

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: EDITH RAMIREZ, CHAIRWOMAN
MAUREEN K. OHLHAUSEN
TERRELL MCSWEENY

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

PUBLIC
Docket No. 9357

**ERRATA SHEET AMENDING RESPONDENT LABMD, INC.’S CORRECTED¹
ANSWERING BRIEF**

Respondent LabMD, Inc. (“LabMD”) submits the following errata sheet² amending its Corrected Answering Brief timely filed on Friday, February 5, 2016 at 11:17 p.m.:

- A. Table of Contents
 - Page i: “RECORD REFERENCES AND GLOSSARY{**xii**}”³
*replaces*⁴ “RECORD REFERENCES AND GLOSSARY.....xiii”
 - Page i: “STATUTES.....{**x**}” *replaces* “STATUTES.....ix”

¹ Respondent’s Corrected Answering Brief was timely filed on February 5, 2016 at 11:17 p.m. through the FTC E-Filing System. On February 9, 2016, Respondent discovered errata in the Table of Contents, Table of Authorities, Record References and Glossary, and non-substantive case cite errata in the body of the brief. Respondent conferred with FTC Complaint Counsel by telephone on Feb. 10, 2016 regarding the subject errata and Complaint Counsel does not have an objection to this filing. As part of that agreement, Respondent also agreed to identify the text and location of textual differences (and errata) between the version of the answering brief erroneously filed at 5:02 p.m. on Friday, February 5, 2016 (which contained attorney work product), and the Corrected Answering Brief timely filed later that evening at 11:17 p.m.

² This errata sheet is submitted in good faith and is complete and accurate to the best of Respondent’s knowledge.

³ Changes will be highlighted in {**bold brackets**.}

⁴ Action items are italicized.

- Page i: “REGULATIONS.....{x}” replaces “REGULATIONSix”
- Page i: “OTHER AUTHORITIES.....{x}” replaces “OTHER AUTHORITIES.....ix”

B. Table of Authorities

- Page v: “*Blakely v. Johnson*, 140 S.E.2d 867 ({Ga.} 1965)” replaces “*Blakely v. Johnson*, 140 S.E.2d 867 (1965)”
- Page v: “*Blue Cross and Blue Shield of Ala. fv. Weitz*, 913 F.2d {1544} (11th Cir. 1990) replaces “*Blue Cross and Blue Shield of Ala. V. Weitz*, 913 F.2d 396 (11th Cir. 1990)”
- Page v: “*Chapman v. P&G Distrib., LLC*, 766 F.3d 1296 (11th Cir. {2014})” replaces “*Chapman v. P&G Distrib., LLC*, 766 F.3d 1296 (11th Cir. 2004)”
- Page vi: “*FTC v. Accusearch, Inc.*, 2007 U.S. Dist. LEXIS 74905 (D. Wyo. Sept. 28, 2007) 2, 28{, 29}” replaces “*FTC v. Accusearch, Inc.*, 2007 U.S. Dist. LEXIS 74905 (D. Wyo. Sept. 28, 2007) 2, 28”
- Page vi: “*FTC v. Neovi, Inc.*, {604 F.3d 1150 (9th Cir. 2010)}.....2, 3 {64}” replaces “*FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (N.D. Ga. 1974)..... 2, 3, 64”
- Page vi: “*FTC v. Page*, 378 F. Supp. {1052 (N.D. Ga. 1974)}” replaces “*FTC v. Page*, 378 F. Supp. 1052 (S.D. Cal. 2008)”
- Page vi: “*In re Chicago Bridge & Iron Co.*, {No. 9300,} 138 F.T.C. 1024 ({F.T.C.} Jan. 6, 2005)” replaces “*In re Chicago Bridge & Iron Co.*, 138 F.T.C. 1024 (Jan. 6, 2005)”
- Page vi: “*In re Horizon Corp.*, No. 9017, 97 F.T.C. 464 (F.T.C. May 15, 1981) {10,} 11” replaces “*In re Horizon Corp.*, No. 9017, 97 F.T.C. 464 (F.T.C. May 15, 1981) 10, 11”
- Page vi: “*In re McWane, Inc.*, {No. 9351,} 2013 FTC LEXIS 76 ({F.T.C.} May 8, 2013)..... 21, 45, 56” replaces “*In re McWane, Inc.*, 2013 FTC LEXIS 76 (May 8, 2013) 21, 45, 56”
- Page vi: *add/insert* “{*In re McWane, Inc.*, No. 9351, 2012 FTC LEXIS 142 (F.T.C. Aug. 16, 2012)}.....45”

- Page vi: “*In re Orkin Exterminating Co.*, {No. 9176,} 108 F.T.C. 263 ({F.T.C.} Dec. 15, 1986).....5” replaces “*In re Orkin Exterminating Co.*, 108 F.T.C. 263 (Dec. 15, 1986).....5”
- Page vi: “*In re POM Wonderful, LLC*, FTC No. 9344, 2013 FTC LEXIS 6 {F.T.C. Jan. 10, 2013}21 {~~22~~}” replaces “*In re POM Wonderful, LLC*, FTC No. 9344, 2013 FTC LEXIS 621, 22”
- Page vii: add/insert “{*In re Trans Union Corp.*, No. 9255, 2000 FTC LEXIS 23, at *9 (F.T.C. Feb. 10, 2003)}.....11}”
- Page vii: “*In the Matter of Gemtronics Inc.*, FTC No. 9330, 2009 FTC LEXIS 196 (Sept. {26} {16}, 2009)” replaces “*In the Matter of Gemtronics Inc.*, FTC No. 9330, 2009 FTC LEXIS 196 (Sept. 26, 2009)”
- Page vii: “*Nat’l Parks Conservation Ass’n v. Norton*, {324 F.3d 1229 (11th Cir. 2003)}25” replaces “*Nat’l Parks Conservation Ass’n v. Norton*, 504 U.S. 555 (1992)25”
- Page vii: “*Riley v. Camp.*, 130 F.3d 958 (11th Cir. 2011){29} {30}” replaces “*Riley v. Camp.*, 130 F.3d 958 (11th Cir. 2011)29”
- Page vii: “*Remijas v. Neiman Marcus Grp., LLC*, {794 F.3d 688 (7th Cir. 2015)}53” replaces “*Remijas v. Neiman Marcus Grp., LLC*, No. 14-3122, 2015 U.S. App. LEXIS 12487 (7th Cir. 2015)53”
- Page viii: “*Russell-Newman Mnf. Co. v. N.L.R.B.*, 407 F.2d 247{~~249~~} (5th Cir. 1969)12” replaces “*Russell-Newman Mnf. Co. v. N.L.R.B.*, 407 F.2d 247, 249 (5th Cir. 1969)12”
- Page viii: “*Smith v. Triad of Alabama, LLC*, {No. 1:14-cv-324-WKW-PWG,} {No. 14-324} 2015 U.S. Dist. LEXIS132514 (M.D. Ala. Sept. 2, 2015).....26, 66” replaces “*Smith v. Triad of Alabama, LLC*, No. 1:14-cv-324-WKW-PWG, 2015 U.S. Dist. LEXIS 132514 (M.D. Ala. Sept. 2, 2015).....26, 66”

C. Other Authorities

- Page viii: “*In {the Matter of} {re} ECM BioFilms, Inc.*, {~~a corporation, also d/b/a Enviroplastics International,~~} FTC No. 9358, Partial Dissent of Comm’r Maureen K. Ohlhausen at 7 {(F.T.C. Oct. 19, 2015)}{21,} 44” replaces “*In the Matter of ECM BioFilms, Inc.*, a corporation, also d/b/a *Enviroplastics International*, FTC No. 9358, Partial Dissent of Comm’r Maureen K. Ohlhausen at 744”

- Page viii: *remove corrected “In ~~{the Matter of}~~ {re} ECM BioFilms, Inc., {a corporation, also d/b/a Envioplastics International,} FTC No. 9358, Partial Dissent of Comm’r Maureen K. Ohlhausen at 7 {(F.T.C. Oct. 19, 2015)}{21,} 44” from page x and insert same on page vi directly underneath corrected “In re Chicago Bridge & Iron Co., {No. 9300,} 138 F.T.C. 1024 {(F.T.C.) Jan. 6, 2005)”*
- Page viii: “Health Information Technology for Economic and Clinical Health Act, Pub. L. 111-5, div. A, title XIII, div. B, title IV, Feb. 17, 2009, 123 Stat. 226, 467 (42 U.S.C. 300jj et seq.; 17901 et seq.) (Feb. 17, 2009){47, 48} {16}” *replaces* Health Information Technology for Economic and Clinical Health Act, Pub. L. 111-5, div. A, title XIII, div. B, title IV, Feb. 17, 2009, 123 Stat. 226, 467 (42 U.S.C. 300jj et seq.; 17901 et seq.) (Feb. 17, 2009)47, 48”
- Page xi: *add/insert “{HIPAA Security Series, Security 101 for Covered Entities at 1, 7 (Vol. 2 Paper 1) (11/2004: rev. 3/2007)}.....47}”*
- Page xi: *add/insert “{Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334, 8338-49, 8351, 8359-64, 8367-69, 8372-73 (Feb. 20, 2003); 45 C.F.R. Parts 160, 162, 164}.....47”*

D. Record references and Glossary

- Corrected page {xiii}: *add/insert “{HIPAA – Health Insurance Portability and Accountability Act of 1996}”*
- Corrected page {xiii}: *add/insert “{HITECH – Health Information Technology for Economic and Clinical Health Act of 2009}”*

E. Identified/located differences and errata between Respondent’s Answering Brief and Respondent’s Corrected Answering Brief

- The RCAB⁵ *removed* all bold type from all subject matter headings and divisions from page 1 through page 67 (excluding the **CONCLUSION**).
- The pagination of the RCAB *shifted slightly* due to corrections made, but *no substantive text was changed in any way*.
- The numbering of the footnotes *shifted* because of added and/or edited footnotes. *All changes are identified herein.*

⁵ Respondent’s Corrected Answering Brief.

- RCAB at i: *added* “{STATUTES},” “{REGULATIONS},” and “{OTHER AUTHORITIES}” to Table of Contents with correct small Roman numbering (RAB at i).
- RCAB at i-iv: Table of Contents reference numbers *all corrected from* “{II. Argument and all sections following to the end of brief}.” (RAB at i-iv).
- RCAB at iv: *added* “{CONCLUSION.....67}” to Table of Contents (RAB at iv).
- RCAB at x: “STATUTES” section *corrected* as follows: “{5 U.S.C. § 556(d).....31}; {15 U.S.C. § 18.....44}; {15 U.S.C. § 45(l).....25}; {15 U.S.C. § 45(n)10}; {42 U.S.C. § 1320d-6.....37, 64}.” (RAB at viii).
- RCAB at x: “REGULATIONS” section *corrected* as follows: “{16 C.F.R. § 3.31A(c)6}.” (RAB at viii).
- RCAB at 3: “*FTC v. Neovi, Inc.*, {604 F.3d 1150, 1157 (9th Cir. 2010)}” *replaced* “*FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104 (S.D. Cal. 2008)” in *both versions*.
- RCAB at 5: “{footnote 2}To the extent the CC Statement of Facts conflicts with either the IDFF, and/or RFF or RCFF, Respondent adopts the IDFF.” *replaced* “[footnote 2] To the extent the CC Statement of Facts conflicts with either the IDFOF, and/or RPFOF or RRCCFOF, Respondent adopts the IDFOF.”
- RCAB at 5: “{because such an opinion from Dr. Hill}” *replaced* “because her claims were” (RAB⁶ at 5).
- RCAB at 6: {footnote 3 *added/inserted* following “reasonable” as follows: “Moreover, Dr. Hill was never asked to opine within a reasonable degree of probability/likelihood whether LabMD medical data security during the relevant time period proximately caused injury or was likely to cause substantial injury. The FTC’s argument is also wrong as a matter of law. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1323-24 (11th Cir. 2008); *Chapman v. P&G Distrib., LLC*, 766 F.3d 1296, 1312-16 (11th Cir. 2014). *See generally Prieto v. Malgor*, 361 F.3d 1313, 1317-18 (11th Cir. 2004) (describing general requirements for Rule 26 expert reports).”} Footnote 3 does *not* appear in RAB.
- RCAB at 11: “*In the Matter of Gemtronics Inc.*, FTC No. 9330, 2009 FTC LEXIS 196 (Sept. {16}, 2009)” *replaced* “*In the Matter of Gemtronics Inc.*, FTC No. 9330, 2009 FTC LEXIS 196 (Sept. 26, 2009)” (RAB at 11).

⁶ Respondent’s Answering Brief which was erroneously filed at 5:02 p.m. on Friday, Feb. 5, 2016.

- RCAB at 11: “*{In re Trans Union Corp., No. 9255, 2000 FTC LEXIS 23, at *9 (F.T.C. Feb. 10, 2003)}* replaced “*In re Trans Union Corp., No. 9255, 2000 FTC LEXIS 23, at *9 (Feb. 10, 2003).*” (RAB at 11).
- RCAB at 16: “**Second, the “defense-in-depth” standard articulated by the FTC and its expert Raquel Hill, which relies in part on HIPAA, was not applicable to medical data security from June 2007 to May 2008, and therefore is irrelevant to this case. See Hill, Tr. at 305-10. Dr. Hill was unaware of any document that cites all of her “seven principles for a comprehensive information security program.” RFF at 86 ¶ 362 (citing Hill, at Tr. 242-43). Most importantly, LabMD cannot be held to this “standard” because it was not established that such standard existed and was applicable to LabMD for the relevant time period. Moreover, Dr. Hill only became aware of the so-called defense-in-depth strategy circa mid-2009. Id. at ¶ 365 (citing Hill, Tr. 306).**” replaced “Second, the “defense-in-depth” standard articulated by the FTC and its expert Raquel Hill, which relies in part on HIPAA, was not applicable to medical data security from June 2007 to May 2008, and therefore is irrelevant to this case. See Hill, Tr. at 305-10. Dr. Hill admitted that she had never heard of “defense-in-depth” before 2009. Id. at 306 (JUDGE CHAPPELL: “When do you believe you first saw that use of [defense-in-depth] as commonplace in the IT community? . . . five years, ten years, one year, how long ago?” [Dr. Hill]: I think that it was maybe around five years ago or so when I became familiar with the strategy.”) (cited in RPTB at 76.). “Thus, application of Dr. Hill’s opinion to the instant matter would require LabMD to have known about and complied with the defense in depth standard beginning in January 2005 – three and half years before Dr. Hill was even aware that the ‘defense in depth’ strategy existed. Surely, LabMD should not be held accountable for implementing a strategy that the FTC’s expert was not aware existed [in June 2007-May 2008]. For this reason, Dr. Hill’s opinion should be accorded little or no weight.” RPTB at 76.” (RAB at 15-16).
- RCAB at 21: “*{In the Matter of ECM BioFilms, Inc., No. 9358, (F.T.C. Oct. 19, 2015)}*” replaced “*In re ECM BioFilms, Inc., (F.T.C. Oct. 19, 2015) (No. 9358).*” (same in both versions).
- RCAB at 23: “*{See supra Section II.A.3.{b.}}*” replaced “*See supra Section II.A.3.(b).*” (RAB at 23).
- RCAB at 32 n.12: “**While the FTC argues otherwise, it also failed to prove the second and third prongs of the Section 5(n) test, that such actual harm or likely substantial harm “is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” Chief ALJ Chappell did not consider the second and third prongs of Section 5(n)’s standard of proof because the FTC failed to prove the first prong. See**

ID at 13-14; see also id. at 55-56.}” replaced “The FTC also failed to prove the second and third prongs of the Section 5(n) test, that such actual harm or likely substantial harm “is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” Chief ALJ Chappell did not consider the second and third prongs of Section 5(n)’s standard of proof because the FTC failed to prove the first prong. *See* ID at 13-14; *see also id.* at 55-56 (“Accordingly, Complaint Counsel’s failure to meet its burden of proving the first prong of the three part test – that Respondent’s conduct caused, or is likely to cause, substantial consumer injury – is fatal to its case, and any factual determinations regarding the additional two prongs of the unfair conduct test – that substantial consumer injury is not reasonably avoidable by consumers, and is not outweighed by benefits to consumers or competition – would be superfluous and, accordingly, need not, and will not, be made.”).” (RAB at 32 n.10).

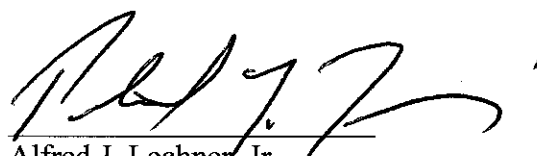
- RCAB at 33: “[footnote]11 *See supra* Section [REDACTED] & {footnote 12} *See infra* Section [REDACTED].” (RAB at 33 nn. 11 & 12) *struck from RCAB.*
- RCAB at 34: “**are likely to reoccur**” (RAB at 34) – *highlight removed.*
- RCAB at 43: “**{the LabMD data security practices}**” replaced “THE LabMD data security practices” (RAB at 43).
- RCAB at 43 n.18: “**{Absent the Tiversa crime (theft of the 1718 File from LabMD), and its false evidence (fraudulently claiming “spread” of the 1718 File on the P2P network), there is no case against LabMD.}**” replaced “Absent the Tiversa crime (theft of the 1718 File from LabMD), and its FALSE EVIDENCE (fraudulently claiming “spread” of the 1718 File on the P2P network), there is no case against LabMD.” (RAB at 43-44 n.18).
- RCAB at 45: “**{In re McWane, Inc., No. 9351, 2012 FTC LEXIS 142, at *8 (F.T.C. Aug. 16, 2012) (citations omitted)}**” replaced *{In re McWane, Inc., No. 2012 FTC LEXIS 142, at *8 (citations omitted);}*” *in both versions.* (RAB at 45).
- RCAB at 58: “**{The Clay Shields rebuttal testimony {failed} to offer an opinion that the LabMD medical data security practices in 2007-2008 caused or are likely to cause substantial harm to consumers;}**” replaced “**The Clay Shields rebuttal testimony failed to offer an opinion that the LabMD medical data security practices in 2007-2008 caused or are likely to cause substantial harm to consumers**” (RAB at 59).
- RCAB at 64: “**{Additionally, the FTC knew, or should have known, that neither Tiversa nor the Privacy Institute {was} authorized to obtain or disclose the individually identifiable health information contained on the 1718 File.}**” replaced “Additionally, the FTC knew, or should have known, that neither Tiversa nor the

Privacy Institute was authorized to obtain or disclose the individually identifiable health information contained on the 1718 File.” RAB at 64).

- RCAB at 67: RAB at 67 signature block is *unsigned*. RCAB at 67 is *signed*.

Dated: February 11, 2016

Respectfully submitted,



Alfred J. Lechner, Jr.

Daniel Z. Epstein

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Counsel for Respondent, LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2016, I caused to be filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send an electronic notification of such filing to the Office of the Secretary:

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

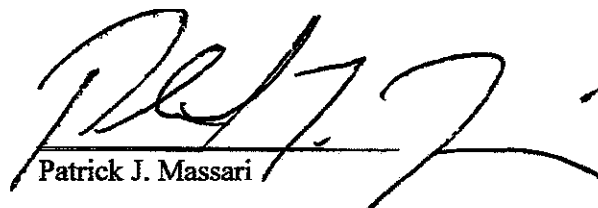
I also certify that I delivered via hand delivery and electronic mail copies of the foregoing document to:

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

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo Van Druff, Esq.
Megan Cox, Esq.
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Division of Privacy and Identity Protection
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Room CC-8232
Washington, DC 20580

Dated: February 11, 2016


Patrick J. Massari

CERTIFICATE OF ELECTRONIC FILING

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

Dated: February 11, 2016



Patrick J. Massari

Notice of Electronic Service

I hereby certify that on February 11, 2016, I filed an electronic copy of the foregoing ERRATA SHEET AMENDING RESPONDENT LABMD, INC.'S CORRECTED ANSWERING BRIEF, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Washington, DC, 20580

Donald Clark
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I hereby certify that on February 11, 2016, I served via E-Service an electronic copy of the foregoing ERRATA SHEET AMENDING RESPONDENT LABMD, INC.'S CORRECTED ANSWERING BRIEF, upon:

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