't get in by knocking on the door.
16 You know, someone had to let you inside the door.
17   Q.   Were the actual filing cabinets that were
18 used locked?
19   A.   No, not during the day because you could
20 close the door and lock the door.
21   Q.   Were the filing cabinets capable of being
22 locked? Did they have a lock on them?
23   A.   I believe so.
24   Q.   Did you have a key to them?
25   A.   I had the key to the door.

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1   Q.   Was there a retention policy for the
2 copied checks, meaning after a period of time, the
3 copied checked could be destroyed?
4   A.   Not that I'm aware of because the year
5 that I did the management, it was -- you just had it
6 there by date and each month.
7   Q.   So during the time that you were the
8 manager working with copied checks, all of the checks
9 that were copied were kept?
10   A.   Yes.
11   (Exhibit CX158 was marked for
12 identification.)
13   Q.   (By Mr. Sheer) I'm handing you a document
14 that's marked CX158 with a Bates number of
15 FTC-LabMD-000308.
16   Have you seen it before?
17   A.   Again, the format is the one that I
18 created. All of this extra messy details, no.
19   Q.   All right. Number five says, "Add notes
20 to each patient's account in Lytec."
21   A.   Uh-huh (affirmative).
22   Q.   I think you've already explained that
23 Lytec is the billing application.
24   A.   Yes.
25   Q.   What are the notes that are being

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1 described here?
2   A.   The -- if you call the insurance company
3 and you spoke to Susie, Susie at the insurance company
4 stated that the patient's PPO policy was effective on
5 such-and-such a date. Those were the notes that you
6 could add into the system.
7   Q.   What kind of information could you see
8 when you were the billing manager in Lytec?
9   A.   The patient demographics, the insurance
10 demographics, the diagnosis code, CPT code, the
11 billing history for the insurance claims, that type of
12 information.
13   Q.   Would you see information about payment
14 cards?
15   A.   No. I instructed everybody not to put the
16 payment card information. What you could do, you
17 could put, patient called, gave permission to bill MC,
18 which is MasterCard, or CC, credit card, those two
19 type codes, or, you know, Visa. You didn't have to
20 put the actual name of the credit card and no credit
21 card numbers in the system.
22   Q.   We'll come back to that. Were there
23 limits on the information that you could view in
24 Lytec? Was there some information that was off limits
25 to you as the billing manager?

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1   A.   As far as the patient's account?
2   Q.   As far as whatever was in Lytec.
3   A.   It might have been. I didn't have access
4   to everything because I didn't need to use a lot of
5   the functions and keys and everything. So I wasn't --
6   I didn't go in there to see if I had permission to use
7   it. I didn't click on any tabs or whatever. I just
8   stuck with the billing information for patient and
9   insurance.
10   Q.   Could you change information that you
11   could view in Lytec?
12   A.   If I needed to change a patient's address,
13   insurance company, things like that, yes.
14   Q.   Did you delete information?
15   A.   No, because you had to -- well, what I
16   did, and I tried to have everybody do it, if you're
17   going to change or delete like a policy number, put
18   the old policy number in the notes so that way if the
19   claim comes back denied from the insurance companying
20   saying this is an incorrect policy number, you can go
21   ahead and contact the patient and let them know we
22   filed your claim twice with these two policy numbers
23   and they're being denied, and do you have, you know,
24   updated insurance that we can file. Otherwise we have
25   to, you know, drop the balance to your responsibility.

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1   Q.   Could you print the information you could
2   see in Lytec?
3   A.   The patient notes or insurance notes?
4   Q.   Everything, everything you could see.
5   A.   You can print notes. You could print
6   claims. You could print the notes and the claims.
7   That's as far as I'm aware of, and the aging reports,
8   of course, you can print those.
9   Q.   Now, when you're saying aging reports, are
10   you meaning just the insurance aging reports or the
11   insurance aging and the patient aging reports or
12   something else?
13   A.   Patient aging and insurance aging are two
14   separate reports. You can print either one.
15   Q.   After you stopped being the billing
16   manager, did your access to Lytec change?
17   A.   I'm not sure if it did or didn't. I just
18   stuck in the billing. That's all I had to do.
19   Q.   So you could access the same -- I think
20   what you're saying -- well, let me put it as a
21   question.
22   Could you access the same information when
23   you were billing manager that you could access when
24   you were working from home and no longer the billing
25   manager?

35

1   A.   Yes, just the billing -- the patient
2   insurance billing information and my email accounts
3   because I had to email either some of the local
4   doctors' offices or, well, some of the reps before
5   they changed up. I could contact them by email and
6   they could respond to me by email instead of having to
7   call back and forth.
8   Q.   Could you email yourself information from
9   Lytec?
10   A.   I don't think so, but, I mean, I don't
11   know. Lytec is a very basic system as far as medical
12   software and everything like that. It's a basic
13   system. It's not one of the more sophisticated
14   systems like a Misys Tiger or NextGen or any of the
15   newer stuff.
16   Q.   And what's the difference?
17   A.   Well, let's say, you know, back in the
18   '80s or '90s you had, what, the DOS or the AS400-type
19   systems, and now you've got the Windows-based system.
20   It's like that.
21   Q.   So you're telling me Lytec is not a
22   Windows-based system?
23   A.   It's -- I don't know if you would consider
24   it -- because I'm not technical, so I don't know what
25   you would consider Windows-based. But you could go

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1   into Lytec, you click on what you need, and, you know,
2   that's it.
3   There are more different versions of
4   medical software out there now where Lytec is, you
5   know -- let's say you had like a -- I don't know how
6   to explain it. If you have a video game, you've got a
7   PlayStation 3. You start out with the basic. You can
8   upgrade to a PlayStation 4.
9   That's kind of how Lytec is. There's
10   different levels or different software.
11   Q.   All right. You've told us about the
12   information that you could see in Lytec --
13   A.   Uh-huh (affirmative).
14   Q.   -- when you were the billing manager. Was
15   there any information you could see that you didn't
16   need to see to do your job?
17   A.   No.
18   Q.   Now, we've talked about your tenure as the
19   billing manager, and there were eight people who
20   worked for you when you were the billing manager.
21   Could they do the same things in Lytec that you could
22   do?
23   A.   They could not run any reports that I'm
24   aware of. They didn't have access to run actual aging
25   reports.

EXHIBIT

6

In the Matter of:

LabMD, Inc.

January 24, 2014
Patrick Howard

Condensed Transcript with Word Index

For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

73

1   A. To reset the router.
2   Q. Was that a constant occurrence or periodic?
3   A. I think it was periodic. I think that had to
4   do with -- and, obviously, my speculation, I think it had
5   to do with power issues within the building; but we could
6   never prove that.
7   Q. Do you recall who was the Internet service
8   provider for LabMD?
9   MS. HARRIS: Objection. Overbroad as to time
10 frame.
11 BY MR. KREBS:
12   Q. During your tenure at LabMD.
13   MS. HARRIS: Same objection.
14   THE WITNESS: I don't recall.
15 BY MR. KREBS:
16   Q. Was there ever a point in time where the server
17 updates were turned off?
18   MS. HARRIS: Objection. Asked and answered.
19   THE WITNESS: I don't believe so. Now let me
20 reclarify that if I might.
21 BY MR. KREBS:
22   Q. Absolutely.
23   A. There may have been a time where we turned them
24 off for testing purposes, but it was not longer than --
25 you know, we're talking 15 to 30 minutes, not on a

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1   continuous basis. And I say testing because we did a lot
2   of testing with the Web portion.
3   Q. The --
4   A. -- when we were trying to integrate the Web
5   portion into the LabSoft application.
6   Q. And I want to make sure, the Web portion, we're
7   talking about the Web portal or Web page that was created
8   for doctors to both send in information and receive it?
9   A. Exactly.
10   Q. During your tenure, did you have -- did LabMD
11 have any problems with applications running properly?
12   MS. HARRIS: Objection. Overbroad. Vague as
13 to problems.
14   THE WITNESS: I think every institution has
15 problems with applications running correctly but did
16 we have --
17 BY MR. KREBS:
18   Q. Was it more of a systematic problem?
19   MS. HARRIS: Objection. Vague as to systematic
20 problem.
21   THE WITNESS: I don't believe so. I do recall
22 that we had initially had memory issues with the
23 LabSoft software, but that was corrected down the
24 road.
25

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1   BY MR. KREBS:
2   Q. And how was -- were the memory issues
3   corrected?
4   A. It'd run slow; and like any program, you click
5   on it, then you wait.
6   Q. Did you add more servers, add more memory?
7   A. Added more memory.
8   Q. I want to see if I can get a sense of how users
9   accessed the LabMD network in different applications.
10 When -- you stated earlier that LabMD used the active
11 directory to create at one point in time user profiles
12 for individual users; correct?
13   A. Correct.
14   Q. And what version of the Microsoft operating
15 system were you using at that time?
16   A. XP.
17   Q. I want to make sure I have all the departments.
18 We talked about pathology. We talked about billing.
19 We've talked about laboratory, managers, and IT. Did I
20 leave any group out?
21   A. No. We did -- when I say laboratory, I include
22 the people that do the assessioning.
23   Q. Will you spell that?
24   A. A-s-s-e-s-s-i-o-n. The function of those
25 people is to unpack samples and scan them in and get them

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1   set up so laboratory technicians can run the testing.
2   Q. Thank you. I had no idea what that word meant.
3   A. Okay. That's what those people do.
4   Q. When a user logged on to the system, to the
5   LabMD network, could the user access all applications on
6   the LabMD network or were there limitations in their
7   profiles?
8   MS. HARRIS: Objection. Overbroad.
9   THE WITNESS: The limitations were on the
10 workstations themselves, in that the laboratory
11 information system was installed in the laboratory.
12 It wasn't installed in the billing department, so,
13 therefore, they didn't have access to that.
14 BY MR. KREBS:
15   Q. Was the billing software installed in the
16 laboratory?
17   A. No, sir.
18   Q. When -- could a user use their credentials for
19 a workstation that was not theirs?
20   MS. HARRIS: Objection. Calls for incomplete
21 hypothetical, calls for speculation, overbroad.
22   THE WITNESS: Yes, they could.
23 BY MR. KREBS:
24   Q. And when a user logged in with their
25 credentials, did they have administrative rights to that

19 (Pages 73 to 76)