

ORIGINAL



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

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

**ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO AMEND DISCOVERY RESPONSES AND DENYING WITHOUT PREJUDICE RESPONDENT'S MOTION TO HAVE REQUESTS FOR ADMISSION DEEMED ADMITTED**

**I.**

On March 25, 2014, Respondent filed a Motion to Have Requests for Admission Deemed Admitted ("Respondent's Motion"). Federal Trade Commission ("FTC") Complaint Counsel filed an opposition to the Motion on April 4, 2014 ("Complaint Counsel's Opposition").

On April 1, 2014, Complaint Counsel filed a Motion to Amend Complaint Counsel's Response to Respondent's First Set of Requests for Admission ("Complaint Counsel's Motion"), along with the proposed amended Response. Respondent filed an opposition on April 11, 2014 ("Respondent's Opposition").

As explained below, Complaint Counsel's Motion is GRANTED and Respondent's Motion is DENIED WITHOUT PREJUDICE.

**II.**

On February 19, 2014, Respondent served its First Set of Requests for Admission ("RFAs") on Complaint Counsel. Complaint Counsel served its response on March 3, 2014 ("Initial Responses"). See 16 C.F.R. § 3.32(b)(requiring responses to requests for admission be served within 10 days). Respondent's Motion asserts that Complaint Counsel's Initial Responses are deficient because: (1) Complaint Counsel asserted improper objections to RFAs 1 and 2, and did not otherwise admit or deny these RFAs; and (2) as to RFAs 3, 5, 11, 13, 15, 17, and 19, Complaint Counsel's responses were "evasive" and responded to questions that were not asked. Therefore, Respondent argues, the subjects of these RFAs should be deemed admitted as facts in this matter, pursuant to FTC Rule 3.32(b).

In apparent response to Respondent's Motion, Complaint Counsel filed its Motion to amend the responses at issue, along with proposed amended responses, on April 1, 2014 ("Amended Responses"). Complaint Counsel contends that the proposed Amended Responses

admit each Request identified as deficient by Respondent in its Motion, thereby providing Respondent the relief it has requested. In response to Complaint Counsel's Motion, Respondent asserts that Complaint Counsel should have provided "good faith" RFA responses at the outset; that the Amended Responses are themselves deficient, and that Respondent has suffered prejudice as a result. Accordingly, Respondent maintains, it is "just and appropriate" to deem the subject RFAs admitted.

### III.

#### A. Complaint Counsel's Motion to Amend

As authority for seeking to amend its Initial Responses, Complaint Counsel cites FTC Rule 3.32(c), which states:

(c) Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

16 C.F.R. § 3.32(c).

Under the plain language of Rule 3.32(c), the Administrative Law Judge may allow amendment of "[a]ny matter *admitted* under this rule . . ." (emphasis added). In the instant case, the RFAs that Complaint Counsel seeks to amend were *not* admitted, and the issue is whether Complaint Counsel may now be permitted to change its Initial Responses and admit these RFAs. Accordingly, Rule 3.32(c) is not applicable to Complaint Counsel's Motion. Notwithstanding the foregoing, however, Complaint Counsel's Motion is within the scope of the general powers and duties of the Administrative Law Judge, pursuant to Rule 3.42(c) ("Administrative Law Judges shall have the duty . . . to take all necessary action to avoid delay . . . [and] have all powers necessary to that end, including" among others, to regulate the course of the hearings and to consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding).

Based on the foregoing, Complaint Counsel will be allowed to amend its responses in accordance with the proposed Amended Responses. To the extent that the Amended Responses admit facts in issue, the Amended Responses will help narrow the issues for trial and advance presentation of the merits. Moreover, Respondent has failed to explain why it would be prejudiced by allowing the proposed amendments. Respondent contends that Complaint Counsel should have admitted the subject RFAs at the outset, and Complaint Counsel's swift attempt to admit these same RFAs after receiving Respondent's Motion appears to acknowledge this failing. However, the desire to "punish" Complaint Counsel for the Initial Responses is not a sufficient reason for denying a request to amend, especially where, as here, the denying party seeks now to amend with admissions. Respondent fails to demonstrate how proposed admissions can be prejudicial to Respondent.

Respondent further contends that the proposed Amended Responses contain deficiencies; however, Respondent's assertions in this regard are not properly presented or briefed, as noted below, and therefore should not form the basis for precluding Complaint Counsel from providing the Amended Responses.

For all these reasons, Complaint Counsel's Motion to Amend is GRANTED.

**B. Respondent's Motion to Have RFAs Deemed Admitted, based on Initial Responses.**

As a preliminary matter, Complaint Counsel urges that Respondent's Motion should be denied for failure to "meet and confer" with Complaint Counsel regarding the Initial Responses, in advance of filing its Motion to deem the RFAs admitted. Rule 3.22(g) of the Commission's Rules of Practice requires that "each motion to compel or determine sufficiency pursuant to § 3.38(a) . . . shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement."<sup>1</sup> 16 C.F.R. §3.22(g). Furthermore, Additional Provision 4 of the Scheduling Order issued in this case makes clear that motions that fail to include a statement representing that counsel for the moving party has conferred with opposing counsel to attempt to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement, may be denied on that ground.

Counsel for parties moving to determine the sufficiency of discovery responses have a duty to make reasonable efforts to confer with opposing counsel in advance on the issues raised by the motion. 16 C.F.R. § 3.22(g); *In re Lab Corp.*, 2011 FTC LEXIS 26, at \*6 (Feb. 8, 2011) (holding that a single email to counsel, sent on a Sunday, one calendar day before filing a motion to compel, without awaiting a response to that email, does not constitute a good faith effort to resolve by agreement the issues raised by the motion). Here, it is undisputed that Respondent filed the instant Motion without first meeting and conferring with Complaint Counsel in an attempt to resolve the matter, as required by Rules and the Scheduling Order.<sup>2</sup> To move to have requests deemed admitted without first providing Complaint Counsel an opportunity to cure the deficiencies is, if not in direct contravention of the Rules, an inefficient use of judicial resources that might have been avoided.

Because, pursuant to this Order, Complaint Counsel's Initial Responses have been amended, it is inappropriate to adjudicate the sufficiency of the Initial Responses. It is also inappropriate to address and resolve Respondent's assertions of deficiencies in the Amended Responses since Respondent raises those asserted deficiencies without sufficient specificity, through Respondent's Opposition to Complaint Counsel's Motion, and Complaint Counsel has not had an opportunity to respond.


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<sup>1</sup> Rule 3.38(a) authorizes a motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to a request for admission under § 3.32. 16 C.F.R. § 3.38(a).

<sup>2</sup> Complaint Counsel's Motion to Amend includes a Rule 3.22(g) certificate stating that it wrote a letter to Respondent's counsel in an attempt to obtain Respondent's consent to the Motion prior to filing, but that Respondent did not respond by the deadline requested in the letter.

Accordingly, for all the foregoing reasons, Respondent's Motion is DENIED; however, this denial is WITHOUT PREJUDICE to Respondent's rights with respect to the Amended Responses, if any, provided under FTC Rules of Practice. The parties shall meet and confer in an attempt to resolve disputes prior to filing any future motions, pursuant to FTC Rule 3.22(g) and the Scheduling Order. Failure to comply with these obligations may result in such motions being summarily denied.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: April 15, 2014