

ORIGINAL

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

RESPONDENT LabMD, Inc.'s MOTION TO COMPEL TESTIMONY

Respondent LabMD, Inc., hereby respectfully moves the Court for an order compelling Complaint Counsel ("CC") to cause its rule 3.33 witness to appear and provide testimony regarding the data security standards that the Bureau of Consumer Protection ("BCP") has published and intends to use at the Hearing in this matter to establish that LabMD's data security was inadequate. Such evidence goes directly to Respondent's defense of fair notice and the defense that LabMD's data security was adequate.

BACKGROUND

This Court's March 10, 2014 Order denied in part Complaint Counsel's Motion for protective Order regarding Respondent's Rule 3.33 Notice of Deposition. Ultimately, this Order allows Respondent to proceed with a Rule 3.33 deposition of the BCP. As per the Court's order and agreement of the parties, the deposition of Complaint Counsel's designee convened at FTC headquarters at 600 Pennsylvania Avenue, N.W., Washington, D.C on April 14, 2014.

During the deposition, Respondent's counsel attempted to question the designee about the data security standards the BCP published during the relevant period of 2005 to 2010 which the Bureau plans to use at the hearing to establish that LabMD's data security was inadequate. Complaint Counsel objected and instructed the designee not to answer the questions, arguing that the subject matter of the question

was beyond the scope of the Court's aforementioned Order. Deposition of Daniel Kaufman, Apr. 14, 2014, at 115-139, attached hereto as Exh. 1. For example Respondent's Counsel asked Mr. Kaufman, "Based on the allegations in paragraph 10(a), my question is has the Bureau or the FTC published, and by published I mean made available to the public, the standard that it requires for a comprehensive information security program for companies like LabMD to have in place?" Complaint Counsel objected to the question stating, "I object to the question because it exceeds the bounds of the Court's March 10th, 2014 protective order, and I am instructing Mr. Kaufman to not answer the question. . ." *Id.* at 119.

Respondent disagrees with Complaint Counsel's interpretation of the Court's Order. Respondent's position is that such evidence goes directly to Respondent's defense of fair notice, the defense that LabMD's data security was adequate, and the Court's Order permits the line of questioning at issue and only limits inquiry in this area to the extent it seeks the Bureau's legal standards for reasonableness. *See* Court's March 10, 2014 Order, attached hereto as Exh 2.

Respondent respectfully requests this Court for an Order requiring Complaint Counsel to produce its Rule 3.33 designee and require him to answer questions regarding the data security standards that the Bureau has published and intends to use at the Hearing in this matter to establish that LabMD's data security was inadequate during the relevant time period from January 2005 through the present.

CONCLUSION

For the reasons stated above, this Court should grant in its entirety Respondent LabMD, Inc's motion to compel the Bureau's Rule 3.33 witness to appear and testify accordingly.

Dated: April 22, 2014

Respectfully submitted,



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

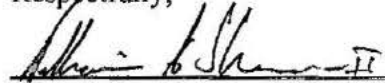
Daniel Z. Epstein
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: (202) 499-4232
Facsimile: (202) 330-5842
Email: daniel.epstein@causeofaction.org
Counsel for Respondent

STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)
AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER

Respondent respectfully submits this Statement, pursuant to F.T.C. Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Compel Testimony, Respondent met and conferred with Complaint Counsel, in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach an agreement. Respondent Counsel William Sherman engaged in a meet-and-confer with Complaint Counsel Laura VanDruff and Alain Sheer on Friday, April 18, at approximately 12:15 pm at the Federal Trade Commission Office, 600 Pennsylvania Avenue, NW, Washington, DC 20580, regarding Complaint Counsel's refusal to allow their R. 3.33 witness to provide testimony pursuant to this Court's March 10, 2014 Order. Despite good faith efforts, an agreement was unable to be reached.

Dated: April 22, 2014

Respectfully,


William A. Sherman, II, Esq.

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

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

**[PROPOSED] ORDER GRANTING LabMD, Inc.'s MOTION TO COMPEL
TESTIMONY**

Upon consideration of Respondent LabMD, Inc.'s Motion to Compel Testimony, and in consideration of the entire Record in this matter, IT IS HEREBY ORDERED that LabMD, Inc.'s Motion to Compel is GRANTED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that on April 22, 2014, 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 on April 22, 2014, 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: April 22, 2014

By: 
William A. Sherman, II

EXHIBIT 1

1 to allegations of consumer injury. So you can
2 answer to the extent you know.

3 THE WITNESS: Yeah, I do think that
4 the allegations all focus on natural persons, so
5 yes.

6 MR. SHERMAN: Okay. I need to take a
7 break.

8 (A recess was taken at 2:32 p.m., after
9 which the deposition resumed at 2:40 p.m.)

10 MR. SHERMAN: Back on the record. I
11 want to place this on the record, counsel.

12 My next line of inquiry would be to
13 question Mr. Kaufman and the Bureau about the
14 data security standards that they are going to
15 use to basically demonstrate that LabMD
16 participated in an unfair practice.

17 It is my understanding that you have
18 made an objection to that line of inquiry.

19 MS. VAN DRUFF: I believe that the
20 Court had made a determination that that line of
21 inquiry is not permissible.

22 MR. SHERMAN: Okay. I think I just

1 want to place on the record that I disagree with
2 your objection. I believe that what the Court
3 stated was that we could not require -- inquire
4 generally into legal standards, and this is on
5 page 7, second -- the first full paragraph, that
6 we could not -- that we could not inquire
7 generally into the legal standards of the FTC
8 used in the past, and it is currently using to
9 determine whether an entity's data security
10 practices are unfair under Section 5.

11 I do not believe that it prevents us
12 from inquiring about the data security
13 standards. And that is where I want to go next
14 with Mr. Kaufman. And I understand you may have
15 an objection, but I submit that for your
16 consideration.

17 MS. VAN DRUFF: And you are drawing a
18 distinction between the language on page 7 of
19 the Court's March 10th order and the language on
20 page 9 at numbered paragraph 3 of the Court's
21 order; is that correct?

22 MR. SHERMAN: Yes. I am not asking

1 about their decision-making. I want to know
2 what standard LabMD is going to be held to
3 throughout the period.

4 The data security standard, not the
5 legal standard, not reasonableness.

6 MS. VAN DRUFF: Okay. And so to be
7 clear, counsel, if you were to frame your
8 question in terms of the factual bases of the
9 allegations of paragraph 10, which has several
10 subparagraphs, I may be able to permit Mr.
11 Kaufman to answer, but otherwise -- and that is
12 consistent with the Court's holding on page 6 of
13 the March 10th opinion.

14 MR. SHERMAN: The other question,
15 counsel, is given your narrow interpretation of
16 the Judge's order, I know that you have probably
17 prepared your witness based on your
18 interpretation of that order. Is Mr. Kaufman
19 prepared to respond to questions which would ask
20 him what the data security standards are for
21 certain time periods that LabMD will be measured
22 up against?

1 MS. VAN DRUFF: I can't begin to
2 answer that question in the abstract. I would
3 need to know what the question was, and then
4 that may go to a privilege, so I don't know that
5 I can submit to you whether Mr. Kaufman was
6 prepared on a specific subject or not by
7 counsel.

8 MR. SHERMAN: Okay.

9 BY MR. SHERMAN:

10 Q. Mr. Kaufman, paragraph 10 of the
11 Bureau's complaint indicates that at all
12 relevant times LabMD engaged in a number of
13 practices that taken together failed to provide
14 reasonable and appropriate security for personal
15 information on its computer networks.

16 Among other things in paragraph A it
17 says that, it alleges that LabMD did not
18 develop, implement, or maintain a comprehensive
19 information security program to protect
20 consumers' personal information.

21 And I am reading from the complaint.
22 Do you have a copy of the complaint?

1 A. No.

2 Q. We didn't provide you with a copy of
3 the complaint? I had a copy of the complaint
4 for everyone.

5 (Deposition Exhibit Number RX-9 was marked
6 for identification.)

7 MS. VAN DRUFF: I'm sorry, counsel,
8 was there a question pending?

9 MR. SHERMAN: No. I wanted to make
10 sure that the witness had a copy of the
11 complaint in front of him.

12 BY MR. SHERMAN:

13 Q. Based on the allegations in paragraph
14 10(a), my question is has the Bureau or the FTC
15 published, and by published I mean made
16 available to the public, the standard that it
17 requires for a comprehensive information
18 security program for companies like LabMD to
19 have in place?

20 MS. VAN DRUFF: I object to the
21 question because it exceeds the bounds of the
22 Court's March 10th, 2014 protective order, and I

1 am instructing Mr. Kaufman to not answer the
2 question.

3 If you would like to reframe the
4 question as it relates to paragraph 10(a), in
5 terms of the factual bases of Complaint
6 counsel's allegations, I will permit Mr. Kaufman
7 to answer.

8 MR. SHERMAN: Okay.

9 BY MR. SHERMAN:

10 Q. So is there a factual bases for the
11 allegation that LabMD did not develop,
12 implement, or maintain a comprehensive
13 information security program that met the data
14 security standards set out by the Bureau during
15 the year of 2005?

16 MS. VAN DRUFF: And I would make the
17 same objection and the same instruction. Again,
18 at note 6 of the Court's order, the Judge
19 acknowledges that it has already -- that, I'm
20 sorry, the Court has rejected LabMD's argument
21 that it is entitled to discovery of the
22 standards the Commission used in the past and is

1 currently using to determine whether an entity's
2 data security practices violate Section 5.

3 So if you would like to inquire of Mr.
4 Kaufman the factual bases of the allegation of
5 paragraph 10(a), you may ask that question, but
6 as it relates to standards, I will instruct Mr.
7 Kaufman --

8 MR. SHERMAN: I want to know -- I am
9 not going to change my question.

10 BY MR. SHERMAN:

11 Q. I want to know what the data security
12 standards are, okay, and were for the year 2005,
13 that the Bureau published and made known to
14 companies like LabMD with regard to
15 implementing, developing, maintaining a
16 comprehensive information security program to
17 protect consumers' personal information?

18 MS. VAN DRUFF: And I am lodging the
19 same objection. That question exceeds the
20 bounds of the Court's protective order. And I
21 am instructing Mr. Kaufman to not answer the
22 question.

1 BY MR. SHERMAN:

2 Q. And I would ask the same question for
3 the year 2005, 2006, 2007, 2008, 2009, 2010, and
4 through the years to the present for each
5 subcategory in paragraph 10.

6 So, in other words, my question is
7 were the data security standards published and
8 made known to companies like LabMD that the
9 Bureau and/or the FTC made known that establish
10 what a company should do and to what extent it
11 should develop, implement, and maintain a
12 comprehensive information security program to
13 protect consumers' personal information? I
14 would go to subparagraph 10(b), what did the
15 Bureau do and what were the standards that the
16 Bureau published and made known to companies
17 like LabMD requiring them to use readily
18 available measures to identify commonly known or
19 reasonably foreseeable security risks and
20 vulnerabilities on its networks from the year
21 2005 through the present, and I would ask a
22 similar question for each subcategory in

1 paragraph 10.

2 And so is it still your position that
3 you would object to each of those questions and
4 instruct Mr. Kaufman not to answer?

5 MS. VAN DRUFF: Without a pending
6 question, I don't know that I can respond to
7 that, but what I can tell you is the question as
8 it is formulated as I understand it relating to
9 A and B exceeds the bounds of the Court's March
10 10th, 2014 protective order, and I am
11 instructing Mr. Kaufman to not answer that
12 question.

13 MR. SHERMAN: I will go through each
14 question then, okay?

15 MS. VAN DRUFF: Okay.

16 BY MR. SHERMAN:

17 Q. So just to be clear, Mr. Kaufman, I
18 would like to know what are the data security
19 standards that were published in any way, shape,
20 form, or fashion by the Bureau or the FTC that
21 were available and were made known to companies
22 like LabMD about what the FTC's standards or

1 requirements were for the use of readily
2 available measures or what those readily
3 available measures to identify commonly known
4 and reasonably foreseeable security risks and
5 vulnerabilities on its networks were? Can you
6 answer that question?

7 And please keep in mind I am asking
8 for an answer that would encompass the time
9 period of 2005 through the present.

10 MS. VAN DRUFF: And I object to the
11 question on the basis that it is vague,
12 ambiguous, and compound, and that it most
13 importantly exceeds the bounds of the Court's
14 March 10th, 2014 protective order, which limited
15 the topics of this deposition. And I am
16 instructing Mr. Kaufman to not answer the
17 question.

18 BY MR. SHERMAN:

19 Q. Mr. Kaufman, can you tell us what data
20 security standards were published by the Bureau
21 or the FTC to make known to companies like LabMD
22 what the Bureau or the FTC expected in terms of

1 data security standards for that company as it
2 relates to the adequate measures to prevent
3 employees from accessing personal information
4 not needed to perform their jobs?

5 MS. VAN DRUFF: I object to the
6 question because it exceeds the bounds of the
7 Court's March 10th, 2014 protective order
8 insofar as it does not relate to any of the four
9 topics noticed by Respondent and limited by the
10 Court's order, and I am instructing Mr. Kaufman
11 to not answer the question.

12 BY MR. SHERMAN:

13 Q. And, again, I would couch that
14 question for the period of 2005 through the
15 present, and I would note your objection.

16 MS. VAN DRUFF: The same objection,
17 same instruction to not answer the question
18 because it exceeds the bounds of the protective
19 order.

20 BY MR. SHERMAN:

21 Q. Mr. Kaufman, can you tell us what the
22 data security standards are that the FTC

1 published or made known to companies like LabMD
2 which would establish a standard for companies
3 like LabMD to adequately train employees to
4 safeguard personal information from 2005 through
5 the present?

6 MS. VAN DRUFF: Object to the question
7 on the basis that it exceeds the bounds of the
8 Court's March 10th, 2014 protective order. And
9 I am instructing Mr. Kaufman to not answer the
10 question.

11 BY MR. SHERMAN:

12 Q. Mr. Kaufman, what is the standard that
13 the FTC has established, published, and put
14 forth which informs companies like LabMD what
15 the FTC expects with regard to that company's
16 requiring employees or other users with remote
17 access to the networks to use commonly
18 authenticated -- I'm sorry, common
19 authentication-related security measures such as
20 periodically changing passwords, prohibiting the
21 use of the same password across applications and
22 programs, or using two-factor authentication?

1 MS. VAN DRUFF: I object to the
2 question because it exceeds the bounds of the
3 Court's March 10, 2014 protective order. And I
4 am instructing Mr. Kaufman to not answer the
5 question.

6 BY MR. SHERMAN:

7 Q. From the period of 2005 through 2010.
8 I'm sorry, from 2005 to the present. And I note
9 your objection.

10 MS. VAN DRUFF: Same objection,
11 continued instruction. Thank you, counsel.

12 BY MR. SHERMAN:

13 Q. Mr. Kaufman, what are the standards,
14 the data security standards established by the
15 Bureau or the FTC which the Bureau has made
16 known or published and made known to companies
17 like LabMD advising them that the FTC's
18 expectation -- advising them as to what the
19 FTC's expectations were with regard to
20 maintaining and updating operating systems of
21 computers and other devices on its networks, for
22 example, on some computers, Respondent used

1 operating systems that were unsupported by the
2 vendor.

3 Were there any such data security
4 standards and regulations published and made
5 known by the Bureau or the FTC which would
6 advise a company like LabMD what those standards
7 were?

8 MS. VAN DRUFF: Object to the
9 question, which is compound and ambiguous, but
10 also because it exceeds the bounds of the
11 Court's March 10th, 2014 protective order. And
12 I am instructing Mr. Kaufman to not answer the
13 question.

14 BY MR. SHERMAN:

15 Q. And I would include from 2010 through
16 the present.

17 MS. VAN DRUFF: It is the same
18 instruction, same objection.

19 BY MR. SHERMAN:

20 Q. Mr. Kaufman, what are the data
21 security standards established or published,
22 and/or published by the FTC which would inform a

1 company such as LabMD what the FTC's
2 expectations were with regard to that company
3 employing readily available measures to prevent
4 or detect unauthorized access to personal
5 information on its computer networks from 2005
6 through the present?

7 MS. VAN DRUFF: Object to the question
8 because it exceeds the bounds of the Court's
9 March 10th, 2014 protective order. And I am
10 instructing Mr. Kaufman to not answer the
11 question.

12 BY MR. SHERMAN:

13 Q. Mr. Kaufman, has the FTC or the Bureau
14 informed entities like LabMD that the FTC
15 expects or requires them to have a comprehensive
16 information security program?

17 MS. VAN DRUFF: I object to the
18 question because it exceeds the bounds of the
19 Court's protective order. And I am instructing
20 Mr. Kaufman to not answer the question.

21 BY MR. SHERMAN:

22 Q. Mr. Kaufman, has the Bureau or the FTC

1 informed entities like LabMD that the FTC
2 expects and/or requires them to use readily
3 available measures to identify commonly known or
4 reasonably foreseeable security risks and
5 vulnerabilities on its networks?

6 MS. VAN DRUFF: I object to the
7 question because it exceeds the bounds of the
8 Court's March 10th, 2014 protective order, and I
9 am instructing Mr. Kaufman not to answer.

10 BY MR. SHERMAN:

11 Q. Mr. Kaufman, has the FTC informed
12 entities like LabMD that the FTC expects or
13 requires them to use adequate measures to
14 prevent employees from assessing personal
15 information not needed to perform their jobs?

16 MS. VAN DRUFF: I object to the
17 question because it exceeds the bounds of the
18 Court's March 10th, 2014 protective order, and I
19 am instructing Mr. Kaufman to not answer the
20 question.

21 BY MR. SHERMAN:

22 Q. Mr. Kaufman, has the Bureau or the FTC

1 informed entities like LabMD that the FTC
2 expects or requires them to use appropriate
3 measures to prevent employees from installing on
4 their computers applications or materials that
5 were not needed to perform their jobs?

6 MS. VAN DRUFF: I object to the
7 question because it exceeds the bounds of the
8 Court's March 10th, 2014 protective order, and I
9 am instructing Mr. Kaufman to not answer the
10 question.

11 BY MR. SHERMAN:

12 Q. Mr. Kaufman, has the Bureau or the FTC
13 informed entities like LabMD that the FTC
14 expects or requires them to use appropriate
15 measures to adequately maintain or review
16 records of activities on their networks?

17 MS. VAN DRUFF: Object to the question
18 because it exceeds the bounds of the Court's
19 March 10th, 2014 protective order, and I am
20 instructing Mr. Kaufman to not answer the
21 question.

22 BY MR. SHERMAN:

1 Q. Mr. Kaufman, where can a company like
2 LabMD find the Bureau's or the FTC's data
3 security standards which will inform a company
4 like LabMD what the FTC or the Bureau expects
5 with regard to that company's data security?

6 MS. VAN DRUFF: I object to the
7 question because it exceeds the bounds of the
8 Court's March 10th, 2014 protective order, and I
9 am instructing Mr. Kaufman to not answer the
10 question.

11 BY MR. SHERMAN:

12 Q. Mr. Kaufman, with regard to data
13 security standards, does the Bureau or the FTC
14 have the authority to enforce HIPAA?

15 MS. VAN DRUFF: Objection, counsel.
16 Are you grounding any -- are you grounding your
17 question in any of the topics noticed by
18 Respondent or as limited by the Court's March
19 10th, order?

20 MR. SHERMAN: Yes. And it is the
21 objectionable topic of data security standards.

22 MS. VAN DRUFF: I see.

1 MR. SHERMAN: The topic which you have
2 been objecting to.

3 MS. VAN DRUFF: Thank you, counsel.
4 May I have the question read back, please?

5 THE REPORTER: "Question: Mr.
6 Kaufman, where can a company like LabMD find the
7 Bureau's or the FTC's data security standards
8 which will inform a company like LabMD what the
9 FTC or the Bureau expects with regard to that
10 company's data security?"

11 MS. VAN DRUFF: I object to the
12 question because it exceeds the bounds of the
13 Court's March 10th, 2014 protective order, and I
14 am instructing Mr. Kaufman to not answer the
15 question.

16 BY MR. SHERMAN:

17 Q. With regard to data security, does the
18 Bureau or the FTC have the authority to enforce
19 HITECH?

20 MS. VAN DRUFF: I object to the
21 question because it exceeds the bounds of the
22 Court's March 10th, 2014 protective order, and I

1 am instructing Mr. Kaufman to not answer the
2 question.

3 MR. SHERMAN: Can we go off the
4 record?

5 MS. VAN DRUFF: Certainly.

6 MR. SHERMAN: I need to take a break
7 and consult with my counsel.

8 MS. VAN DRUFF: Of course.

9 (A recess was taken at 3:05 p.m., after
10 which the deposition resumed at 3:06 p.m.)

11 BY MR. SHERMAN:

12 Q. Mr. Kaufman, I am going to show you
13 what has been marked as RX-10, which for the
14 record is the expert report of Raquel Hill.

15 (Deposition Exhibit Number RX-10 was marked
16 for identification.)

17 BY MR. SHERMAN:

18 Q. Have you seen that document before?

19 A. Yes.

20 Q. Are the requirements set out in
21 Professor Hill's report what the Bureau will
22 measure LabMD's performance in terms of its data

1 security against at the hearing?

2 MS. VAN DRUFF: I'm sorry, I am going
3 to need the question read back.

4 THE REPORTER: "Question: Are the
5 requirements set out in Professor Hill's report
6 what the Bureau will measure LabMD's performance
7 in terms of its data security against at the
8 hearing?"

9 MS. VAN DRUFF: And, counsel, not
10 trying to be difficult but, of course, the
11 Bureau is not the fact finder at the hearing, so
12 is your question what the Bureau's standard will
13 be at the hearing?

14 BY MR. SHERMAN:

15 Q. Well, my question is you would agree
16 that in Professor Hill's report, there are
17 several descriptions of what Professor Hill
18 opines to be adequate data security measures
19 that should have been taken by LabMD in order to
20 adequately protect the information that it
21 possessed, correct?

22 MS. VAN DRUFF: Objection, Professor

1 Hill's report speaks for itself, but you may
2 answer the question.

3 THE WITNESS: That's my understanding,
4 yes.

5 BY MR. SHERMAN:

6 Q. Okay. And you have read the -- you
7 have reviewed the report, correct?

8 A. Correct.

9 Q. Okay. My question is is that the data
10 security standard that LabMD will be held to in
11 terms of whether or not its data security
12 practices and procedures from 2005 through, I
13 think, July of 2010, is that what -- is that the
14 standard that LabMD will be held to at the
15 hearing?

16 MS. VAN DRUFF: And, counsel,
17 questions relating to standards exceed the
18 bounds of the Court's March 10th, 2014
19 protective order. To the extent you want to
20 rephrase your question as it relates to factual
21 bases for the allegations of paragraph 10, I
22 will permit Mr. Kaufman to answer, but otherwise

1 I am instructing Mr. Kaufman to not answer the
2 pending question.

3 BY MR. SHERMAN:

4 Q. Mr. Kaufman, if it is demonstrated at
5 the hearing that -- well, let me ask you this:
6 The requirement set out in Professor Hill's
7 report with regard to data security, does the
8 Bureau intend to apply these particular
9 standards to other companies?

10 MS. VAN DRUFF: And, again, counsel,
11 to the extent that your question relates to
12 standards or the investigational prosecution of
13 other targets, it exceeds the bounds of the
14 Court's March 10th, 2014 protective order. And
15 I am instructing Mr. Kaufman not to answer the
16 question.

17 BY MR. SHERMAN:

18 Q. Mr. Kaufman, in terms of the data
19 security standards set out in Professor Hill's
20 report, is it the Bureau's position that if
21 LabMD did not take every measure set out in this
22 report, that LabMD has committed an unfair act

1 or practice?

2 MS. VAN DRUFF: Can I have the
3 question read back, please?

4 THE REPORTER: "Question: Mr.
5 Kaufman, in terms of the data security standards
6 set out in Professor Hill's report, is it the
7 Bureau's position that if LabMD did not take
8 every measure set out in this report, that LabMD
9 has committed an unfair act or practice?"

10 MS. VAN DRUFF: The question is
11 predicated on data security standards, and as
12 such it exceeds the bounds of the Court's March
13 10, 2014 protective order, and I am instructing
14 Mr. Kaufman to not answer that question.

15 MR. SHERMAN: Based on that, counsel,
16 I don't have any further questions. What I
17 would like to do is to attempt, at least, to get
18 the ALJ on the phone, not today but some day
19 where we can discuss whether or not your
20 objections will be sustained to that line of
21 questioning.

22 And so that's, that's my intent.

1 MS. VAN DRUFF: Thank you, counsel.

2 MR. SHERMAN: Thank you, Mr. Kaufman.

3 THE WITNESS: Thank you.

4 (Whereupon, at 3:12 p.m., the
5 deposition was concluded.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

EXHIBIT 2

PUBLIC

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

In the Matter of

LabMD, Inc.,
a corporation,
Respondent.

DOCKET NO. 9357

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER
REGARDING RULE 3.33 NOTICE OF DEPOSITION**

On February 14, 2014, Complaint Counsel filed a Motion for Protective Order Regarding Rule 3.33 Notice of Deposition ("Motion"). Complaint Counsel seeks to prevent Respondent from proceeding with a deposition of designee(s) of the Bureau of Consumer Protection of the Federal Trade Commission ("Bureau" or "BCP"). On February 26, 2014, Respondent LabMD, Inc., ("Respondent" or "LabMD") filed an opposition to the Motion ("Opposition").

Having fully reviewed the Motion and the Opposition, and having considered all arguments and contentions raised therein, the Motion is GRANTED IN PART AND DENIED IN PART, as explained below.

I. Introduction

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, engaged in an unfair trade practice in violation of Section 5(a) of the Federal Trade Commission ("FTC") Act by failing to take "reasonable and appropriate" measures to prevent unauthorized access to consumers' personal information, which conduct caused, or is likely to cause, substantial injury to consumers. Complaint ¶¶ 6-11, 17-23. Specifically, the Complaint alleges that Respondent failed to maintain adequate network security to protect confidential patient information, including by making certain "insurance aging reports," allegedly containing confidential patient information, available on a peer-to-peer, or "P2P" file sharing application ("the 1,718 file"). Complaint ¶¶ 17, 19. The Complaint further avers that in October 2012, the Sacramento, California Police Department ("SPD") found more than 35 LabMD "Day Sheets,"

allegedly containing confidential patient information (“Day Sheets”)¹, and a small number of copied checks, in the possession of individuals who subsequently pleaded no contest to state charges of identity theft (the “Sacramento Incident”). Complaint ¶ 21.

Respondent’s Answer admits that an alleged third party, Tiversa Holding Corporation (“Tiversa”), contacted Respondent in May 2008 and claimed to have obtained the P2P insurance aging file via Limewire, but denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23. Respondent’s answer also includes a number of affirmative defenses, including among others, denial of due process and fair notice, and that the actions of the FTC are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with applicable law. Answer at pp. 6-7.

On January 30, 2014, Respondent served a “Notice of Deposition of the Bureau of Consumer Protection,” pursuant to Rule 3.33(a) and 3.33(c)(1) of the Commission’s Rules of Practice. Respondent’s Notice seeks a Bureau designee(s) to testify regarding matters known or reasonably available to the Bureau concerning the following topics:

- (1) The 1,718 file, including the Bureau’s relationship with Tiversa, Dartmouth College, and Eric Johnson;
- (2) All data-security standards that have been used by the Bureau to enforce the law under Section 5 of the Federal Trade Commission Act since 2005;
- (3) Consumers that have been harmed by LabMD’s allegedly inadequate security practices; and
- (4) The Bureau’s relationship with the Sacramento Police Department [SPD] relating to [LabMD] documents [that SPD] found at a Sacramento “flop house.”

(“Topics”) (Motion Exhibit B at 4).

II. Relevant Rules of Practice

Rule 3.33(c)(1) of the Commission’s Rules of Practice authorizes Respondent to notice the deposition of the BCP, and requires BCP to “designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf.”² The rule also requires that the deposition notice “describe with reasonable particularity the matters on which examination is requested,” so as to facilitate designation of those persons with applicable knowledge. 16 C.F.R. 3.33(c)(1).

¹ As alleged in the Complaint, Day Sheets are spreadsheets of payments received from consumers, which may include personal information such as consumer names, Social Security Numbers, and methods, amounts, and dates of payments. Complaint ¶ 9.

² Complaint Counsel objects that Respondent’s Notice, in defining “Bureau” as “[t]he Federal Trade Commission’s Bureau of Consumer Protection, and its directors, officers, and employees,” improperly attempts to reach the members of the Commission. Motion at 8-9. Respondent’s Notice properly mirrors the language of Rule 3.33(c)(1) and Respondent makes clear in its Opposition that it is not seeking to depose any members of the Commission pursuant to Rule 3.33(c)(1). Opposition at 2 n.1.

Rule 3.33(c)(1) depositions are also subject to the discovery limits of Rule 3.31(c)(1): “[p]arties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). If it is determined that “such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b),”³ the Administrative Law Judge may rule that a deposition shall not be taken. 16 C.F.R. § 3.33(b). Finally, as with any discovery, the Administrative Law Judge may disallow, or limit, a deposition by way of a protective order under Rule 3.31(d) (“The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.”).

In the instant case, Complaint Counsel seeks an order disallowing the noticed deposition in its entirety, pursuant to Rule 3.33(b) and 3.31(d). The burden of demonstrating an entitlement to this protective order is on Complaint Counsel. *In re LabMD Inc.*, 2014 FTC LEXIS 22, at *20 (Jan. 30, 2014). In the context of a Rule 30(b)(6) deposition sought from a government employee, one court has stated: “The burden is on the party seeking the protective order to demonstrate that good cause exists for the entry of [the protective] order by making a ‘particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Integra Bank Corp. v. FDIC*, 2014 U.S. Dist. LEXIS 3039, *6-7 (S.D. Ind. Jan. 10, 2014) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16, (1981)).⁴ “In addition, ‘[b]efore restricting discovery, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it and taking into account society’s interest in furthering the truthseeking function.’” *Id.* at *7 (citation omitted). Thus, the burden is on Complaint Counsel to demonstrate that the deposition is not reasonably likely to lead to the discovery of relevant information, or that notwithstanding any such relevance, BCP should nevertheless be protected from deposition by Respondent.

III. Analysis

The Orders issued previously in this case hold that the Commission’s reasons for issuing a complaint and the information the Commissioners evaluated and considered prior to filing a complaint, including the standards that the Commissioners used in determining whether to issue a complaint, are outside the scope of discovery, absent extraordinary circumstances, which circumstances Respondent failed to demonstrate. *See* February 25, 2014 Order Granting Complaint Counsel’s Motion to Quash and to Limit Deposition Subpoenas Served on Commission Attorneys (February 25 Order); February 21, 2014 Order Denying Respondent’s Motion for a Rule 3.36 Subpoena (February 21 Order); January 30, 2014 Order on Complaint

³ Rule 3.43(b) states “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(b).

⁴ Commission Rule 3.33(c)(1) mirrors Rule 30(b)(6) of the Federal Rules of Civil Procedure. Where the Federal Rules of Civil Procedure are similar to the Commission’s Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating disputes. *In re Pom Wonderful LLC*, 2011 FTC LEXIS 42, *9 n.3 (March 16, 2011) (citations omitted).

Counsel's Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order (January 30 Order). Any "attempt to probe the mental processes of this agency in investigating respondents and the decision leading up to the complaint in this matter . . . is ordinarily privileged since [such information relates] to an integral part of the decision-making process of this agency." *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, *5 (June 16, 1967) (citation omitted) (denying respondent's application for depositions from the Secretary of the Commission, the Director of the Bureau of Deceptive Practices, and an attorney of the Commission).

Although Respondent is not entitled to discovery on the decision making process of the agency, it is entitled to discovery of facts that form the basis for the allegations of the Complaint. *FTC v. Cyberspy Software LLC*, 2009 U.S. Dist. LEXIS 132299, at *4 (M.D. Fla. May 26, 2009) ("A party is entitled to the facts relevant to the litigation."). See also 16 C.F.R. § 3.31(c)(1) ("Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent."). With these precepts in mind, the analysis turns to the four topics listed in Respondent's Rule 3.33 Notice of Deposition.

A. Deposition Notice Topics 1 and 4

Complaint Counsel argues that Respondent's Notice Topic 1 is improper because the "subjects on which Respondent seeks testimony regarding the 1,718 file," i.e., the Bureau's "relationships" with Tiversa, Dartmouth College, and Eric Johnson regarding the 1,718 file, are not stated with "reasonable particularity," as required by Rule 3.33(c). Complaint Counsel makes the substantially identical argument as to Topic 4 -- the Bureau's "relationship" with the SPD relating to certain LabMD documents found by SPD during the Sacramento Incident (hereafter, "LabMD Documents"). Motion at 4-5. According to Complaint Counsel, the term "relationship" is overbroad; no single witness has personal knowledge of the Bureau, and its directors, officers, and employees, as it relates to the 1,718 file or the LabMD Documents; and it would be impossible to educate a Bureau designee about every conceivable subject of examination regarding the 1,718 file or the LabMD Documents. Motion at 6.

Respondent counters that the meaning of "relationship" is sufficiently clear, and refers to "communications," "behavior," and "dealings" between two entities. Opposition at 4.⁵ Respondent further argues that the 1,718 file is clearly relevant to the Complaint (Complaint ¶¶ 11, 13-20) and that the Bureau's communications with Tiversa, Dartmouth College and/or Eric Johnson are narrowed to the topic of the 1,718 file. Opposition at 4-5. Respondent also states that the Complaint expressly refers to the LabMD documents found by the SPD (Complaint ¶ 21) and claims that FTC officials waited four months before contacting LabMD to inform them that the Day Sheets had been found by the SPD. Opposition at 8.

As an initial matter, Topics 1 and 4 are "reasonably particular" enough to enable BCP to designate those with applicable knowledge. The goal of the requirement in the analogous Fed.

⁵ Consistent with Respondent's definition, the Merriam-Webster Online dictionary defines "relationship" as "the way in which two or more people, groups, countries, etc., talk to, behave toward, and deal with each other." Opposition at 4.

R. Civ. Pro. 30(b)(6) that the notice of deposition “describe with reasonable particularity the matters for examination” is to “enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to testify is able to respond regarding that matter.” Charles A. Wright, et al., 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed. 2013). Rule 30(b)(6) requires only that the notice describe in terms as clear as possible the matters about which testimony is sought so that the organization can determine the identity and number of persons whose presence will be necessary to provide an adequate response to any potential questions. *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598, 603-04 (D. Del. 1973).

As stated in the Notice, Topics 1 and 4 may appear to be overly broad; however, Respondent, in its Opposition, has made clear that the information it actually seeks is more narrow. With respect to Topic 1, Respondent seeks testimony on: “how [the] FTC came to possess the 1718 file.” Opposition at 9. With respect to Topic 4, Respondent seeks testimony on how the FTC learned of the Sacramento Incident and how the FTC handled or disseminated LabMD’s property after it learned of the Sacramento Incident. *Id.* The scope of Topics 1 and 4 is, accordingly, so limited.

Complaint Counsel further argues that a deposition of the Bureau regarding its “relationship” with Tiversa, Dartmouth College, and Eric Johnson is outside the scope of discovery under Rule 3.31(c)(1) because Respondent has propounded written discovery to Complaint Counsel regarding communications with these nonparties; issued a subpoena to, and taken the deposition of, Tiversa regarding communications with FTC, Dartmouth College, and Eric Johnson; and also will soon take the deposition of Tiversa employee Rick Wallace on these same matters. Complaint Counsel does not argue, however, that the requested deposition testimony from BCP is unreasonably cumulative or duplicative of other discovery, *see* 16 C.F.R. § 3.31(c)(2)(ii), and the mere fact that discovery is being sought from multiple sources or discovery methods is not a basis for denying discovery. *See* 16 C.F.R. § 3.31(a) (“Parties may obtain discovery by *one or more* of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission”) (emphasis added). Nor does Rule 3.33 require a showing of particular need, in order to take a deposition of designee(s) of the BCP.

Finally, Complaint Counsel contends that the requested information regarding the 1,718 file is outside the scope of discovery under Rule 3.31(c)(2), which states in part:

Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices . . .

16 C.F.R. § 3.31(c)(2). Complaint Counsel asserts that the subject communications with Tiversa, Dartmouth College, and Eric Johnson regarding the 1,718 file “largely predate” the opening of the investigation of LabMD in January 2010 and were not “collected or reviewed” in

the course of the investigation or prosecution of this case. Thus, Complaint Counsel concludes, Respondent must demonstrate good cause to depose BCP. Motion at 5. By its express terms, however, Rule 3.31(c)(2) applies to “searches for materials.” It does not address deposition testimony, and there is no similar restriction to testimony sought under Rule 3.33. Thus, there is no basis for concluding that Rule 3.31(c)(2) requires Respondent to demonstrate good cause to depose BCP.

Accordingly, Complaint Counsel has failed to demonstrate that deposition testimony on Topics 1 and 4 should be barred in its entirety. However, nothing in this ruling is intended to overrule or alter the limitations cited in the January 30 Order and the February 25 Order that pre-complaint attorney communications with SPD, Tiversa, Dartmouth College, and Eric Johnson may not be elicited to derive the FTC’s decision making process in determining to investigate or prosecute this case.

B. Deposition Notice Topic 2

Respondent’s Notice Topic 2 asks for the Bureau’s designee(s) to provide testimony regarding “all data-security standards that have been used by the [Bureau] to enforce the law under Section 5 of the Federal Trade Commission Act since 2005.” (Motion, Ex. B at 4). Complaint Counsel argues that the basis “for the Commission’s commencement of this action” is “not relevant for purpose of discovery in an administrative adjudication” and that Notice Topic 2 does not correspond to any permissible affirmative defense and is foreclosed by the Commission’s January 16, 2014, Order Denying Respondent LabMD’s Motion to Dismiss, *In re LabMD Inc.*, 2014 FTC LEXIS 2 (Jan. 16, 2014) (“January 16 Commission Order”) and the January 30 Order. Motion at 7.

In its Opposition, Respondent acknowledges, as it must, the prior rulings in this case holding that Respondent may not discover the legal standards the FTC has used in the past and is currently using to enforce Section 5 in data security cases, in order to discover and challenge the Commission’s decision making processes in issuing the Complaint in this case. *See, e.g.*, February 25 Order; February 21 Order; January 30 Order. However, notwithstanding the broad language of Topic 2, Respondent does not appear to be seeking discovery of the “standards” for enforcement of Section 5 in data security matters generally. Rather, Respondent states that it is “apparent” that Complaint Counsel seeks to apply a “reasonableness” standard to whether Respondent’s data security practices may be deemed “unfair” under Section 5. Respondent further states that the Commission, in its Order Denying Respondent’s Motion to Dismiss, admitted that in order to establish its case, the FTC would need to determine, as a factual matter, “whether LabMD’s data security procedures were ‘unreasonable.’” Opposition at 6 (*citing* January 16 Commission Order at 18-19). Therefore, Respondent argues, Respondent is entitled to know the bases for the contention that Respondent’s data security practices were not reasonable.

Paragraph 10 of the Complaint alleges that Respondent “failed to provide reasonable and appropriate security for personal information on its computer networks” and cites seven alleged data security practices of Respondent as examples of Respondent’s failures. Complaint ¶ 10 (a)-(g). Respondent’s right to inquire into the factual bases for these allegations cannot credibly be

disputed.⁶ 16 C.F.R. § 3.31(c)(1). However, Respondent may not inquire into why, or how, BCP or the Commission determined to use a reasonableness standard to enforce Section 5, or why the alleged facts justify a conclusion of unreasonableness, because “a request for such justification is explicitly a request for the ‘mental impressions, conclusions, opinions or legal theories of a party’s attorney’” and is not permissible. *FTC v. Cyberspy Software LLC*, 2009 U.S. Dist. LEXIS 71270, at *7 (M.D. Fla. July 31, 2009). For the same reason, Respondent is not entitled to explore attorney thought processes as to which facts support which contentions, and which do not, or what inferences are being drawn from the evidence in the case. *Id.* at *10-11.

Based upon the foregoing, Complaint Counsel has not demonstrated that Topic 2 is entirely outside the scope of discovery, so as to bar any and all deposition testimony within its scope, and Respondent has articulated a valid line of inquiry. For these reasons, the deposition will not be barred; however, consistent with prior rulings in this case, Respondent may not inquire generally into the legal standards the FTC used in the past and is currently using to determine whether an entity’s data security practices are unfair under Section 5. In addition, to prevent improper inquiry into privileged matters, Respondent will also be barred from inquiring into the legal opinions, legal reasoning, mental processes or decision making of the Bureau, its directors, officers, or employees, or of the Commission, with respect to Section 5 enforcement standards. *See Cyberspy Software*, 2009 U.S. Dist. LEXIS 71270, at *10-11.

C. Deposition Notice Topic 3

Respondent’s Notice Topic 3 asks for the Bureau’s designee(s) to provide testimony regarding “[c]onsumers that have been harmed by LabMD’s allegedly inadequate security practices.” (Motion, Ex. B at 4). Complaint Counsel does not argue, and has not shown, that Topic 3 is not relevant for purposes of discovery. The Complaint in this matter alleges that Respondent’s asserted inadequate security “caused, or is likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.” Complaint ¶ 22. Thus, inquiry into the facts underlying the allegation of consumer injury is clearly relevant under Rule 3.31(c)(1).

Complaint Counsel nevertheless contends that Respondent should be barred from seeking discovery on the topic from BCP because Topic 3 “demands testimony that Complaint Counsel will present through expert witnesses.” Motion at 7. Complaint Counsel further contends that because Topic 3 “requires the Bureau to prematurely disclose the opinions of Complaint Counsel’s expert witnesses, it is not an appropriate subject for discovery pursuant to Rule 3.33(c)(1).” Motion at 8.

Respondent counters that “Complaint Counsel [is not] allowed to unilaterally restrict the scope of discovery by indicating its own choice of producing testimony [and that] LabMD is clearly entitled to discover [the] FTC’s position on facts regarding potential and/or actual harm

⁶ The February 21 Order held that “documents sufficient to show the standards the FTC used in the past and is currently using to determine whether an entity’s data security practices violate Section 5 of the FTC Act,” are outside the scope of discovery. *See* February 21 Order at 6-7. In the dispute resolved by that Order, Respondent argued that such discovery was relevant to its defense challenging the bases for the Commission’s decision to issue the Complaint against LabMD. For the reasons set forth in the February 21 Order, that argument was rejected. *Id.*

to consumers in this case without regard to [the] FTC's expert witness list." Opposition at 7.

Simply because Complaint Counsel intends to present expert opinion testimony on whether Respondent's practices caused or were likely to cause substantial injury to consumers does not relieve Complaint Counsel from its obligation to provide fact discovery on the topic of consumer injury, such as the identities of customers known to have been harmed and the factual basis underlying the allegation of consumer harm, or other facts that may be required to support these allegations in the Complaint.

Accordingly, Complaint Counsel has not met its burden of showing that inquiry into Topic 3 should be barred. However, Respondent is not entitled to inquire, and will be barred from inquiring, into the legal opinions, legal reasoning, mental processes or decision making of BCP, or its directors, officers, or employees, or of the Commission, with respect to the contention that Respondent's practices caused, or are likely to cause, consumer harm. See *Cyberspy Software*, 2009 U.S. Dist. LEXIS 71270, at *10-11 (barring discovery of "opposing counsel's thought processes as to which facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far"). In this regard, Respondent may not inquire into why, or how, the factual bases of the allegations in the Complaint justify the conclusion that Respondent violated the FTC Act, because such inquiry is tantamount to "a request for the mental impressions, conclusions, opinions or legal theories" of the FTC.

IV. Conclusion and Order

Complaint Counsel has failed to demonstrate that the deposition of BCP should be barred in its entirety. Accordingly, to this extent, Complaint Counsel's Motion for a Protective Order is DENIED. However, to ensure compliance with prior discovery orders in this case, and to prevent improper inquiry into privileged matters, Complaint Counsel's Motion for Protective Order is GRANTED IN PART pursuant to Rule 3.31(d), and it is HEREBY ORDERED:

1. The Bureau shall designate one or more persons to testify on its behalf about information known or reasonably available to it with regard to Topics 1-4 of Respondent's deposition notice, as modified within this Order;
2. Topics 1 and 4 are limited to: how the FTC came to possess the 1718 file; how the FTC learned of the Sacramento Incident; and how the FTC handled or disseminated LabMD's property after it learned of the Sacramento Incident;
3. Notwithstanding the relief granted in this Order, Respondent is prohibited from inquiring into any privileged matters, including without limitation, the legal opinions or legal reasoning or mental impressions of any attorney involved in the investigation or prosecution of this case, and specifically including:

The decision making processes of the Bureau with respect to the investigation of Respondent or the prosecution of this case;

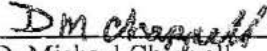
The legal standards the Bureau used in the past and is currently using to determine whether an entity's data security practices are unfair under Section 5;

The legal reasoning or mental processes of the Bureau with respect to the use of a reasonableness standard in the Complaint; and

The legal reasoning or mental processes of the Bureau with respect to the contention that Respondent's practices caused, or are likely to cause, consumer harm; and

4. The fact discovery deadline of March 5, 2014 is hereby extended for an additional 20 days from the date of this Order for the purpose of allowing the Rule 3.33 deposition noticed by Respondent on January 30, 2014, as limited by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Dated: March 10, 2014