

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



\_\_\_\_\_)  
In the Matter of )  
 )  
LabMD, Inc., )  
 a corporation, )  
 Respondent. )  
 )  
\_\_\_\_\_)

**PUBLIC**  
Docket No. 9357

**COMPLAINT COUNSEL’S MOTION TO AMEND COMPLAINT COUNSEL’S  
RESPONSE TO RESPONDENT’S FIRST SET OF REQUESTS FOR ADMISSION**

Pursuant to Commission Rules 3.22, 3.31, and 3.32, 16 C.F.R. §§ 3.22, 3.31, 3.32, Complaint Counsel respectfully moves to amend its Response to Respondent’s First Set of Requests for Admission. The proposed amendments will aid the presentation of the merits of the proceeding and will not prejudice Respondent.

**BACKGROUND**

On February 19, 2014, Complaint Counsel received Respondent LabMD, Inc.’s First Set of Requests for Admission to Complainant Federal Trade Commission. On March 3, 2014, Complaint Counsel timely served its answers and objections to Respondent LabMD, Inc.’s Requests for Admission. On March 25, 2014, without satisfying its meet and confer obligations under Rule 3.22(g), Respondent’s Counsel filed a Motion to Have Requests for Admission Deemed Admitted, raising issue with Complaint Counsel’s responses to Requests 1, 2, 3, 5, 11, 13, 15, 17, and 19. On March 31, 2014, Complaint Counsel invited Respondent to consent to a motion to amend Complaint Counsel’s Response to LabMD, Inc.’s Requests for Admission (**Exhibit A**), and provided Respondent with Complaint Counsel’s proposed Amended Responses

(**Exhibit B**), wherein Complaint Counsel amended its responses to admit each Request raised by Respondent in its March 25<sup>th</sup> Motion. Respondent failed to respond to Complaint Counsel's invitation to consent to a motion to resolve this issue.

**ARGUMENT**

**I. COMPLAINT COUNSEL SHOULD BE ALLOWED TO AMEND ITS RESPONSE BECAUSE IT SUBSERVES THE PRESENTATION OF THE MERITS OF THE PROCEEDING**

The Court should permit Complaint Counsel to amend its response to Respondent's Requests for Admission because it will promote the presentation of the merits of the proceeding. *See* Rule 3.22(c), 16 C.F.R. § 3.22(c). Complaint Counsel stated its answers and objections in its Response to Respondent's Requests for Admission served on March 3, 2014, including its responses to Requests 1, 2, 3, 5, 11, 13, 15, 17, and 19 ("the Requests"). To advance the proceedings, Complaint Counsel moves to amend its response to admit the above-noted Requests, while continuing to note its objections and clarifications to all Requests. By amending its responses to admit, Complaint Counsel narrows the matters at issue in this proceeding.

Furthermore, deemed admissions of the Requests without the objections and clarifications noted by Complaint Counsel may not be supported by the facts or may be irrelevant to this proceeding and therefore would not be useful to the Court. Had Complaint Counsel had an opportunity to meet and confer with Respondent about its concerns regarding certain of Complaint Counsel's responses, Complaint Counsel would have obviated the need for the Court to consider Respondent's March 25, 2014 Motion to Have Requests for Admission Deemed Admitted by offering to amend all of the Requests which Respondent raised in its Motion.

**II. COMPLAINT COUNSEL SHOULD BE ALLOWED TO AMEND ITS RESPONSE BECAUSE IT WILL NOT PREJUDICE RESPONDENT IN MAINTAINING ITS DEFENSE ON THE MERITS**

The Court should allow Complaint Counsel to amend its Response to Respondent's Requests for Admission because amendment will not prejudice Respondent whatsoever. Rule 3.22(c) allows the Administrative Law Judge to permit amendment when "the party who obtained the admission fails to satisfy the Administrative Law Judge that . . . amendment will prejudice him in maintaining his action or defense on the merits." See Rule 3.22(c), 16 C.F.R. § 3.22(c). Complaint Counsel's proposed amendments will admit the requests identified in Respondent's Motion, while preserving Complaint Counsel's objections thereto. Respondent cannot be prejudiced by receiving the very relief it has requested. Because the proposed amendments actually admit the requested statements, they cannot cause the type of prejudice anticipated by Rule 3.32(c) – where a party withdraws an admission previously made, to the detriment of its opponent, who had relied on the admission in preparing the presentation of its evidence. Moreover, granting this Motion serves the interests of judicial economy, as the amendments will resolve the issues raised in Respondent's March 25<sup>th</sup> Motion.

**CONCLUSION**

For the foregoing reasons, the Court should grant this Motion to Amend Complaint Counsel's Response to LabMD, Inc.'s Requests for Admission.

Dated: April 1, 2014

Respectfully submitted,

  
Alain Sheer  
Laura Riposo VanDruff  
Megan Cox

Margaret Lassack  
Ryan Mehm  
John Krebs  
Jarad Brown  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room NJ-8100  
Washington, DC 20580  
Telephone: (202) 326-2282 – Cox  
Facsimile: (202) 326-3062  
Electronic mail: mcox1@ftc.gov

Complaint Counsel

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

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

**[PROPOSED] ORDER GRANTING THE MOTION TO AMEND  
COMPLAINT COUNSEL’S RESPONSE TO RESPONDENT’S FIRST SET OF  
REQUESTS FOR ADMISSION**

Upon consideration of Complaint Counsel’s Motion to Amend Complaint Counsel’s Response to LabMD, Inc.’s First Set of Requests for Admission, it is hereby

ORDERED, that Complaint Counsel is permitted to amend its Response to Respondent’s First Set of Requests for Admission as set forth in its Amended Response.

ORDERED:

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

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-113  
Washington, DC 20580

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

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

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

Michael Pepson  
Lorinda Harris  
Hallee Morgan  
Robyn Burrows  
Kent Huntington  
Daniel Epstein  
Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650  
Washington, DC 20006  
michael.pepson@causeofaction.org  
lorinda.harris@causeofaction.org  
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Reed Rubinstein  
Sunni Harris  
William A. Sherman, II  
Dinsmore & Shohl, LLP  
801 Pennsylvania Avenue, NW, Suite 610  
Washington, DC 20004  
reed.rubinstein@dinsmore.com  
william.sherman@dinsmore.com

sunni.harris@dinsmore.com  
*Counsel for Respondent LabMD, Inc.*

**CERTIFICATE FOR ELECTRONIC FILING**

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

April 1, 2014

By: 

Megan Cox  
Federal Trade Commission  
Bureau of Consumer Protection



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

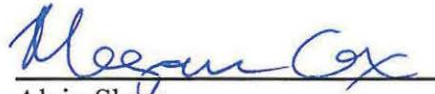
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In the Matter of )	<b>PUBLIC</b>
)	
LabMD, Inc., )	Docket No. 9357
a corporation, )	
Respondent. )	
)	
)	
_____ )	

**STATEMENT REGARDING MEET AND CONFER PURSUANT TO  
RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Amend Complaint Counsel’s Response to Respondent’s First Set of Requests for Admission, Complaint Counsel conferred with counsel for Respondent by letter on March 31, 2014. On that date, at 6:22 PM, Megan Cox, for Complaint Counsel, transmitted a letter to William Sherman, II, for Respondent. Mr. Sherman’s co-counsel, Michael Pepson, Lorinda Harris, Hallee Morgan, Robyn Burrows, Kent Huntington, Daniel Epstein, Reed Rubinstein, and Sunni Harris, were copied on Ms. Cox’s letter. Complaint Counsel requested that Respondent consent to the amendment of Complaint Counsel’s responses and provided the proposed amended responses. Complaint Counsel requested a response or a telephonic meet-and-confer by 4:00 PM on April 1, 2014. Complaint Counsel stated that if Counsel for Respondent did not respond, Complaint Counsel would proceed to file the Motion. Respondent failed to respond to Complaint Counsel’s letter.

Dated: April 1, 2014

Respectfully submitted,

A handwritten signature in blue ink that reads "Megan Cox". The signature is written in a cursive style and is positioned above a horizontal line.

Alain Sheer

Laura Riposo VanDruff

Megan Cox

Margaret Lassack

Ryan Mehm

John Krebs

Jarad Brown

Federal Trade Commission

600 Pennsylvania Ave., NW

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Electronic mail: [mcox1@ftc.gov](mailto:mcox1@ftc.gov)

*Complaint Counsel*

# Exhibit A



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

March 31, 2014

**VIA EMAIL**

William A. Sherman, II  
Dinsmore & Shohl LLP  
801 Pennsylvania Avenue, NW  
Suite 610  
Washington, DC 20004

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

Dear Mr. Sherman:

This letter relates to Respondent LabMD, Inc.'s Motion to Have Requests for Admission Deemed Admitted, filed on March 25, 2014.

Respondent's Counsel did not meet and confer with Complaint Counsel in advance of filing this Motion with the Court, and did not attach the "statement representing that counsel for the moving party ha[d] conferred with opposing counsel in an effort of good faith to resolve by agreement the issues raised by the motion and [w]as . . . unable to reach such an agreement," as required by Rule 3.22(g) and Additional Provision 4 of the Court's Scheduling Order. Had Respondent complied with its meet and confer obligations, Complaint Counsel is confident that the parties could have resolved the discovery issues that are the subject of the Motion without burdening the Court.

In an effort to resolve the issues raised in Respondent's Motion, Complaint Counsel has amended its responses to Respondent's Requests for Admission. Those amended responses are attached to this letter. Pursuant to Rule 3.32(c), Complaint Counsel intends to seek leave of the Court to amend its responses as reflected in the attached document. Complaint Counsel believes that the amendments to the responses should resolve all issues identified in Respondent's March 25<sup>th</sup> Motion.

If Respondent consents to the amendment of Complaint Counsel's responses as reflected in the attached document, please notify me at your earliest convenience. If Respondent does not consent to the amendment of Complaint Counsel's responses, or in the alternative, if Respondent will oppose Complaint Counsel's Motion, we seek a telephonic meet-and-confer regarding Complaint Counsel's Rule 3.32(c) Motion by 4:00 PM on Tuesday April 1, 2014.

William A. Sherman, II  
March 31, 2014  
Page 2

If I do not hear from you on the issue by 4:00 PM on April 1, Complaint Counsel will assume that Respondent opposes the Motion and proceed to file the Motion.

Sincerely,

A handwritten signature in cursive script that reads "Megan Cox". The signature is written in black ink and is positioned above the printed name.

Megan Cox

cc: Reed D. Rubinstein (*via email*)  
Michael D. Pepson (*via email*)  
Lorinda B. Harris (*via email*)  
Hallee K. Morgan (*via email*)  
Kent Huntington (*via email*)  
Sunni Harris (*via email*)  
Robyn Burrows (*via email*)  
Daniel Epstein (*via email*)

# Exhibit B

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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_____ )	
In the Matter of )	<b>PUBLIC</b>
)	
LabMD, Inc., )	Docket No. 9357
a corporation, )	
Respondent. )	
_____ )	

**COMPLAINT COUNSEL’S AMENDED RESPONSE TO LABMD, INC.’S FIRST SET OF REQUESTS FOR ADMISSION (NUMBERS 1-20)**

Pursuant to Sections 3.31 and 3.32 of the Federal Trade Commission’s Rules of Practice for Adjudicative Proceedings (“Rules of Practice”), Complaint Counsel hereby amends its responses to Respondent LabMD, Inc.’s First Set of Requests for Admission (“Respondent’s Requests”).

Complaint Counsel has not completed its discovery or its preparation for trial. Complaint Counsel’s answers to Respondent’s Requests are given without prejudice to Complaint Counsel’s right to produce information relating to any subsequently discovered facts. Complaint Counsel reserves the right to assert additional objections to Respondent’s Requests, and to amend or supplement these objections and responses as necessary after the close of discovery.

**General Objections**

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

1. Complaint Counsel objects to Respondent's definition of "Commission" and "FTC" as overly broad. The "Federal Trade Commission" (or "FTC") can act only by a majority vote of a quorum of the five Commissioners. Therefore, Complaint Counsel cannot answer these Requests on behalf of the "Federal Trade Commission" or any individual Commissioner or employee. The objections and responses to these requests are submitted on behalf of Complaint Counsel in this matter, and not on behalf of the "Federal Trade Commission," its employees, staff, agents, or attorneys other than Complaint Counsel.
2. Complaint Counsel objects to Respondent's Requests to the extent the Requests seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any Request, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Requests to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of Respondent. By responding to Respondent's Requests, Complaint Counsel does not waive or intend to waive, but rather reserves and intends to reserve: (a) any objections to the competency, relevance, materiality, privilege, or admissibility as evidence, for any purpose, of any information produced in response to Respondent's Requests; (b) the right to object on any ground to the use of information produced in response to Respondent's Requests at any hearing or trial; and (c) the right to object on any ground at any time to a demand for a further answer to Respondent's Requests.



4. Complaint Counsel objects to Respondent's Requests to the extent they are overly broad, vague, ambiguous, or unduly burdensome.
5. Complaint Counsel objects to Respondent's Requests to the extent they seek information or admissions that are beyond the scope of permissible discovery under Rule 3.31(c) of the Rules of Practice. Complaint Counsel is limiting its responses to the scope of discovery set forth in Rule 3.31(c).
6. Complaint Counsel objects to Respondent's Requests to the extent they seek information that relates to expert testimony prior to the dates prescribed by the October 22, 2013 Revised Scheduling Order.
7. Complaint Counsel objects to Respondent's Requests to the extent they seek to require Complaint Counsel to admit any Request based on information that is not within Complaint Counsel's possession, custody, or control.
8. Complaint Counsel objects to Respondent's Requests to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts for its responses and objections when such facts are known to Respondent and/or contained in the more than 15,000 pages of documents already produced by Respondent.
9. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to undertake legal research for Respondent.
10. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to analyze or organize information for Respondent.
11. The failure of Complaint Counsel to object to any Request on a particular ground may not be construed as a waiver of its right to object on any additional ground(s).

12. Complaint Counsel asserts that any admission contained in this response is for the purpose of the pending administrative proceeding only and is not an admission for any other purpose, nor may it be used in any other proceeding.

Each of the above-listed General Objections is incorporated by reference to each specific response and objection set forth below. Subject to and without waiving these objections, Complaint Counsel provides the following responses.

**Specific Responses and Objections**

Request for Admission No. 1

Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security, data security practices or data security standards for Protected Health Information (“PHI”) pursuant to its authority under 15 U.S.C. § 57a(a).

Response to Request for Admission No. 1

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission’s January 16, 2014 Order Denying Respondent LabMD’s Motion to Dismiss, Respondent’s Third and Fifth Defenses are no longer relevant to this administrative proceeding.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 1.

Request for Admission No. 2

Admit that between 2005 and the present the FTC has not prescribed any rules or promulgated regulations regarding data-security, data security practices or data security

standards for PHI that defines what acts are prohibited or required under Section 5 of the Federal Trade Commission Act (the “FTC Act”), 15 U.S.C. § 45 as related to PHI.

Response to Request for Admission No. 2

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission’s January 16, 2014 Order Denying Respondent LabMD’s Motion to Dismiss, Respondent’s Third and Fifth Defenses are no longer relevant to this administrative proceeding.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 2.

Request for Admission No. 3

Admit that the FTC does not issue advisory opinions regarding data-security practices the FTC believes to be forbidden or required by Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Request for Admission No. 3

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “advisory opinions,” “forbidden,” and “required.” For purposes of this response, Complaint Counsel understands the term “advisory opinions” to refer to advice or interpretation provided pursuant to Sections 1.1 through 1.4 of the Rules of Practice.

Complaint Counsel denies Request for Admission No. 3 to the extent that it suggests that “advisory opinions” are the only means the FTC uses to provide guidance regarding data security practices.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel otherwise admits Request for Admission No. 3.

Request for Admission No. 4

Admit that the FTC has not accused LabMD of committing a “deceptive act or practice” under Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Request for Admission No. 4

Complaint Counsel objects to this Request to the extent it seeks to foreclose, limit, or preclude any cause of action. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “accused.”

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits that its Complaint does not allege that Respondent committed a “deceptive act or practice” in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Request for Admission No. 5

Admit that the FTC’s Complaint does not specifically reference any industry standards for data-security practices, hardware or software necessary to avoid a violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

Response to Request for Admission No. 5

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. *See* Order Denying Respondent LabMD's Motion to Dismiss at 14, *In the Matter of LabMD, Inc.*, Docket No. 9357 (Jan. 16, 2014) (“information security is an ongoing process of assessing risk and vulnerabilities: no one static standard can assure appropriate security, as security threats and technology constantly evolve.”) (citation omitted). Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “industry standards.”

Complaint Counsel denies the Request to the extent that it suggests that Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), requires Complaint Counsel to allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel otherwise admits Request for Admission No. 5.

Request for Admission No. 6

Admit that the FTC has no evidence to dispute that LabMD has never been accused of violating either the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or the Health Information Technology for Economic and Clinical Health Act (HITECH) or any regulations implementing those statutes, including but not limited to as 65 Fed. Reg. 82,462, 82,463 (Dec. 28, 2000) (HIPAA Privacy Rule); 68 Fed. Reg. 8,334, 8,334 (Feb. 20, 2003) (HIPAA Security Rule); 78 Fed. Reg. 5,566, 5,639 (Jan. 25, 2013) (HHS HITECH rule).

Response to Request for Admission No. 6

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission's January 16, 2014 Order Denying Respondent LabMD's Motion to Dismiss, Respondent's Third Defense is no longer relevant to this administrative proceeding. Complaint Counsel further objects to this Request to the extent it seeks information protected from disclosure by the common interest, deliberative process, law enforcement, and work product privileges. Complaint Counsel further objects to this Request to the extent it seeks information outside its possession, custody or control. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "accused."

Request for Admission No. 7

Admit that the FTC has not accused LabMD of violating any rules or regulations not specifically referenced within the four corners of the FTC's Complaint.

Response to Request for Admission No. 7

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission's January 16, 2014 Order Denying Respondent LabMD's Motion to Dismiss, Respondent's Third Defense is no longer relevant to this administrative proceeding. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "accused."

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 7.

Request for Admission No. 8

Admit that HIPAA, HITECH, and regulations implementing those statutes are not mentioned in the FTC's Complaint.

Response to Request for Admission No. 8

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Following the Commission's January 16, 2014 Order Denying Respondent LabMD's Motion to Dismiss, Respondent's Third Defense is no longer relevant to this administrative proceeding.

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 8.

Request for Admission No. 9

Admit that the information contained in the "Day Sheets" and "P2P insurance aging file" referred to in paragraphs 20 and 21 of the Complaint constitute Protected Health Information (PHI), as that term is used in HIPAA, HITECH, and regulations implementing those statutes.

Response to Request for Admission No. 9

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request to the extent it seeks a legal conclusion regarding the application of HIPAA, HITECH and the regulations implementing those statutes.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits that the information contained

in the “Day Sheets” and the “P2P insurance aging file” includes personal information, as defined in Respondent’s Requests, and PHI.

Request for Admission No. 10

Admit that the FTC’s consent orders are only legally binding upon the parties thereto.

Response to Request for Admission No. 10

Complaint Counsel objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “consent orders” and “legally binding.”

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 10.

Request for Admission No. 11

Admit that the SANS Institute does not have lawful authority to create enforceable data-security standards.

Response to Request for Admission No. 11

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “data-security standards,” “lawful authority,” and “enforceable.”

Complaint Counsel denies Request for Admission No. 11 to the extent that it suggests that the “SANS Institute” is the only entity that provides guidance regarding data security practices.



Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel otherwise admits Request for Admission No. 11.

Request for Admission No. 12

Admit that the FTC did not allege that a person's data-security practices may constitute an "unfair act or practice" that violates Section 5 of the FTC Act, 15 U.S.C. § 45, until after Congress last amended Section 5 to add 15 U.S.C. § 45(n) in 1994.

Response to Request for Admission No. 12

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice.

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 12.

Request for Admission No. 13

Admit that the FTC's "Guides for Business" relating to data security, including but not limited to the FTC document entitled "Peer-to-Peer File Sharing: A Guide for Business" and "Protecting Personal Information: A Guide to Business," are not legally binding upon any U.S. company.

Response to Request for Admission No. 13

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "legally binding."

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 13.

Request for Admission No. 14

Admit that none of the documents available on the Internet on the FTC's "Bureau of Consumer Protection Business Center's" self-described "Legal Resources" website, <http://business.ftc.gov/legal-resources/all/35>, including but not limited to consent orders and FTC "Guides for Business," establish specific data-security practices which any U.S. company must adopt to comply with 15 U.S.C. § 45(a), (n).

Response to Request for Admission No. 14

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. Complaint Counsel further objects to the form of this Request. Complaint Counsel further objects to this Request as overly broad. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "consent orders" and "adopt."

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel denies Request for Admission No. 14. A party subject to an order must comply with the specific requirements set forth in that order.

Request for Admission No. 15

Admit that the FTC has no complaining witness who says that his or her data was released or disclosed as the result of LabMD's allegedly unlawful data-security practices.

Response to Request for Admission No. 15

Complaint Counsel objects to this Request to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the opinions of expert witness(es). Complaint Counsel further objects that this Request calls for expert opinions and is not an appropriate subject for this manner of discovery. Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “released” and “disclosed.”

Complaint Counsel denies Request for Admission No. 15 to the extent that it suggests that no consumers were harmed or likely to be harmed as a result of Respondent’s unfair acts or practices.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 15.

Request for Admission No. 16

Admit that Complaint Counsel was aware of the trailer to Mr. Michael Daugherty’s book, *The Devil Inside the Beltway*, available at website <http://michaeljdaugherty.com/2013/07/19/the-devil-inside-the-beltway-book-trailer/>, prior to July 23, 2013.

Response to Request for Admission No. 16

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice. The suggestion that the FTC retaliated against Respondent in response to Respondent’s speech is not relevant to this administrative proceeding. *See* Order Denying Respondent’s Motion for a 3.36 Subpoena at 6, *In the Matter of*

*LabMD, Inc.*, Docket No. 9357 (Feb. 21, 2014) (“Documents that may be reasonably expected to show whether or not ‘the FTC violated Daugherty’s First Amendment rights by retaliating against LabMD’ in filing this Complaint are not relevant to the allegations of the Complaint, the proposed relief, or the defenses of Respondent.”). Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of “aware.”

Request for Admission No. 17

Admit that a FTC document entitled “Peer-To-Peer File Sharing: A Guide For Business,” available at <http://business.ftc.gov/documents/bus46-peer-peer-file-sharing-guide-business>, was not made publicly available on the Internet or otherwise published until January 2010.

Response to Request for Admission No. 17

Complaint Counsel objects to this Request as seeking an admission irrelevant to any permissible claim or defense in this administrative proceeding and outside the scope of discovery pursuant to Section 3.31(c) of the Rules of Practice.

Subject to and without waiving the foregoing objection and General Objections, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 17.

Request for Admission No. 18

Admit that Complaint Counsel has no evidence to dispute that LabMD's “Day Sheets,” which are referenced in paragraph 21 of the Complaint, did not exist in an electronic form that could be transmitted via the Internet in October 2012.

Response to Request for Admission No. 18

Complaint Counsel objects to this Request as premature because discovery and trial preparation are not complete. Complaint Counsel further objects to this Request to the extent it requires an extensive and complete investigation of all the evidence in this administrative

proceeding. Complaint Counsel further objects that the Request requires Complaint Counsel to analyze the evidence for Respondents.

Subject to and without waiving the foregoing objections and General Objections, and to the extent further response is required, Complaint Counsel, after reasonable inquiry, lacks sufficient information to admit or deny Request for Admission No. 18. LabMD's "Day Sheets" were in the possession of identity thieves in Sacramento, CA on October 5, 2012, and, prior to October 5, 2012, they were transferred from LabMD's possession into the identity thieves' possession. Complaint Counsel has not yet established how the "Day Sheets" were transferred from LabMD's possession to the identity thieves' possession. LabMD implemented a data archive project to save paper documents in an electronic format. The "Day Sheets" may have been saved in an electronic form that could have been transmitted via the Internet.

Request for Admission No. 19

Admit that the FTC cannot identify a single person it believes to be a "consumer" within the meaning of the Section 5 of the FTC Act who has experienced harm to their identity or finances as a result of LabMD's allegedly unlawful data-security practices.

Response to Request for Admission No. 19

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

Complaint Counsel denies Request for Admission No. 19 to the extent that it suggests that no consumers were harmed or likely to be harmed as a result of Respondent's unfair acts or practices.

Subject to and without waiving the foregoing objections, General Objections, and denial, and to the extent further response is required, Complaint Counsel admits Request for Admission No. 19.

Request for Admission No. 20

Admit that the FTC obtained the 1,718 File from Tiversa, Inc.

Response to Request for Admission No. 20

Complaint Counsel objects to Respondent's definition of the "1,718 File." Respondent defines the "1,718 File" to mean "the 1,718 page file owned by LabMD that the Company claimed in 2008 to have obtained from LabMD via Limewire." The definition of the "1,718 File" is vague and ambiguous as to "Company," "obtained," and "claimed." Complaint Counsel further objects to Respondent's characterization that the "1,718 File" was "obtained" from LabMD. The evidence in this administrative proceeding does not support this characterization. For purposes of this response, Complaint Counsel understands the term "1,718 File" to mean the 1,718 page file owned by LabMD that Tiversa Holding Corp. found at four different IP addresses. These documents have been produced by Tiversa Holding Corp. at TIVERSA-FTC\_RESPONSE-000001 – 001719, TIVERSA-FTC\_RESPONSE-001720 – 003438, TIVERSA-FTC\_RESPONSE-003439 – 005157, and TIVERSA-FTC\_RESPONSE-005158 – 006876.

Complaint Counsel further objects to this Request on the grounds that it is vague and ambiguous as to the meaning of "Tiversa, Inc." and "obtained." For purposes of this response, Complaint Counsel understands the term "Tiversa, Inc." to refer to Tiversa, as defined in Respondent's Requests.

Subject to and without waiving the General Objections, and to the extent further response is required, Complaint Counsel admits that: (1) as part of Complaint Counsel's Part II investigation of LabMD, it issued a CID to the Privacy Institute and received the 1,718 file, which has been produced at FTC-PRI-000001 – FTC-PRI-001719; and (2) as part of this administrative proceeding, it issued a subpoena *duces tecum* to Tiversa Holding Corp. and received four 1,718 files downloaded from four different IP addresses. These documents have been produced at TIVERSA-FTC\_RESPONSE-000001 – 001719, TIVERSA-FTC\_RESPONSE-001720 – 003438, TIVERSA-FTC\_RESPONSE-003439 – 005157, and TIVERSA-FTC\_RESPONSE-005158 – 006876.