

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

**MOTION IN LIMINE TO STRIKE AS A LIVE TRIAL WITNESS
DEPUTY DIRECTOR OF BUREAU OF CONSUMER PROTECTION**

Ignoring no fewer than five prior Orders of this Court and of the Commission, Respondent intends to call the Deputy Director of the Bureau of Consumer Protection, Daniel Kaufman, as a live witness regarding the Commission’s “standards, guidelines, and regulations” regarding data security. This Court has ruled repeatedly that discovery regarding these very topics exceeds the bounds of the Commission’s Rules and of controlling precedent. On the bases of these prior rulings, the Court should prevent Respondent from eliciting testimony at the evidentiary hearing that Respondent was not permitted to obtain during discovery. In addition, Respondent’s proposed examination of Deputy Director Kaufman will relate exclusively to issues that are neither relevant nor material to the question of fact before the Court regarding the reasonableness of LabMD’s data security procedures. Allowing such an examination to proceed would implicate significant policy considerations.

Complaint Counsel has conferred in good faith with Respondent in an effort to resolve the dispute, but has been unable to reach an agreement. *See* Meet & Confer Statement (attached as **Exhibit A**). Pursuant to Rules 3.22 and 3.43, 16 C.F.R. §§ 3.22, 3.43, Complaint Counsel

respectfully moves the Court for an *in limine* order to strike from Respondent's Witness List the Deputy Director of the Bureau of Consumer Protection as a live trial witness.¹

BACKGROUND

Respondent's Witness List identifies its first witness, Bureau of Consumer Protection Deputy Director Daniel Kaufman, as a witness who Respondent intends to call live at the evidentiary hearing. *See* Resp't Final Prop. Witness List (Apr. 9, 2014), 2 (attached as **Exhibit B**). Respondent's Witness List describes the testimony that it intends to elicit during its examination of Mr. Kaufman:

We expect that Mr. Kaufman will testify live about the FTC's regulatory scheme regarding data security, any published or unpublished FTC standards, guidelines or regulations which the FTC requires Covered Entities like LabMD to meet regarding the security of Protected Health Information from 2005 to the present; the initiation and evolution of the FTC's standards, guidelines and regulations regarding data security and what these regulations and guidelines required Covered Entities like LabMD to have in place at all relevant times from 2005 to the present; the media by which the FTC alerted or informed Covered Entities like LabMD that these standards, guidelines and regulations existed.

Id.

ARGUMENT

I. PRIOR RULINGS PREVENT RESPONDENT FROM ELICITING THE TESTIMONY IT SEEKS FROM DEPUTY DIRECTOR KAUFMAN

Rulings to date establish that the subjects on which Respondent intends to elicit testimony from Deputy Director Kaufman – the standards the Commission has used in the past

¹ Recognizing that Motions *in Limine* are discouraged, *see* Add'l Provisions to Scheduling Order (Sept. 25, 2013) at ¶ 9, Complaint Counsel is limiting its request for *in limine* relief to the narrow issue of striking Deputy Director Kaufman from Respondent's Witness List because Respondent's anticipated trial examination clearly violates this Court's and the Commission's prior rulings.

and is using currently to determine whether an entity's data security practices violate Section 5 of the Federal Trade Commission Act – are neither relevant for the purposes of discovery nor admissible at the evidentiary hearing. *See* Order Granting in Part Mot. for Prot. Order (Mar. 10, 2014) (“Protective Order”), at 6-7 (holding that prior rulings establish 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” and that “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”); Order Denying Resp't Mot. for Rule 3.36 Subpoena (Feb. 21, 2014), at 6-7 (holding that “the standards the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5” are “outside the scope of permissible discovery in this case”); Order Granting Mot. to Quash (Jan. 30, 2014) (“Order Quashing Subpoena”), at 6 (holding that the information regarding the bases for the Commission's commencement of this action are “not relevant for purposes of discovery in an administrative adjudication”); *see also* Order Granting Mot. to Quash and Limit (Feb. 25, 2014), at 2 (holding that “the decision making process preceding . . . issuance [of an administrative complaint] is not discoverable in the ensuing litigation absent extraordinary circumstances”); Comm'n Order Denying Mot. to Dismiss (Jan. 16, 2014) (“MtD Denial”), at 14 (holding that the Commission may enforce Section 5 in data security cases without issuing “regulations addressing the specific conduct at issue”). In limiting the scope of Mr. Kaufman's deposition as the designee of the Bureau of Consumer Protection, the Court held specifically that Respondent was prohibited from inquiring into “standards . . . used in the past and . . . currently . . . to determine whether an entity's data security practices are unfair under Section 5.” Protective Order at 8-9.

Respondent intends to elicit from Deputy Director Kaufman at trial *exclusively* evidence regarding the Commission’s purported data security standards that the Court prohibited it from eliciting at deposition. *See Ex. B*, at 2. Such an examination would violate five separate, prior rulings in this case. Accordingly, the Court should enter an *in limine* order to strike from Respondent’s Witness List Deputy Director Kaufman as a live trial witness.

II. PERMITTING RESPONDENT’S PROPOSED EXAMINATION WOULD NOT YIELD EVIDENCE THAT IS RELEVANT OR ADMISSIBLE AND RISKS COUTENANCING HARASSING TACTICS

A. Deputy Director’s Testimony is Neither Relevant nor Material to Assessing Whether Respondent’s Data Security Procedures Were Reasonable.

The issue to be tried during the administrative proceeding is *not* the sufficiency of the FTC’s “standards, guidelines, and regulations” regarding data security. *Ex. B* at 2. The adequacy of the Commission’s notice regarding data security standards is *not* before this Court. *See* MtD Denial at 14-17 (holding that the Commission has “enforced Section 5’s prohibition of ‘unfair . . . acts or practices’ primarily through case-by-case adjudication and litigation from the time the statute was enacted” and “the three-part statutory standard governing whether an act or practice is ‘unfair’ . . . should dispel LabMD’s concern about whether the statutory prohibition of ‘unfair . . . acts or practices’ is sufficient to give fair notice of what conduct is prohibited”); *cf.* *FTC v. Wyndham Worldwide Corp.*, No. 13-1887, 2014 WL 1349019, *14 (D.N.J. April 7, 2014) (holding that “the contour of an unfairness claim in the data-security context, like any other, is necessarily ‘flexible’ such that the FTC can apply Section 5 ‘to the facts of particular cases arising out of unprecedented situations’”) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965)).

Instead, this Court will assess, *inter alia*, the factual question of “whether LabMD’s data security procedures were ‘unreasonable’ in light of the circumstances.” MtD Denial at 18-19.

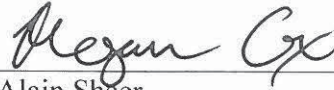
The FTC’s “standards, guidelines, and regulations” regarding data security are not relevant to this LabMD-specific inquiry. *See, e.g., In re Basic Research*, 2004 FTC LEXIS 210, *10-11 (Nov. 4, 2004) (“the issue to be tried is . . . not the Commission’s decision to file the Complaint”); *In re Exxon Corp.*, 1981 FTC LEXIS 113, at *5-6 (Jan. 29, 1981) (denying on relevance grounds respondent’s renewed request for discovery into whether the Commission had “reason to believe” that a violation of law had occurred). Accordingly, Respondent’s proposed trial examination of Mr. Kaufman is neither relevant nor material, *see* Rule 3.43(b), 16 C.F.R. § 3.43(b), and the Court should enter an *in limine* order to strike from Respondent’s Witness List Deputy Director Kaufman as a live trial witness.

B. Policy Considerations Militate in Favor of Excluding Deputy Director as a Trial Witness.

The policy considerations that the Court evaluated in its January 30th Order quashing Respondent’s Subpoena to Senior Complaint Counsel are equally applicable here. *See* Order Quashing Subpoena at 7-8. In particular, permitting a senior official of the Bureau of Consumer Protection to be subjected to a trial examination in the administrative process regarding subjects that are not relevant to the allegations of the Complaint or to any cognizable defense would “disrupt[] trial preparation, increase[e] time and cost requirements, and countenance[e] potentially harassing trial tactics.” *Id.* at 8. Accordingly, the Court should enter an *in limine* order to strike from Respondent’s Witness List Deputy Director Kaufman as a live trial witness.

Dated: April 22, 2014

Respectfully submitted,



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Complaint Counsel

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

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

**[PROPOSED] ORDER GRANTING MOTION IN LIMINE TO STRIKE AS A TRIAL
WITNESS DEPUTY DIRECTOR OF BUREAU OF CONSUMER PROTECTION**

Having carefully considered Complaint Counsel’s Motion *in Limine* to Strike as a Trial Witness Deputy Director of Bureau of Consumer Protection and any opposition thereto, it is hereby

ORDERED, that Bureau of Consumer Protection Deputy Director Daniel Kaufman shall be STRICKEN from Respondent’s Witness List as a live witness at the Evidentiary Hearing in this matter.

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 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:

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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 22, 2014

By: 

Megan Cox
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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


_____)	
In the Matter of)	PUBLIC
)	
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 *in Limine* to Strike as a Trial Witness Deputy Director of the Bureau of Consumer Protection, Complaint Counsel met and conferred with counsel for Respondent, LabMD, Inc. in a good faith effort to resolve by agreement the issues raised by the motion, and has been unable to reach an agreement. Complaint Counsel conferred with counsel for Respondent on April 21, 2014 at 4:30 PM. Laura Riposo VanDruff, Jarad Brown, and Megan Cox for Complaint Counsel conferred with William Sherman II, for Respondent.

Dated: April 22, 2013

Respectfully submitted,



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Complaint Counsel

Exhibit B

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

COMMISSIONERS: **Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Joshua D. Wright**

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

RESPONDENT’S FINAL PROPOSED WITNESS LIST

Pursuant to the Court’s Revised Scheduling Order, dated October 22, 2013, Respondent hereby provides its Final Proposed Witness List to Complaint Counsel. This list identifies the fact witnesses who may testify for Respondent at the hearing in this action by deposition and/or investigational hearing transcript, declaration, or orally by live witness.

Subject to the limitations in the Scheduling Order and Revised Scheduling Order entered in this action, Respondent reserves the right:

- A. To present testimony by deposition and/or investigational hearing transcript, affidavit, declaration, or orally by live witness, from the custodian of records of any party or non-party from whom documents or records have been obtained—specifically including, but not limited to, those parties and non-parties listed below—to the extent necessary to demonstrate the authenticity or admissibility of documents in the event a stipulation cannot be reached concerning the authentication or admissibility of such documents;

- B. To present testimony by deposition and/or investigational hearing transcript, affidavit, declaration, or orally by live witness, from persons listed below and any other person that Complaint Counsel identifies as a potential witness in this action;

C. To amend this Final Proposed Witness List to be consistent with the Court's ruling on any pending motions, including any motions in limine filed in this matter;

D. To question the persons listed below about any topics that are the subjects of testimony by witnesses to be called by Complaint Counsel;

E. Not to present testimony by deposition and/or investigational hearing transcript, declaration, or live orally, from any of the witnesses listed below;

F. To question any person listed below about any other topics that the person testified about at his or her deposition or investigational hearing, or about any matter that is discussed in any documents to which the person had access and which are designated as exhibits by either party or which have been produced since the person's deposition was taken;

G. To present testimony by deposition and/or investigational hearing transcript, affidavit, declaration, or orally by live witness, from any persons, regardless whether they are listed below, to rebut the testimony of witnesses proffered by Complaint Counsel;

H. For any individual listed below as being associated with a corporation, government agency, or other non-party entity, to substitute a witness designated by the associated non-party entity; and

I. To supplement this Final Proposed Witness List as circumstances may warrant.

Subject to these reservations of rights, Complaint counsel's Final Proposed Witness list is as follows:

1. Daniel Kaufman, Bureau of Consumer Protection's Rule 3.33 Witness

We expect that Mr. Kaufman will testify live about the FTC's regulatory scheme regarding data security, any published or unpublished FTC standards, guidelines or regulations which the FTC requires Covered Entities like LabMD to meet regarding the security of Protected Health Information from 2005 to the present; the initiation and evolution of the FTC's standards, guidelines and regulations regarding data security and what these regulations and guidelines required Covered Entities like LabMD to have in place at all relevant times from 2005 to the present; the media by which the FTC alerted or informed Covered Entities like LabMD that these standards, guidelines and regulations existed.

- 2. Robert Boback, Chief Executive Officer of Tiversa Holding Corporation (“Tiversa”)**
We expect that Mr. Boback will testify live, as Tiversa’s corporate designee, about Tiversa’s technology and its use on peer-to-peer file sharing protocols and networks; Tiversa’s communications with the FTC, Eric Johnson and Dartmouth; facts relating to the “P2P insurance aging file” referenced in Paragraph 17 of the Complaint; and other facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint. We also expect that Mr. Boback will testify about facts relating to the documents produced in response to Complaint Counsel’s subpoena duces tecum to the organization that produced Tiversa’s document to the FTC in this action and the admissibility of those documents into evidence in the hearing in this action. We also expect that Mr. Boback will testify about any Civil Investigative Demands which resulted in the production of documents from Tiversa to FTC.
- 3. Eric Johnson, former Associate Dean of the Tuck School of Business at Dartmouth**
We expect that Mr. Johnson will testify live to the facts underlying his study entitled “Data Hemorrhages in the Health-Care Sector”; communications with the FTC, Tiversa, and/or Health and Human Services regarding LabMD, the 1718 file and his research methodology in general and specifically in relation to locating and downloading the 1718; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.
- 4. Allen Truett, former Chief Executive Officer of Automated PC Technologies, Inc.**
We expect that Mr. Truett will testify live about LabMD’s computer networks, including, but not limited to, remote access thereto; the products and/or services that he and his company, Automated PC Technologies, Inc., provided to LabMD, including but not limited to the security features of those products and/or services; the communications between LabMD and Mr. Truett or Automated PC Technologies, Inc.; the facts underlying and set forth in the affidavit that Mr. Truett executed on May 20, 2011, which LabMD submitted to Commission staff during the Part II investigation; and the facts relating to affirmative defenses asserted in the Answer.
- 5. Karina Jestes, Detective, Sacramento, CA Police Department**
We expect that Detective Jestes will testify by designation about facts relating to the security incident alleged in Paragraphs 10 and 21 of the Complaint; those consumers affected by the security incident alleged in Paragraphs 10 and 21 of the Complaint; facts relating to meetings and communications between her and the FTC; facts relating to the documents produced in response to Complaint Counsel’s subpoena *duces tecum* to the Custodian of Records of the Sacramento, CA Police Department in this action and the admissibility of those documents into evidence in the hearing in this action.
- 6. Robert Hyer, former LabMD IT Manager and former LabMD contractor**
We expect that Mr. Hyer will testify live about LabMD’s computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD’s security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; and facts relating to affirmative defenses asserted in the Answer.

7. Jeff Martin, LabMD IT employee and former LabMD contractor

We expect that Mr. Martin will testify by designation about LabMD's computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

8. Allison Simmons, former LabMD IT employee

We expect that Ms. Simmons will testify by designation about her knowledge of LabMD's searches for the 1718 file on P2P networks; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

9. Chris Maire, former LabMD employee

We expect that Mr. Maire will testify by designation about LabMD's computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

10. John Boyle, former LabMD employee

We expect that Mr. Boyle will testify live about LabMD's computer networks, including, but not limited to, remote access thereto; hard ware and soft ware, LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

11. Michael Daugherty, President CEO of LabMD, Inc.

We expect that Mr. Daugherty will testify live about LabMD's computer networks; LabMD's security policies and practices, and employee training; LabMD employees; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

12. Lou Carmichael, former LabMD consultant

We expect that Ms. Carmichael will testify by designation about LabMD's security policies and practices, hard ware and soft ware, compliance program, and employee training; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

13. Rick Wallace, former Tiversa Employee

We expect that Mr. Wallace will testify live about Tiversa's technology and its use with peer-to-peer file sharing applications and networks; Tiversa's communications with the Federal Trade Commission ("FTC") and Dartmouth College; facts relating to the "P2P insurance aging file" as referenced in Paragraph 17 of the Complaint; Mr. Wallace's and Tiversa's participation and role in Dartmouth's research for the article by Eric Johnson, titled; "Data Hemorrhages in the Health-Care Sector."

14. Chris Gormley, Tiversa Employee

We expect that Mr. Gormley will testify by designation about Tiversa's technology and its use with peer-to-peer file sharing applications and networks; Tiversa's communications with the Federal Trade Commission ("FTC") and Dartmouth College; facts relating to the "P2P insurance aging file" as referenced in Paragraph 17 of the Complaint; Mr. Gormley's and Tiversa's participation and role in Dartmouth's research for the article by Eric Johnson, titled; "Data Hemorrhages in the Health-Care Sector."

15. Rosalind Woodson, Former LabMD Employee

We expect that Rosalind Woodson will testify live about her use of a P2P file sharing application on her work station computer and her knowledge of LabMD's policies regarding such use, as well as her knowledge of the "1718 File."

16. David Lapidés, Detective Sandy Springs, GA Police Department

We expect that Detective Lapidés will testify by designation about his communications with LabMD and the Bureau of Consumer Protection and documents provided to him relating to the security incident alleged in Paragraph 21 of the Complaint; or any other matters as to which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. Detective Lapidés will also testify about facts relating to documents that were produced in response to Complaint Counsel's subpoena *duces tecum* to the Sandy Springs, GA Police Department in this action, and the admissibility of those documents into evidence in the hearing in this action.

17. Curt Kaloustian, former LabMD IT employee

We expect that Mr. Kaloustian will testify live about his knowledge of LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT-related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; Respondent's affirmative defenses, or the proposed relief.

18. Kim Gardner, former LabMD Executive Assistant

We expect that Ms. Gardner will testify by designation about LabMD's security policies and practices, and employee training; the protected health information to which she had access; information relating to the wind down of LabMD's business operations and the corresponding relocation of LabMD's business premises; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint

Counsel about which she has knowledge; or any other matters as to which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

19. Peter Sandrev, Broadvox employee, Cypress Communications, LLC (“Cypress”) designee

We expect that Mr. Sandrev will testify by designation about LabMD's computer networks, including, but not limited to the products and/or services that Cypress provided to LabMD, including but not limited to any security features of those products and/or services; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which Cypress has knowledge; or any other matters as to which Cypress has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. He will also testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to Cypress in this action, and the admissibility of those documents into evidence in the hearing in this action.

20. Eric Knox, former LabMD sales employee

We expect that Mr. Knox will testify by designation about LabMD's computer networks, including, but not limited to remote access thereto; LabMD's security policies and practices, and sales employee training; the protected health information to which he and other LabMD sales employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

21. Kevin Wilmer, Investigator, Federal Trade Commission, Bureau of Consumer Protection, Division of Privacy and Identity Protection

We expect that Mr. Wilmer will testify by designation about the process used to identify the individuals listed in Appendix A (designated as “CONFIDENTIAL”) to Complaint Counsel's Initial Disclosures as “Individuals Associated with 9-Digit Numbers Listed in the Day Sheets Referenced in Paragraph 21 of the Complaint Whose Names Are Not Listed in Those Day Sheets,” which has been produced at FTC-010907, as well any other issues addressed in his deposition.

22. Lawrence Hudson, former LabMD sales employee

We expect that Ms. Hudson will testify by designation about LabMD's computer networks, including, but not limited to remote access thereto; LabMD's security policies and practices, and sales employee training; the protected health information to which she and other LabMD sales employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel as to which she has knowledge; or any other matters as to which she has

knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

23. Letonya Randolph, Midtown Urology, PC ("Midtown Urology") employee, Midtown Urology designee

We expect that Ms. Randolph will testify by designation about Midtown Urology's relationship and communications with LabMD; computer hardware and software provided to Midtown Urology by LabMD, and the maintenance thereof; the transmission of protected health information between Midtown Urology and LabMD, if any; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which Midtown Urology has knowledge; or any other matters about which Midtown Urology has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. She will also testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to Midtown Urology in this action, and the admissibility of those documents into evidence in the hearing in this action.

24. Nicotra Harris, former LabMD finance or billing employee

We expect that Ms. Harris will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD billing employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

25. Jeremy Dooley, former LabMD Communications Coordinator and IT employee

We expect that Mr. Dooley will testify by designation about LabMD's computer networks, including, but not limited to, hard ware and soft ware; remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

26. Jerry Maxey, Southeast Urology Network ("S.U.N.") employee, S.U.N. designee

We expect that Mr. Maxey will testify by designation about S.U.N.'s relationship and communications with LabMD; computer hardware and software provided to S.U.N. by LabMD, and the maintenance thereof; the transmission of protected health information between S.U.N. and LabMD; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which S.U.N. has knowledge; or any other matters about which S.U.N. has knowledge that are relevant to

the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. He will also testify about facts relating to the documents produced in response to Complaint Counsel's subpoena duces tecum to S.U.N. in this action, and the admissibility of those documents into evidence in the hearing in this action.

27. Jennifer Parr, former LabMD IT employee

We expect that Ms. Parr will testify by designation about LabMD's computer networks, including, but not limited to, hardware and software; remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; LabMD's IT related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

28. Karalyn Garrett, former LabMD finance or billing employee

We expect that Ms. Garrett will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

29. Patricia Gilbreth, former LabMD finance or billing employee

We expect that Ms. Gilbreth will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

30. Patrick Howard, former LabMD IT employee

We expect that Mr. Howard will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT-related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he

has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

31. Sandra Brown, former LabMD finance or billing employee

We expect that Ms. Brown will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

32. Brandon Bradley, former LabMD IT employee

We expect that Mr. Bradley will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT-related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

33. Erick Garcia

We expect that Mr. Garcia will testify by designation about facts relating to the security incident alleged in Paragraph 21 of the Complaint.

34. Adam Fisk

We expect Adam Fisk to testify live and give an expert opinion about the technology behind the program known as LimeWire; the operation of peer to peer networks; the adequacy of LabMD's network security hard ware, soft ware policies practices and procedures; and to offer rebuttle testimony with regard to Complaint Counsel's expert Rachel Hill's opinion.

s/ William A. Sherman, II

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CERTIFICATE OF SERVICE

I certify that on April, 9 2014 I caused a copy of the foregoing Respondent's Final Proposed Witness List to be served via courier on:

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Margaret Lassack, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
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Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

Dated: April 9, 2014

By: /s/ William A. Sherman, II
William A. Sherman, II

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