

ORIGINAL

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 ON RESPONDENT’S MOTION TO COMPEL A PROPER PRIVILEGE LOG

I.

On March 25, 2014, Respondent filed a Motion to Compel a Proper Privilege Log (“Motion”), pursuant to Federal Trade Commission (“FTC”) Rule 3.38A.¹ FTC Complaint Counsel filed an opposition to the Motion on April 4, 2014 (“Opposition”).

As explained below, Respondent’s Motion is DENIED WITHOUT PREJUDICE.

II.

The material facts are not in dispute. In connection with its responses to Respondent’s discovery requests, Complaint Counsel served a privilege log on March 5, 2014 (“March 5 Privilege Log”). On March 21, 2014, Respondent sent a letter to Complaint Counsel informing Complaint Counsel that Respondent believed the March 5 Privilege Log to be deficient. The parties engaged in a meet and confer teleconference on March 24, 2014. A statement representing that Respondent’s counsel has conferred with Complaint Counsel in an effort to resolve the issues raised by this Motion, as required by FTC Rule 3.22(g), is attached to Respondent’s Motion.

¹ FTC Rule 3.38A(a) states: “Any person withholding material responsive to . . . a request for production . . . shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the . . . request for production, submit, together with such claim, a schedule which describes the nature of the documents, communications, or tangible things not produced or disclosed - and does so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The schedule need not describe any material outside the scope of the duty to search set forth in § 3.31(c)(2) except to the extent that the Administrative Law Judge has authorized additional discovery as provided in that paragraph.” 16 C.F.R. § 3.38A(a).


Complaint Counsel states that in the March 24 teleconference, Complaint Counsel advised Respondent that it would provide to Respondent a revised privilege log, along with a declaration regarding governmental privileges, before the end of the week. Opposition at 2. Complaint Counsel informed Respondent that it anticipated being able to provide a declaration and a supplemental privilege log on or before March 28, 2014. Motion, Ex. 4 (email from Complaint Counsel to Respondent's counsel memorializing March 24 teleconference). Respondent makes no mention of this representation in its Motion.

Respondent filed its Motion on March 25, 2014. On March 27, 2014, Complaint Counsel provided Respondent a revised privilege log and a declaration from Jessica Rich, Director of the Bureau of Consumer Protection, in support of the deliberative process and law enforcement privilege assertions ("March 27 Privilege Log").

III.

The subject of Respondent's Motion, the March 5 Privilege Log, has been revised by the March 27 Privilege Log and a supporting declaration. It is unclear whether or not a dispute now exists regarding Complaint Counsel's privilege log. Accordingly, the Motion is DENIED WITHOUT PREJUDICE to Respondent's rights under Rule 3.38A, if any, with respect to the March 27 Privilege Log.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: April 10, 2014