

ORIGINAL

PUBLIC

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



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

**ORDER GRANTING RESPONDENT'S MOTION TO REQUIRE
COMPLAINT COUNSEL TO DESIGNATE WITNESS FOR RULE 3.33 DEPOSITION**

On March 25, 2014, Respondent LabMD filed an Emergency Motion to Require Complaint Counsel to Designate a 3.33 Witness ("Motion"). By Order issued March 25, 2014, Federal Trade Commission ("FTC") Complaint Counsel was directed to file its response no later than 4:00 p.m. on March 26, 2014. Complaint Counsel filed its response on March 26, 2014 ("Opposition").

The Motion asserts that Complaint Counsel has failed and refused to designate a witness, or witnesses, that will testify at the deposition of the FTC Bureau of Consumer Protection (the "Bureau" or "BCP"), as required by FTC Rule 3.33(c)(1), and that such refusal is hindering Respondent's ability to prepare for the deposition, which is currently scheduled for March 28, 2014. Respondent seeks an order requiring Complaint Counsel to designate the Bureau's witness(es) for the deposition, and providing Respondent with additional time to prepare for the deposition.

Complaint Counsel replies that the Rules do not require the recipient of a Rule 3.33(c)(1) deposition notice to identify its designee in advance of the deposition, and that Respondent will suffer no prejudice from not having advance notice of the designee. Complaint Counsel maintains that it has notified Respondent that it will designate an individual to testify on behalf of the Bureau, and that it will produce the designee for deposition on March 28, 2014, at 9:00 a.m. According to Complaint Counsel, "[t]hat is all that Rule 3.33(c)(1) requires." Opposition at 2.

As further explained below, Respondent's Motion is GRANTED.

I. Background

On January 30, 2014, Respondent served on Complaint Counsel a "Notice of Deposition of the Bureau of Consumer Protection," pursuant to Rule 3.33(c)(1) of the FTC's Rules of

Practice, seeking testimony on four specified topics. On February 14, 2014, Complaint Counsel filed a motion for a protective order seeking to prevent Respondent from proceeding with the noticed deposition. On March 10, 2014, Complaint Counsel's motion was denied in substantial part, and pursuant to Rule 3.33(c)(1), Complaint Counsel was ordered, among other things, to "designate one or more persons to testify on [the Bureau's] 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." (Hereafter, "March 10 Order"). In addition, the March 10 Order extended the discovery deadline by 20 days from the date of the Order (i.e., to March 31, 2014) for the purpose of completing the deposition of the Bureau.

Based upon the Motion, Opposition, and the exhibits attached thereto, the record shows that, on several occasions, Respondent's counsel has requested that Complaint Counsel identify the designee that would be testifying for the Bureau. These requests include by email, on March 14 and March 18, 2014, and in the course of meet and confer discussions on March 24 and March 25, 2014. Declaration of William A. Sherman, II, attached to Motion (hereafter, "Sherman Decl."), ¶¶ 6, 8-11, and Exhibits B and C thereto. When Respondent's counsel inquired on March 24, 2014, the attorneys attending the meet and confer teleconference on behalf of Complaint Counsel advised Respondent's counsel that they did not have the information. Sherman Decl. ¶¶ 8-9. On March 25, 2014, when Respondent's counsel again inquired, Respondent was advised that BCP would not disclose the identity of the designee because it had no duty to do so. *Id.* ¶¶ 10-11.

II. Analysis

Rule 3.33(c)(1) states in pertinent part:

A party may name as the deponent . . . any bureau or regional office of the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization.

16 C.F.R. § 3.33(c)(1). Further, the March 10 Order specifically directed Complaint Counsel to "designate one or more persons to testify" on behalf of BCP. Contrary to Complaint Counsel's argument, this requires more of Complaint Counsel than simply to produce a deponent at the scheduled date and time of the deposition. To "designate" means, in this context, to "specify" and/or to "name." See <http://dictionary.reference.com/browse/designate?s=t>. Thus, by requiring Complaint Counsel to "designate" the BCP deponent(s), the Rule and the March 10 Order placed a duty upon Complaint Counsel to identify the BCP designee(s). The dispute in this Motion appears to be regarding when the designation must be disclosed. Neither party cites a case specifically addressing this issue.

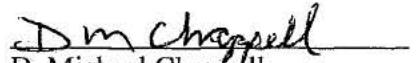
The language of Rule 3.33(c)(1) and the March 10 Order requiring the Bureau to "designate" its deponent(s) is properly interpreted as requiring disclosure of the identity of the

deponent(s) "promptly upon selecting [the designee(s)] and reasonably in advance of their testimony." *See Martin v. State Farm Mut. Auto. Ins. Co.*, 2011 U.S. Dist. LEXIS 17875, at *3-4 (S.D. W. Va. Feb. 22, 2011) (granting motion to compel identification of corporate designee in advance of deposition).¹ Moreover, reasonable advance notice of the identity of the designee(s) furthers the purposes of avoiding surprise and enabling all parties to properly prepare for the deposition, thereby advancing the proper development of the evidentiary record. *See id.* at *4. Under these circumstances, no legitimate purpose is served by withholding the identity of the designee(s) from opposing counsel. *Id.* *See also Paleteria La Michoacana, Inc. v. Productos Lacteos Tocumbo S.A. DE C.V.*, 292 F.R.D. 19, 25 n.3. (D.D.C. 2013) (requiring party to identify in advance corporate designees and the topics for which each witness has been designated, and stating "[w]hether or not the Rules require such advance designation, the Court expects parties to cooperate in order to avoid unnecessary re-deposition of the same individuals as fact witnesses").

III. Conclusion and Order

For all the foregoing reasons, the Motion is GRANTED, and it is hereby ORDERED that no later than 12:00 p.m. on March 27, 2014, Complaint Counsel shall: (1) notify Respondent's counsel of the name(s) of the person(s) that shall testify on behalf of the Bureau for purposes of the FTC Rule 3.33(c)(1) deposition noticed by Respondent, as modified by the March 10 Order; and (2) as to each person named, specify to Respondent's counsel the deposition topics on which he or she will testify. It is further ORDERED that the Rule 3.33 deposition scheduled for Friday, March 28, 2014, may, at Respondent's option, be rescheduled and that, if rescheduled, the extension of the deadline for completing the deposition of the Bureau, as set forth under the March 10 Order, is hereby further extended through and including April 14, 2014.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: March 26, 2014

¹ 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).