

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



In the Matter of)

PUBLIC

LabMD, Inc.,)
a corporation,)
Respondent.)
_____)

Docket No. 9357

**RESPONDENT LABMD, INC.'s OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO QUASH THE SUBPOENA FOR FACT WITNESS CARL SETTLEMYER
AND MOTION TO LIMIT THE SUBPOENA FOR FACT WITNESS RUTH YODAIKEN**

The subpoenas *ad testificandum* that Respondent LabMD, Inc. (LabMD) served on fact witnesses Carl Settlemyer (Settlemyer) and Ruth Yodaiken (Yodaiken) were properly issued and should not be quashed or limited as requested in Complaint Counsel's Motion. LabMD respectfully requests that Complaint Counsel's Motion be denied in its entirety.

BACKGROUND

Settlemyer and Yodaiken are Federal Trade Commission (FTC) employees. (Compl. Mot. Ex. F). Settlemyer works in the Division of Advertising Practices. (Compl. Mot. Ex. F). Yodaiken works in the Division of Privacy and Identity Protection (Civil Investigative Demand Schedule 4, attached as Ex. 1). It is believed that both were FTC employees involved with: (1) FTC's handling of LabMD's property when importuned from the Sacramento Police Department (SPD); (2) FTC's interactions with Tiversa Holding Corporation (Tiversa) preceding this adjudication, including but not limited to Tiversa's possession and transmittal of LabMD's

property to FTC; and, (3) communications involving Dartmouth College's (Dartmouth) data security study.¹

LabMD seeks to depose Settlemyer and Yodaiken because they have personal knowledge of FTC's complaint, and LabMD's defenses thereto. Settlemyer was a point of contact for FTC's interactions with Tiversa and Dartmouth (Compl. Mot. Ex. F). Settlemyer corresponded with Tiversa regarding Tiversa's report on the release of Protected Health Information (PHI). (Compl. Mot. Ex. F). Settlemyer was party to e-mails with Eric Johnson of Dartmouth regarding Mr. Johnson's paper on PHI. (Attached as Ex. 2).

Yodaiken was party to the FTC's conversations with SPD when FTC assured SPD that FTC would contact LabMD clients whose PHI was in SPD's possession. (Dep. of Detective Karina Jestes, Dec. 17, 2013, 65-67, attached as Ex. 3). Yodaiken may also have been a party to correspondence and meetings with Tiversa and Dartmouth.

LabMD seeks information that is: (1) reasonably expected to yield information relevant to the allegations in the complaint and LabMD's defenses; (2) neither privileged nor protected from discovery.

ARGUMENT

I. Settlemyer and Yodaiken's Depositions Are Reasonably Expected To Yield Information Relevant To The Allegations In The Complaint and LabMD's Defenses.

Discovery before FTC is broad. "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." 16 C.F.R. § 3.31(c)(1). "In fact, the Rules of Practice adopt a liberal approach to discovery." *In re Chain Pharmacy Ass'n, Inc.*,

¹ M. Eric Johnson, Data Hemorrhages in the Health-Care Sector, Dartmouth College, Presented at Financial Cryptography and Data Security, Feb. 22-25, 2009, available at <http://cfs.tuck.dartmouth.edu/cfs-uploads/research-projects/pdf/JohnsonHemorrhagesFC09Proceedingd.pdf>.

1990 FTC LEXIS 193, at *3 (June 20, 1990). While Complaint Counsel has taken full advantage of this liberal approach to discovery by taking numerous depositions, it now seeks to deny LabMD the same rights. Complaint Counsel cannot use Commission discovery procedures as both sword and shield. *See In re Polypore Int'l, Inc.*, 2008 FTC LEXIS 155, at *8-16 (Nov. 14, 2008). “Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied.” *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *4-5 (July 6, 2001). Complaint Counsel makes no such showing.

Moreover, “[a] party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome. . . . [Yet even given] a substantial degree of burden, inconvenience, and cost, **that will not excuse producing information that appears generally relevant to the issues in the proceeding.**” *In re Laboratory Corp. of America*, 2011 FTC LEXIS 31, at *7 (Feb. 28, 2011) (emphasis added) (citations omitted).

This Court’s order in *In re Hoechst Marion Roussel, Inc.*,² (Order Denying Mot. to Compel, Docket No. 9293 (FTC Nov. 8, 2000), is exactly apposite, if not dispositive. Deposition of counsel is “permissible where the attorney is a fact witness Where the attorney’s conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness.” (*Id.* at *2) (citations, brackets, and quotation marks omitted). Complaint Counsel cannot deny the relevance of either Settlemyer or Yodaiken’s testimony. Moreover, the Motion does not demonstrate an undue burden upon FTC.

A. LabMD Seeks Relevant Information.

“A party’s incantation that a proposed deponent is a [Commission] official with limited knowledge cannot insulate him from appropriate discovery.” *Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *4.

² See <http://www.ftc.gov/sites/default/files/documents/cases/2000/11/001108odamtcddt.pdf>.

1. Settlemyer's deposition is likely to yield information relevant to LabMD's defenses.

Respondent's subpoena does not target information outside the scope of discovery. Settlemyer has personal knowledge of the allegations of the Complaint, proposed relief, and facts relevant to defenses of Respondent. Settlemyer was personally involved with FTC's interactions with Tiversa and Dartmouth. Complaint Counsel admits his participation but attempts to categorize these communications as falling within Rule 3.31(c)(2)'s limitation on discovery because Settlemyer's activities ostensibly resulted in materials that were "not collected or reviewed in the course of the investigation . . . of this case." (Compl. Mot. 5).

Rule 3.31(c)(2) does not bar LabMD from deposing Settlemyer for three reasons.

1. Rule states that "Complaint counsel need only *search for materials* that were collected or reviewed in the course of the investigation." (emphasis added). 16 C.F.R. §3.31(c)(2). Respondent is not asking Complaint Counsel to "search for materials," but simply asks Settlemyer to appear for a deposition which will seek information about the critical document upon which the complaint is largely based - the 1,718 file that FTC received from Tiversa. The burden to appear for a deposition is exceedingly low and is easily outweighed by the benefit of allowing Respondent to establish defenses. 16 C.F.R. §3.31(c)(2)(iii).

2. The Civil Investigative Demand which resulted in the production of Tiversa's documents to FTC was served on a third party other than Tiversa. Settlemyer is likely to have knowledge of this unusual arrangement. (Dep. of Robert Boback 142-143, Nov. 21, 2013, attached as Ex. 4).

This information was collected or reviewed in the course of the Phase II the investigation that resulted in FTC's Complaint. Additionally, Complaint Counsel contends that, because Settlemyer's conversations with Tiversa and Dartmouth occurred in 2009 and because FTC did

not formally open its Part II investigation into LabMD until January 2010, Settlemyer's knowledge is "presumptively outside the scope of discovery." (Compl. Mot. 5). Respondent seeks information showing that these communications and unusual arrangements may form the basis of its defenses against this action.

This Court has ruled that the FTC may seek information from "January 1, 2005 to the present." (Order on Resp't Mot. for a Protective Order 7, Nov. 22, 2013, attached as Ex. 5; *see also* Comm'n Resolution for Investigation of Data Security, Jan. 3, 2008, attached as Ex. 6). Why should Respondent's ability to seek information be extremely narrow as compared with that of FTC's, when Respondent is merely seeking information from 2008 and 2009.

3. Rule 3.31(c)(2) allows this Court to permit discovery of information within the Commission's possession. LabMD urges the Court to avail itself of this discretion, if necessary, and allow Respondent access to information necessary for a proper defense.

2. Respondent has already attempted to gather the information it seeks from Settlemyer from other sources.

Rule 3.31 provides that discovery may be limited if it "is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." 16 C.F.R. §3.31(c)(2)(i). Complaint Counsel contends that Respondent has "already deposed Tiversa's designated witness about the communications he had with [Mr.] Settlemyer . . ." and should not be allowed to depose Settlemyer on the same subject. (Compl. Mot. 6). Tiversa's CEO Robert Boback (Mr. Boback) testified:

Q. Do you recognize what these are?

A. A series of e-mails, yes.

Q. And who are they between?

A. Appear to be between myself and Carl Settlemyer.

...

Q. Do you recall what the meeting or call [between you and Mr. Settlemyer] would have been about?

A. . . . [H]e reached out to me. I didn't reach out to him. So, I don't know. I didn't set this up. This didn't come from me.

. . .

Q. . . . Was this peer-to-peer ID theft research conference call about Lab MD?

A. No.

Q. It was not?

A. I don't know. I just testified. I don't recall

(Dep. of Robert Boback 138-39, Nov. 21, 2013, attached as Ex. 4).

Mr. Boback could not recall the substance of the correspondences. Respondent seeks Settlemyer's recollection.

3. Yodaiken's deposition is likely to yield information relevant to Respondent's defenses.

Respondent seeks to depose Yodaiken about her knowledge of FTC's interaction with Tiversa while investigating this matter. This information is reasonably expected to yield information relevant to the allegations in the complaint and Respondent's defenses. 16 C.F.R. § 3.31(c)(1). LabMD believes that Yodaiken has information about FTC's dealings with Tiversa and Dartmouth because she customarily participates with Alain Sheer (Sheer) when investigating data security matters.

Yodaiken is the record custodian for the civil investigative demand FTC served on LabMD. (Civil Investigative Demand Schedule 4, Ex. 1). She is also listed as the secondary point of contact after Sheer for the "Meet and Confer" and the "Modification of Specifications." (Id. at 2, 3).

Previous deposition testimony establishes that it is customary for Yodaiken to join Sheer when contacting third parties concerning LabMD. For example, Yodaiken twice participated in a phone call between Sheer and SPD, (Jestes Dep. 64-68, Dec. 17, 2013, Ex. 3), and again in December 2013. (*Id.* at 100.) In conjunction with Sheer, Yodaiken received data-security

information from SPD. (*Id.* at 74). In one deposition, Respondent discovered three separate incidents when Sheer and Yodaiken worked together on data security.

In 2009, Tiversa met with FTC in Pittsburgh and in Washington, D.C. When asked who was present at that meeting, Mr. Boback said, “Alain Sheer and I believe it was a woman that was with him. But I don’t know who. I don’t know who she was.” (Boback Dep. 138-39, Nov. 21, 2013, Ex. 4). When asked if the name “Ruth [Yodaiken] . . . ring[s] a bell,” and if she was the woman at the meeting, Mr. Boback responded, “It may have been her . . . I don’t know her name at all.” (*Id.* at 145). Respondent seeks to depose Yodaiken to discover whether she was at the 2009 Pittsburgh and D.C. meetings.

Complaint Counsel seeks to limit Respondent’s subpoena to Yodaiken and prevent inquiry into matters involving Tiversa and Dartmouth. However, if Yodaiken did not attend, she may be able to identify the person who did. Respondent sought this information from Sheer but has been prevented from doing so by this court’s ruling quashing the Sheer subpoena. The burden of allowing Respondent to explore whether Yodaiken has information regarding Tiversa and Dartmouth is minute, especially when weighed against the potential benefit of shedding light on the 2009 Pittsburgh and D.C. meetings between FTC and Tiversa. Again, Yodaiken will be asked for factual information about the critical document upon which the complaint is largely based - the 1,718 file that FTC received from Tiversa.

II. LabMD Seeks Information That Is Not Privileged Or Shielded From Discovery.

A. Settlemyer And Yodaiken Are Not Opposing Trial Counsel.

This Court’s previous order to quash the subpoena issued to Sheer was largely based on the fact that Sheer is opposing trial counsel. (Order on Compl. Counsel Mot. to Quash 2-3, attached as Ex. 7). In an apparent attempt to bootstrap that order, Complaint Counsel refers to

Settlemyer and Yodaiken as Commission attorneys. However, neither has filed a notice of appearance in this matter and neither are opposing trial counsel. They simply happen to be attorneys who possess information critical to Respondent's defense. Deposing an attorney is "permissible where the attorney is a fact witness. . . . Where the attorney's conduct itself is the basis of a claim or defense, there is little doubt that the attorney may be examined as any other witness." *In re Hoechst Marion Roussel, Inc.*, Order Denying Mot. to Compel, Docket No. 9293, at *2 (FTC Nov. 8, 2000) (citations, brackets, and quotation marks omitted).

As this Court recently reminded, "attorneys are not immune from being deposed." (Order on Compl. Counsel Mot. to Quash, Ex. 7). This Court held that a "'blanket' prohibition against future subpoenas directed at yet-to-be determined counsel" was not appropriate. (*Id.*). Respondent seeks information to bolster its defenses, not to invalidate FTC's investigative process. LabMD seeks to discover whether FTC's process contributed to or affected the risk of substantial injury that FTC now levels against LabMD.

CONCLUSION

For the reasons stated above, Complaint Counsel's Motion to Quash and Motion to Limit should be denied.



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

Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: (202) 499-4232
Facsimile: (202) 330-5842
Email: michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and
administrative proceedings before federal
agencies.
Counsel for Respondent

**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 DENYING COMPLAINT COUNSEL'S MOTION TO QUASH
AND MOTION TO LIMIT THE SUBPOENA**

Upon consideration of Complaint Counsel's Motion to Quash and Motion to Limit the Subpoena, and Respondent's Opposition thereto, IT IS HEREBY ORDERED that Complaint Counsel's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 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 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 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: January February 20, 2014

By: 
William A. Sherman, II

EXHIBIT

1

**CIVIL INVESTIGATIVE DEMAND SCHEDULE
FOR ORAL TESTIMONY, INTERROGATORY RESPONSE,
AND DOCUMENTS TO LABMD, INC.**

**To: LabMD, Inc.
2030 Powers Ferry Road
Building 500, Suite 520
Atlanta, Ga. 30339**

Attn: Stephen F. Fusco, General Counsel

I. DEFINITIONS

As used in this Civil Investigative Demand, the following definitions shall apply:

A. "And," as well as **"or,"** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any specification in this Schedule all information that otherwise might be construed to be outside the scope of the specification.

B. "Any" shall be construed to include **"all,"** and **"all"** shall be construed to include the word **"any."**

C. "CID" shall mean the Civil Investigative Demand, including the attached Resolution and this Schedule, and including the Definitions, Instructions, and Specifications.

D. "Company" shall mean LabMD, Inc., its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.

E. "Document" shall mean the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, code book or label. **"Document" shall also include Electronically Stored Information.**

F. "Each" shall be construed to include **"every,"** and **"every"** shall be construed to include **"each."**

G. "Electronically Stored Information" or "ESI" shall mean the complete original and any non-identical copy (whether different from the original because of notations, different

metadata, or otherwise), regardless of origin or location, of any information created, manipulated, communicated, stored, or utilized in digital form, requiring the use of computer hardware or software. This includes, but is not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and video and sound recordings, whether stored on: cards; magnetic or electronic tapes; disks; computer hard drives, network shares or servers, or other drives; cloud-based platforms; cell phones, PDAs, computer tablets, or other mobile devices; or other storage media. "ESI" also includes such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

H. "FTC" or "Commission" shall mean the Federal Trade Commission.

I. "Identify" shall be construed to require identification of (a) natural persons by name, title, present business affiliation, present business address and telephone number, or if a present business affiliation or present business address is not known, the last known business and home addresses; and (b) businesses or other organizations by name, address, identities of natural persons who are officers, directors or managers of the business or organization, and contact persons, where applicable; and (c) documents by bates number or by title or description, date, and author.

J. "Referring to" or "relating to" shall mean discussing, describing, reflecting, containing, analyzing, studying, reporting, commenting, evidencing, constituting, setting forth, considering, recommending, concerning, or pertaining to, in whole or in part.

K. "You" and "Your" shall mean the Company.

L. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.

II. INSTRUCTIONS

A. Sharing of Information: The Commission often makes its files available to other civil and criminal federal, state, local, or foreign law enforcement agencies. The Commission may make information supplied by you available to such agencies where appropriate pursuant to the Federal Trade Commission Act and 16 C.F.R. § 4.11 (c) and (j). Information you provide may be used in any federal, state, or foreign civil or criminal proceeding by the Commission or other agencies.

B. Meet and Confer: You must contact Alain Sheer, at 202.326.3321, or Ruth Yodaiken, at 202.326.2127, as soon as possible to schedule a meeting (telephonic or in person) to be held within ten (10) days after receipt of this CID in order to confer regarding your response, including but not limited to a discussion of the submission of Electronically Stored Information and other electronic productions as described in these Instructions.

C. Applicable time period: Unless otherwise directed in the specifications, the applicable time period for the request shall be from January 1, 2007 until the date of full and complete compliance with this CID.

D. Claims of Privilege: If any material called for by this CID is withheld based on a claim of privilege or any similar claim, the claim must be asserted no later than the return date of this CID. In addition, pursuant to 16 C.F.R. § 2.8A(a), submit, together with the claim, a schedule of the items withheld, stating individually as to each item:

1. the type, specific subject matter, date, and number of pages of the item;
2. the names, addresses, positions, and organizations of all authors and recipients of the item; and
3. the specific grounds for claiming that the item is privileged.

If only some portion of any responsive material is privileged, all non-privileged portions of the material must be submitted. A petition to limit or quash this CID shall not be filed solely for the purpose of asserting a claim of privilege. 16 C.F.R. § 2.8A(b).

E. Document Retention: You shall retain all documentary materials used in the preparation of responses to the specifications of this CID. The Commission may require the submission of additional documents at a later time during this investigation. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this investigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise. See 15 U.S.C. § 50; see also 18 U.S.C. §§ 1505, 1519.

F. Petitions to Limit or Quash: Any petition to limit or quash this CID must be filed with the Secretary of the Commission no later than twenty (20) days after service of the CID, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. 16 C.F.R. § 2.7(d).

G. Modification of Specifications: If you believe that the scope of the required search or response for any specification can be narrowed consistent with the Commission's need for documents or information, you are encouraged to discuss such possible modifications, including any modifications of definitions and instructions, with Alain Sheer, at 202.326.3321, or Ruth Yodaiken, at 202.326.2127. All such modifications must be agreed to in writing by an Associate Director, Regional Director, or Assistant Regional Director. 16 C.F.R. § 2.7(c).

H. Procedures: This CID is issued pursuant to Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1. The taking of oral testimony pursuant to this CID will be

conducted in conformity with that section and with Part 2A of the Commission's Rules, 16 C.F.R. §§ 2.8-2.9.

I. Certification: A responsible officer or a duly authorized manager of the company shall certify that the response to this CID is complete. This certification shall be made in the form set out on the back of the CID form, or by a declaration under penalty of perjury as provided by 28 U.S.C. § 1746.

J. Scope of Search: This CID covers documents and information in your possession or under your actual or constructive custody or control including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, and other agents and consultants, whether or not such documents and information were received from or disseminated to any person or entity.

K. Document Production: You shall produce the documentary material by making all responsive documents available for inspection and copying at your principal place of business. Alternatively, you may elect to send all responsive documents to Ruth Yodaiken, Federal Trade Commission, Division of Privacy and Identity Protection, 601 New Jersey Ave., NW, Mail Stop NJ-8100, Washington, DC 20001. Because postal delivery to the Commission is subject to delay due to heightened security precautions, please use a courier service such as Federal Express or UPS. Notice of your intended method of production shall be given by mail or telephone to Alain Sheer, at 202.326.3321, at least five days prior to the return date.

L. Document Identification: Documents that may be responsive to more than one specification of this CID need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this CID have been previously supplied to the Commission, you may comply with this CID by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

M. Information Identification: Each interrogatory specification and sub-specification of this CID shall be answered separately and fully in writing under oath. All information submitted shall be clearly and precisely identified as to the specification(s) or sub-specification(s) to which it is responsive.

N. Production of Copies: Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this

EXHIBIT

2

Kelly, Andrea

From: Johnson, M. Eric <M.Eric.Johnson@tuck.dartmouth.edu>
Sent: Tuesday, February 03, 2009 5:21 PM
To: Settlemyer, Carl
Subject: RE: New Article
Attachments: JohnsonHemorrhagesFC09d.pdf

Yes Carl, I remember you! I trust all is well.

The forthcoming paper is attached. Given your experience in this area, our findings should not be surprising. But the leakage in the healthcare sector is more complex and (in some ways) frightening. Computerworld has a pretty good summary (much better than what appeared in USAToday):

<http://www.computerworld.com/action/article.do?command=viewArticleBasic&taxonomyName=Security&articleId=9127066&taxonomyId=17&pageNumber=1>

Best,

Eric

From: Settlemyer, Carl [<mailto:csettlemyer@ftc.gov>]
Sent: Tuesday, February 03, 2009 5:02 PM
To: Johnson, M. Eric
Cc: Ferguson, Stacey
Subject: New Article

Professor Johnson:

We hope you are well. We saw that you have a new article coming out concerning health info available on P2P networks and were wondering if you could send us a copy when it becomes available. As you know from our past discussions, this is an area of interest to us. It sounds like this article is a significant expansion of your prior work. We look forward to reading it.

Thanks.

Carl S.

Carl H. Settlemyer, Attorney
Federal Trade Commission
BCP-Division of Advertising Practices
600 Pennsylvania Ave., N.W., Room NJ-3212
Washington, DC 20580
Tel: 202-326-2019
csettlemyer@ftc.gov

From: Johnson, M. Eric <M.Eric.Johnson@tuck.dartmouth.edu>
Sent: Tuesday, March 10, 2009 1:30 PM
To: Sheer, Alain <ASHEER@ftc.gov>
Subject: RE: Health Care Data Leaks via P2P

All contact info below. Talk to you on Thursday at 3pm. Best, Eric

M. Eric Johnson
Professor of Operations Management
Director, Glassmeyer/McNamee Center for Digital Strategies
Tuck School of Business
Dartmouth College
Hanover, NH 03755
603-646-0526
Fax: 603-646-1308
<http://mba.tuck.dartmouth.edu/digital/>

From: Sheer, Alain [mailto:ASHEER@ftc.gov]
Sent: Tuesday, March 10, 2009 9:09 AM
To: Johnson, M. Eric
Subject: RE: Health Care Data Leaks via P2P

Three is fine with us. Please email me your number and we'll call you then. My number is 202.326.3321.
Thanks. Alain

From: Johnson, M. Eric [mailto:M.Eric.Johnson@tuck.dartmouth.edu]
Sent: Monday, March 09, 2009 7:03 PM
To: Sheer, Alain
Subject: RE: Health Care Data Leaks via P2P

Yes, happy to chat – does sometime between 3-5 work?

Eric

From: Sheer, Alain [mailto:ASHEER@ftc.gov]
Sent: Monday, March 09, 2009 1:17 PM
To: Johnson, M. Eric
Subject: RE: Health Care Data Leaks via P2P

Hi Eric. Would you be available to talk sometime Thursday with me and a colleague in the Division of Identity Protection? I know you've spoken with Carl about the work he is doing, but on the chance that you aren't familiar with DPIP, here is a link to our information security cases:
http://www.ftc.gov/privacy/privacyinitiatives/promises_enf.html. Thanks. Alain Sheer

From: Johnson, M. Eric [mailto:M.Eric.Johnson@tuck.dartmouth.edu]
Sent: Sunday, March 08, 2009 11:24 PM
To: Settlemyer, Carl
Cc: Sheer, Alain
Subject: RE: Health Care Data Leaks via P2P

Happy to chat.

Eric

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov]
Sent: Thursday, March 05, 2009 2:02 PM
To: Johnson, M. Eric
Cc: Sheer, Alain
Subject: Health Care Data Leaks via P2P

Eric:

Thanks for sending us your recent article about health care data leaks via P2P networks. We'd like to discuss your research with you when you have some free time. Toward that end, I'd like to introduce you to my colleague, Alain Sheer, by copy of this email. Alain is an attorney in our Division of Privacy and Identity Protection and he will contact you directly to try to set something up.

Regards,

Carl S.

Carl H. Settlemyer, Attorney
Federal Trade Commission
BCP-Division of Advertising Practices
600 Pennsylvania Ave., N.W., Room NJ-3212
Washington, DC 20580
Tel: 202-326-2019
csettlemyer@ftc.gov

EXHIBIT

3

In the Matter of:

LabMD, Inc.

December 17, 2013
Detective Karina Jestes

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

1 Q When did that occur?
 2 A I think it was December of '12.
 3 Q Do you recall when you had your first
 4 communication with the FTC regarding the LabMD documents
 5 that you found at the Wilkinson Street residence?
 6 A Are you asking for a date or if I just recollect
 7 the --
 8 Q If you have a date or a general time frame, that
 9 would be helpful.
 10 A From my recollection, it was the week after the
 11 incident occurred because I think this was close to a
 12 weekend, if I'm remembering correctly, and I think I
 13 called and left a message, and then my phone call was
 14 returned when I returned back to work the next week, but I
 15 might be off on the date.
 16 Q Do you recall who at the FTC returned your call?
 17 A I'm not sure if it was Alain Sheer at that point,
 18 but he became my contact person. There might have been
 19 one immediate phone call made before I was connected with
 20 him by somebody else, but pretty quickly I was directed to
 21 Mr. Sheer.
 22 Q What do you recall about the substance of your
 23 initial communication with the FTC, and then we'll get to
 24 Mr. Sheer specifically in a minute?
 25 A I'm sorry. Could you repeat the question?

1 if I -- who started that part of the conversation, but
 2 yes, there was a discussion of "This relates to your
 3 investigation, and we would like to get them to you"; so I
 4 don't remember if it was me saying "Would you like this,"
 5 or them saying "We have this," but that was established.
 6 BY MS. HARRIS:
 7 Q Do you recall when the LabMD documents were first
 8 transmitted to the FTC?
 9 MS. VANDRUFF: Objection. Asked and answered.
 10 Go ahead.
 11 THE WITNESS: Yes, I recall it being
 12 December of 2012.
 13 BY MS. HARRIS:
 14 Q You said that early on you had quite a few
 15 conversations with the FTC; is that correct?
 16 A Yes.
 17 Q What else can you tell me about what you recall
 18 about the substance of those communications?
 19 A If I recall, we discussed kind of some of the
 20 things that we discussed here today, that I couldn't find
 21 a Sacramento connection to the people listed in these
 22 documents nor the company itself.
 23 I also determined that in some of those
 24 conversations it didn't make sense for me to initiate a
 25 conversation, and we could just do this cooperative, joint

1 Q Sure.
 2 What do you recall about the substance of your
 3 initial communication with the FTC following the
 4 October 5, 2012 events?
 5 A I told them what I had said earlier, that through
 6 an Internet search I learned that there was an
 7 investigation going on between the FTC and LabMD. I told
 8 them that I found some documents that looked like they
 9 related to LabMD and their customers, and then we
 10 discussed how we could share this information in a kind of
 11 cooperative investigation.
 12 Q What do you recall was your next -- strike that.
 13 When do you recall was your next communication
 14 with the FTC regarding the events of October 5 and the
 15 FTC's investigation?
 16 A At that time, we were talking quite a bit about
 17 how to get the documents safely to them; so it might have
 18 been that we were speaking on at least a weekly basis,
 19 maybe biweekly.
 20 Q Is it fair to say that fairly early on in your
 21 communications with the FTC they asked for copies of the
 22 LabMD documents that were retrieved from the
 23 Wilkinson Street residence?
 24 MS. VANDRUFF: Objection to form.
 25 THE WITNESS: Yes, and I can't remember exactly

1 investigation.
 2 Going along, I would continue to say "I need to
 3 check with my supervisor"; so that was -- some of those
 4 conversations I would have to go check with a lieutenant
 5 or so to make sure that I was following
 6 Sacramento Police Department procedures; so we talked
 7 about that and, again, that I wouldn't be attempting to
 8 contact all of these people, and I think there was a later
 9 discussion that the FTC said that they would be doing
 10 that, and at some point, they asked if they could use my
 11 name or contact information in a letter or e-mail-type
 12 communication, and again, after checking with my
 13 supervisors, I said "Yes, we could do that." Those types
 14 of discussions.
 15 Q So you referenced a cooperative joint
 16 investigation with the FTC.
 17 Has that been happening -- in other words, has
 18 the Sacramento Police Department been, beginning in and
 19 about fall 2012 and continuing to the present, engaging in
 20 a cooperative joint investigation with the FTC with
 21 respect to the LabMD documents?
 22 A In as much as -- it's kind of -- when -- I'm not
 23 really doing anything in an active investigation, but if
 24 they call and they need something, that's kind of going
 25 earlier to why this hasn't been returned to LabMD. I made

1 an arrangement so that the items of evidence would remain
2 in our evidence section even though the Sacramento Police
3 county case has been closed on the two subjects so that in
4 case the FTC needed these documents they still would be
5 accessible. I don't want to use the term of "joint
6 investigation" if that's like a legal term, but I'm
7 working with them when they need my assistance.

8 **Q Okay. Did the FTC ever tell you to not return
9 LabMD's documents to LabMD?**

10 MS. VANDRUFF: Objection. Asked and answered.

11 THE WITNESS: No.

12 BY MS. HARRIS:

13 **Q You also referenced that the FTC told you that
14 they would contact all the people listed on the LabMD
15 documents.**

16 **Do you recall who at the FTC told you that?**

17 A I remember I was speaking with Alain Sheer, and I
18 believe also on the line was Ruth Yodaiken, I think is the
19 pronunciation of her name (verbatim). We did discuss -- I
20 basically said that I could or someone from the
21 Police Department could do that, but I said it would
22 just -- it would take so much time.

23 As a smaller agency I didn't really feel like I
24 had the manpower to do that; so I know that that
25 discussion occurred where they said "Well, we probably

1 A At that point, I was still speaking with
2 Alain Sheer and Ruth Yodaiken.

3 **Q Do you have a copy of that letter?**

4 A They sent it to me via e-mail; so I'm not sure.
5 I would assume I kept it, but I can't guarantee that I
6 kept it.

7 **Q Do you recall generally what the letter said?**

8 A Not enough. I just remember that my name and
9 phone number were in there and that people could contact
10 me or the FTC if they wanted my information, but I don't
11 remember exactly the beginning summary of why the letter
12 was being sent out.

13 **Q The letter -- was it being sent to the people who
14 appeared on the LabMD documents?**

15 MS. VANDRUFF: Objection. Lacks foundation.

16 THE WITNESS: From my understanding -- and I
17 didn't get a list of the recipients -- but from my
18 understanding, that was going to be the intent.

19 BY MS. HARRIS:

20 **Q Do you know was that letter sent to the consumers
21 listed on the LabMD documents?**

22 A Again, that was -- I know that was the intent of
23 what was going to happen. I wouldn't be able to say
24 whether or not that did, indeed, happen.

25 **Q I'll just note that, when you do get the subpoena**

1 would be able to do that for you" or not maybe "for
2 you" -- "If we're going to do it, then you wouldn't need
3 to as long as it got done."

4 **Q Do you recall when that conversation occurred?**

5 A No, I don't.

6 **Q Do you recall did it occur in fall of 2012?**

7 A I think it was after they received the documents
8 which would have been after December of '12.

9 **Q Do you recall how close in time to December '12
10 the FTC said that they would attempt to contact the people
11 on the LabMD documents?**

12 MS. VANDRUFF: Objection to form.

13 THE WITNESS: No, I don't remember.

14 BY MS. HARRIS:

15 **Q Do you remember even -- was it within the first
16 three months of 2013?**

17 MS. VANDRUFF: Objection to form.

18 THE WITNESS: I don't remember.

19 BY MS. HARRIS:

20 **Q You also referenced the FTC asked if they could
21 disseminate a letter with your name on it.**

22 **Do you recall when the FTC made that request?**

23 A Not exactly. Again, it would have been after
24 December of '12.

25 **Q Do you recall who at the FTC made that request?**

1 **that we submitted, we asked for all communications between
2 your office and the FTC; so to the extent you have it,
3 that letter would be an example of communications that you
4 had with the FTC to produce to us.**

5 A Okay.

6 **Q I believe you testified that you contacted the
7 FTC regarding the LabMD documents as a result of doing a
8 Google search; is that correct?**

9 A Internet search.

10 **Q Pardon me.**

11 **At that time, you determined or discovered that
12 there was an FTC investigation with respect to LabMD?**

13 A Yes.

14 **Q You mentioned having communications with
15 Alain Sheer and Ruth -- I don't know her last name, but
16 we'll fill that in later in the record.**

17 **You mentioned having communications with
18 Alain Sheer and with Ruth in the fall 2012 time frame and
19 thereafter.**

20 **What was your last, most recent communication
21 with anyone at the FTC regarding LabMD and the
22 investigation?**

23 A Technically, I guess today.

24 **Q Good answer.
25 Before today?**

EXHIBIT

4

In the Matter of:

LabMD, Inc.

November 21, 2013

Robert J. Boback

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

1				3			
1	FEDERAL TRADE COMMISSION			1	UNITED STATES OF AMERICA		
2	I N D E X			2	FEDERAL TRADE COMMISSION		
3				3	In the Matter of:		
4	WITNESS:	EXAMINATION:	PAGE	4	Lab MD, Inc., a corporation,	Docket No. 9357	
5	ROBERT J. BOBACK BY MR. SHEER		6	5	Respondent.		
6			164	6			
7		BY MR. SHERMAN	97	7	Thursday, November 21, 2013		
8				8			
9	EXHIBIT:	DESCRIPTION	FOR ID	9	REED SMITH, LLP		
10	No. CX 8	[173.16.83.112]		10	225 Fifth Avenue		
11		Insuranceaging_6.05.07	42	11	Suite 1200		
12	No. CX 9	[201.194.118.82]		12	Pittsburgh, PA 15222		
13		Insuranceaging_6.05.0	49	13			
14	No. CX 10	Tiversa insurance aging file 3	23	14	The above-entitled matter came on for deposition,		
15	No. CX 11	Tiversa insurance aging file 4	56	15	pursuant to notice at 9:09 a.m.		
16	No. CX 12	Subpoena to Tiversa	6	16			
17	No. CX 18	[71.62.145.247]daily credit card		17			
18		Transactions.pdf	65	18			
19	No. CX 19	Four IP addresses	50	19	C O N F I D E N T I A L		
20	No. CX 20	2-page Document with insurance		20	Pursuant to Protective Order		
21		Aging info	38	21			
22	No. CX 21	SOW	18	22			
23	No. CX 22	email 4/17/08	72	23			
24	No. CX 23	email 5/13/08	76	24			
25	No. CX 24	email 5/15/08	79	25			
2				4			
1	No. CX 25	email 5/22/08	86	1	APPEARANCES:		
2	No. CX 26	email 5/23/08	92	2			
3	No. CX 27	email 7/22/08	93	3	ON BEHALF OF THE FEDERAL TRADE COMMISSION:		
4	No. CX 29	subpoena to Tiversa with updated		4	ALAIN SHEER, ESQ.		
5		Date	6	5	MAGGIE LASSACK, ESQ.		
6	No. 0200	Boback's certification of records	95	6	JOHN A. KREBS, ESQ.		
7		(Exhibits retained by Attorney Sheer.)		7	Federal Trade Commission		
8				8	Bureau of Consumer Protection		
9	No. RX 1	Testimony of May 4, 2009	143	9	600 Pennsylvania Avenue, NW		
10	No. RX 2	Letter from the Federal Trade		10	Mail Stop NJ-8100		
11		Commission to Robert Boback	124	11	Washington, DC 20580		
12	No. RX 3	Press release	130	12	202-326-3713		
13	No. RX 4	Dartmouth study	136	13			
14	No. RX 5	Series of e-mails between Robert		14	ON BEHALF OF RESPONDENTS:		
15		Boback and Carl Settlemyer	137	15	William A. Sherman, II, Esq.		
16	No. RX 6	Subpoena	124	16	DINSMORE & SHOHL, LLP		
17				17	801 Pennsylvania Avenue, N.W.		
18				18	Suite 610		
19				19	Washington, DC 20004		
20				20	202-372-9117		
21				21			
22				22	HALLEE MORGAN, ESQ		
23				23	MICHAEL PEPSON, ESQ.		
24				24	CAUSE OF ACTION		
25				25	1919 Pennsylvania Avenue, NW		

1 back. That's it.
 2 A. Okay. Okay.
 3 Q. Do you recognize what RX 4 is?
 4 A. RX 4?
 5 Q. The exhibit that I just handed you.
 6 A. I do. It appears to be the Dartmouth study, Data
 7 Hemorrhages and the Health Care Subject.
 8 Q. And you have seen this report before or this
 9 article?
 10 A. I have.
 11 Q. Okay. And we've turned to a page where figure
 12 No. 4 is depicted.
 13 Are you there?
 14 A. Yes, I am.
 15 Q. Is that a redacted version of one of the pages
 16 contained from the 1,718 file that we've been referring
 17 to?
 18 A. It appears to be.
 19 MR. SHEER: Objection. Foundation.
 20 (Deposition Exhibit RX 5 was marked for
 21 identification.)
 22 BY MR. SHERMAN:
 23 Q. I'll show you what has been marked as Exhibit RX
 24 5 and ask that you take a look at that and let me know
 25 when you are prepared to talk about it.

1 A. I don't recall.
 2 Q. Do you recall what the meeting or call would have
 3 been about?
 4 A. If you look to the last section of it, he reached
 5 out to me. I didn't reach out to him. So, I don't
 6 know. I didn't set this up. This didn't come from me.
 7 Q. But if you look at the last section of the
 8 subject, all the way through, is peer-to-peer theft
 9 research conference call; is that correct?
 10 A. That is what Carl Settlemeyer started the whole
 11 subject line on, yes. I didn't write that.
 12 Q. I understand. Was this peer-to-peer ID theft
 13 research conference call about Lab MD?
 14 A. No.
 15 Q. It was not?
 16 A. I don't know. I just testified. I don't recall
 17 what it was about. I don't know what it was about. If
 18 you go to the last e-mail, we saw your press release.
 19 And I don't recall, specifically, FTC in any
 20 conversation, really, bringing up Lab MD, specifically,
 21 so if that helps you.
 22 Q. I'm just wondering if, as a result of the press
 23 release that they saw, if they had any specific
 24 inquiries about Lab MD?
 25 A. I don't recall. This was someone reaching out to

1 A. Okay.
 2 Q. Do you recognize what these are?
 3 A. A series of e-mails, yes.
 4 Q. And who are they between?
 5 A. Appear to be between myself and Carl Settlemeyer.
 6 Q. And does this refresh your recollection as to who
 7 Carl Settlemeyer is?
 8 A. I saw in the previous document who Carl
 9 Settlemeyer is. I still don't know. I wouldn't be able
 10 to pick him out of a line up.
 11 Q. Did you ever have a meeting in which Carl
 12 Settlemeyer was present?
 13 A. I don't know. I don't know him. I mean, I don't
 14 know.
 15 Q. Well. At the bottom of the first page of our RX
 16 5 --
 17 A. Yes.
 18 Q. -- it is an e-mail between you and Carl
 19 Settlemeyer, would you agree, an e-mail that you sent to
 20 Mr. Settlemeyer?
 21 A. Yes, I would agree.
 22 Q. And you are talking about a meeting; is that
 23 correct?
 24 A. A call, I believe, yes.
 25 Q. Did the meeting or call ever take place?

1 us. I have no idea what they talked to us about. I am
 2 sure they talked to us about the press release. I know
 3 that the FTC looked foolish in the 2007 testimony that
 4 they also testified at that time. And my assumption is
 5 that they wanted to -- they reached out in this fashion
 6 to us, based on that, in an effort to try to educate
 7 themselves on what was going on with peer-to-peer,
 8 because, frankly, they didn't know, in my opinion.
 9 Q. The testimony that you referred to in 2007, the
 10 FTC, in your opinion, because they didn't know a lot
 11 about peer-to-peer networks?
 12 A. That is my opinion, yes, they did. They reported
 13 that the FTC was a neutral -- or that the peer-to-peer
 14 posed neutral risk, which is their quote, which I
 15 disagree with then and I disagree with today.
 16 Q. And have you had any conversations, whether they
 17 be conference calls or meetings with the FTC, in order
 18 to change their opinion as to whether or not
 19 peer-to-peer is a neutral threat?
 20 A. I have -- I have had, in the totality of our time
 21 at Tiversa, I have had, what I believe to be, two
 22 meetings with the FTC. One at Tiversa here in
 23 Pittsburgh. And one at the FTC in DC.
 24 Q. Do you recall who was in attendance at the
 25 meeting here in Pittsburgh?

1 A. I do. Alain Sheer and I believe it was a woman
 2 that was with him. But I don't know who. I don't know
 3 who she was.
 4 Q. Do you recall what year that was?
 5 A. I think it was 2009.
 6 Q. Would it have been around the time of these
 7 e-mails or do you know?
 8 A. It was probably sometime after, after these
 9 e-mails, yes.
 10 Q. And the meeting that you had at the FTC, do you
 11 recall what year that occurred?
 12 A. In that same time, later in the year.
 13 Q. I'm sorry. Do you recall who was in attendance
 14 at those meetings?
 15 A. Alain Sheer, and I don't really recall. There
 16 were other people, maybe another person or two, but I
 17 don't specifically recall who they were.
 18 Q. At those meetings, was Lab MD specifically
 19 discussed?
 20 A. In the meeting in Pittsburgh, no. In the meeting
 21 in DC it may have been, but only in the context of
 22 multiple organizations as well. It wasn't -- there was
 23 no extended time on Lab MD any more than any of the
 24 other organizations that we discussed.
 25 Q. Did you provide the FTC with a list of

1 It was not in our interest to give any information to
 2 the FTC, but we were under federal subpoena.
 3 Q. The subpoena was actually issued to the Privacy
 4 Institute rather than to Tiversa?
 5 MR. SHAW: It is civil investigative demand.
 6 It is different than a subpoena.
 7 BY MR. SHERMAN:
 8 Q. Yes, it is a civil investigative demand.
 9 A. The civil investigative demand, my understanding,
 10 it was issued to the Privacy Institute, however, if I
 11 didn't allow it to go to the Privacy Institute, it would
 12 go directly to Tiversa, so it was only to try to
 13 separate that.
 14 Q. Do you have an estimation of how many documents
 15 you disclosed to the FTC?
 16 A. I do not, the number of documents. We responded
 17 to the civil investigative demand exactly to the letter
 18 of what we had to, because it was a civil investigative
 19 demand. So, whatever the totality of those documents
 20 were, we responded accordingly.
 21 (Deposition Exhibit RX I was marked for
 22 identification.)
 23 BY MR. SHERMAN:
 24 Q. I've handed you what has just been marked as RX
 25 1. I'll ask you to take a look at that and let me know

1 organizations from whom or for whom you had identified
 2 as having personal identifying information or personal
 3 health information accessible on the web?
 4 A. On the web? No.
 5 Q. I'm sorry, on the peer-to-peer network?
 6 A. We did not directly provide it to the FTC,
 7 however, we provided it to the Privacy Institute, which
 8 under a civil investigative demand, provided it to the
 9 FTC.
 10 Q. How did you become aware that the Privacy
 11 Institute, under a civil investigation demand, provided
 12 it to the FTC?
 13 A. The FTC told us that they wanted this
 14 information. And we could provide it or they have --
 15 they will use a civil investigative demand. And we did
 16 not want a civil investigative demand put against
 17 Tiversa. We felt, frankly, we felt pressured into that
 18 situation. And, so, therefore, through a third party,
 19 just to try to create some distance, because we were in
 20 discussions from an acquisition standpoint at Tiversa,
 21 that we didn't want to be in the middle of a civil
 22 investigative demand. So, to separate that, through a
 23 third party, put the Privacy Institute, which then they
 24 gave a civil investigative demand to the Privacy
 25 Institute, which ultimately funneled back to us anyway.

1 when you are prepared to answer questions about it.
 2 A. Is there any specific area, or would you like me
 3 to read the whole thing?
 4 Q. No. Have you seen it before?
 5 A. I have seen it before.
 6 Q. So, you are familiar with the document as it is
 7 presented to you; correct?
 8 A. I'm familiar with my testimony, if you are
 9 stating that that is what it was, then, that is what it
 10 is.
 11 Q. Well, it indicates that this is your testimony
 12 before the house subcommittee on commerce trade and
 13 consumer protection dated May 4, 2009; is that right?
 14 A. That's correct.
 15 Q. And you recall giving that testimony on that
 16 date?
 17 A. I do.
 18 Q. Now, how did you come to testify before the house
 19 subcommittee on commerce and trade?
 20 A. I don't recall.
 21 Q. Were you contacted by a Congressman or --
 22 A. I probably was. I think it was a Congressman or
 23 Congresswoman that started this one. I think it was
 24 Mary Bono Mack, B-o-n-o, M-a-c-k.
 25 MR. SHERMAN: Let me take about a

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1 five-minute break before we go through this. All right.
 2 (There was a brief recess in the
 3 proceeding.)
 4 BY MR. SHERMAN:
 5 **Q. Back on the record. Just to go back very**
 6 **briefly. You indicated that you had two meetings with**
 7 **the FTC and could not remember some of the names of the**
 8 **individuals that were there. I just want to ask you if**
 9 **Ruth Gutican (phonetic), does that name ring a bell?**
 10 A. No, it doesn't.
 11 **Q. As to the female who might have been at any of**
 12 **those meetings?**
 13 A. It may have been her. I have no recollection,
 14 other than the meeting in Pittsburgh, it was Alain Sheer
 15 and what I believe was a female. But I don't know her
 16 name at all.
 17 **Q. And the meeting in DC?**
 18 A. I don't recall. Again, I remember Alain Sheer,
 19 but beyond that I don't know who else was in the
 20 meeting.
 21 **Q. All right. So, let's go back to what has been**
 22 **marked as RX 1, which is your testimony of May 4, 2009.**
 23 **If you turn to Page 3, the second paragraph. You**
 24 **indicated that the fact that peer-to-peer involves**
 25 **downloading of files from individuals that are unknown**

1 **Q. Yes. Did I read that correctly?**
 2 A. Yes, I see that as written in there.
 3 **Q. How do you define a hacker?**
 4 MR. SHAW: Objection. Don't answer the
 5 question. Move on.
 6 MR. SHERMAN: Can you mark that as well?
 7 BY MR. SHERMAN:
 8 **Q. You indicate that later on in the same paragraph,**
 9 **the same testimony, these worms will index and share all**
 10 **information on the victim's computer, without any**
 11 **visibility to the victim. Some ways down in the same**
 12 **paragraph.**
 13 A. Yes, I see where it says this.
 14 **Q. You also go on to say this code is very insidious**
 15 **as users cannot detect their presence on their systems.**
 16 **Do you see that?**
 17 A. I see it.
 18 **Q. Is that the usual MO of a hacker?**
 19 MR. SHAW: Objection. It is outside the
 20 scope of the subpoena. Don't answer the question. You
 21 can mark it.
 22 MR. SHERMAN: Mark it.
 23 BY MR. SHERMAN:
 24 **Q. When Tiversa is searching individual hard drives**
 25 **or computers, are they detectable?**

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1 **to the downloader. When you say, individuals, do you**
 2 **mean individual entities or actual individual computer**
 3 **hard drives?**
 4 MR. SHAW: I'm going to object to this
 5 questioning as outside the scope of the subpoena and
 6 unrelated to the proceeding in which the subpoena has
 7 been taken, including Lab MD.
 8 MR. SHERMAN: Obviously, this technology was
 9 used to download my client's file.
 10 MR. SHAW: And your client's files --
 11 MR. SHERMAN: About his testimony which
 12 references the same technology.
 13 MR. SHAW: Which topic?
 14 MR. SHERMAN: It references the same
 15 technology that you've allowed him to testify to before.
 16 MR. SHAW: And he testified as to your
 17 client. He doesn't need to testify. We'll write that
 18 one down, too. Mark it.
 19 BY MR. SHERMAN:
 20 **Q. You indicated that peer-to-peer involves**
 21 **downloading of files from individuals that are unknown**
 22 **to the downloader, allows the hacker to overcome the**
 23 **hurdle of getting users to download the worm.**
 24 **Do you see that?**
 25 A. Do I see it?

1 A. Tiversa doesn't search individual hard drives or
 2 computers. Tiversa searches the peer-to-peer network.
 3 **Q. When they are searching the network, when Tiversa**
 4 **is searching the network, is Tiversa detectable?**
 5 A. Define detectable?
 6 **Q. The persons whose data you might be downloading**
 7 **or viewing, do they know that you are downloading or**
 8 **viewing that data? Can they detect that?**
 9 A. I don't know what you mean by detect.
 10 **Q. Can they be made aware? Are they aware that**
 11 **someone is accessing their data?**
 12 A. Are you asking, is it possible?
 13 **Q. Yes. Is it possible?**
 14 A. Yes.
 15 **Q. It is possible?**
 16 A. Yes.
 17 **Q. Now, what type of technology would they have to**
 18 **have in order to be aware that their data is being**
 19 **downloaded from the peer-to-peer network?**
 20 MR. SHAW: Object to form. Outside of the
 21 scope of the subpoena. Tiversa hasn't been noticed to
 22 testify about technology that a computer user would need
 23 to have to identify whether their information was being
 24 downloaded from a peer-to-peer network. And I am going
 25 to instruct the witness not to answer. You can mark it

EXHIBIT

5

**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 FOR A PROTECTIVE ORDER

I.

On November 5, 2013, Respondent LabMD, Inc. ("Respondent") filed a Motion for a Protective Order ("Motion") pursuant to Commission Rule of Practice 3.31(d), 16 C.F.R. § 3.31(d), seeking an order limiting or barring deposition and document subpoenas issued by Complaint Counsel to various nonparties.¹ Complaint Counsel filed an opposition to the Motion on November 15, 2013 ("Opposition"). For the reasons set forth below, Respondent's Motion is GRANTED in part and DENIED in part.

Respondent's Motion included a request for oral argument on its Motion. That request is DENIED.

II.

A.

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 FTC Act. Complaint ¶ 23. Specifically, the Complaint alleges that Respondent failed to maintain adequate network security to protect confidential patient information and that such failure caused, or is likely to cause, substantial consumer injury. Complaint ¶ 22. According to the Complaint, a third party informed Respondent that its June 2007 insurance aging report was available on a peer-to-peer, or "P2P," network through Limewire, a P2P file sharing application. Complaint ¶ 17. This file, the Complaint alleges, contained the names, dates of birth, Social Security

¹ According to the Motion, Respondent seeks protection from subpoenas for deposition and/or documents issued to: Allen Truett, 21st Century Oncology, Alison Simmons, Automated PC Technologies, David Lapidus, Cyprus Communications, Eric Knox, Erick Garcia, Jeff Martin, Forensic Strategy Services, Karalyn Garrett, Josie Maldonado, John Boyle, Karina Jestes, Lawrence Hudson, Jeremy Dooley, Managed Data Solutions, Matt Bureau, MasterCard Worldwide, Patrick Howard, ProviDyn, Robert Hyer, Rosalind Woodson, Sacramento Police Dept., Sandy Springs GA Police Depart., Scott Moulton, Trend Micro, Inc., US Bank Nat'l Ass'n, Chris Maire, Visa Inc., Michael Daugherty, and Southeast Urology Network (hereafter, the "Nonparties"). See Motion at 2 n.1.

With respect to discovery into any information involving a time period other than 2005 to 2008, Respondent asserts that LabMD's technology and software, other than that in place at the time of the events in Complaint paragraphs 17-20, is irrelevant. Motion at 7. In its Opposition, Complaint Counsel asserts that LabMD's failures began before 2005 and continued past 2008 and that the subpoenas specify reasonable time periods that are appropriate to the discovery sought. Opposition at 1, 7 n.8.

A request for documents relating to the time period being investigated by Complaint Counsel is relevant. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *4 (Jan. 30, 2004). The Complaint does not allege that Respondent's "failures" began before 2005 and thus discovery of such information does not appear relevant to the allegations of the Complaint. Moreover, with one exception, the instructions on the subpoenas *duces tecum* limit the period covered by a document request to the period from January 1, 2005 or a later period to present.⁷

Information from the time period after 2008 may provide information on whether, in the time period since the alleged security breach, Respondent has employed reasonable and appropriate measures to prevent unauthorized access to personal information and thus may be relevant to the scope of the requested injunctive relief in this case. Accordingly, the subpoenas shall be limited to the period from January 1, 2005 to present.

Regarding discovery into the nature of Respondent's computer network security, including its services contracts and communications with various IT service providers, such information is relevant to whether Respondent failed to provide reasonable and appropriate security for personal information on its computer networks and thus is relevant to the allegations of the Complaint.

With respect to discovery into the existence of any security incidents involving Respondent's computer network, the Complaint alleges as "security incidents" the exposure of the P2P insurance aging file and the Sacramento Incident. It is not apparent that any other security incidents are relevant to the allegations of the Complaint; however, Respondent denies that its security practices caused any consumer injury. Therefore, the existence of other security incidents may be relevant to Respondent's defenses. In addition, the existence of additional security incidents may be relevant to the nature and extent of any appropriate relief in this case, should the alleged violations of the FTC Act be proven. Accordingly, Respondent has failed to demonstrate that the requested discovery is not reasonably likely to lead to the discovery of relevant evidence, or that the requested discovery should otherwise not be allowed.

As to discovery regarding a book written by Respondent's CEO Michael Daugherty, Complaint Counsel states that Mr. Daugherty's book concerns the circumstances relating to the exposure of the P2P insurance aging file and LabMD's business practices. Respondent argues that Mr. Daugherty's self-published manuscript, titled "The Devil Inside the Beltway," is critical of the FTC's conduct with regard to the investigation and litigation of the instant matter, and that the document subpoena to Mr. Daugherty – and Complaint Counsel's nonparty discovery

⁷ The only subpoena *duces tecum* seeking documents from the period before 2005 was the one served on Automated PC Technologies.

EXHIBIT

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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

**RESOLUTION DIRECTING USE OF COMPULSORY PROCESS IN NONPUBLIC
INVESTIGATION OF ACTS AND PRACTICES RELATED TO CONSUMER PRIVACY
AND/OR DATA SECURITY**

File No. P954807

Nature and Scope of Investigation:

To determine whether unnamed persons, partnerships, corporations, or others are engaged in, or may have engaged in, deceptive or unfair acts or practices related to consumer privacy and/or data security, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such investigation shall, in addition, determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation not to exceed five (5) years from the date of issuance of this resolution. The expiration of this five-year period shall not limit or terminate the investigation or the legal effect of any compulsory process issued during the five-year period. The Federal Trade Commission specifically authorizes the filing or continuation of actions to enforce any such compulsory process after the expiration of the five-year period.

Authority to Conduct Investigation:

Sections 6, 9, 10, and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, and 57b-1, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. 1.1 *et seq.* and supplements thereto.

By direction of the Commission.


Donald S. Clark
Secretary

Issued: January 3, 2008

EXHIBIT

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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 COMPLAINT COUNSEL'S MOTION TO QUASH SUBPOENA
SERVED ON COMPLAINT COUNSEL AND FOR PROTECTIVE ORDER**

On January 6, 2014, Complaint Counsel filed a Motion to Quash Subpoena Served on Complaint Counsel and for a Protective Order ("Motion"). Complaint Counsel seeks an order quashing a subpoena *ad testificandum* served by Respondent LabMD ("Respondent" or "LabMD") on Senior Complaint Counsel Alain Sheer and barring Respondent in the future from serving any subpoena *ad testificandum* on any Complaint Counsel attorneys. Respondent filed its opposition on January 16, 2014 ("Opposition").

Having fully reviewed the Motion and the Opposition, and 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 FTC Act. Complaint ¶ 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. Complaint ¶¶ 17, 19. The Complaint further avers that in October 2012, the Sacramento, California Police Department 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. Complaint ¶ 21.

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

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, failure to state a claim, lack of subject matter jurisdiction, 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.

Although Respondent's subpoena does not designate any topics for Mr. Sheer's deposition, according to Respondent's Opposition, Respondent seeks to inquire into the following areas:

1. Mr. Sheer's communications with the Sacramento Police Department ("SPD") in or around December 2012 regarding SPD's discovery of LabMD Day Sheets;
2. Mr. Sheer's communications with Tiversa in meetings and/or conference calls taking place in 2009;
3. Mr. Sheer's communications with Dartmouth College via email in March 2009, regarding a study that Dartmouth conducted on health information available on P2P networks and whether the FTC and Dartmouth "exchanged information" regarding LabMD's alleged data security breach; and
4. Mr. Sheer's knowledge regarding the FTC's "analys[e]s and processes including any rules, regulations, and guidelines, which led the FTC to its decision to investigate LabMD and other similarly situated victims of cyber theft as a means to expand its authority under section 5." Opposition at 3-4.

II. Overview of Applicable Law

The general scope of discovery is set forth in Commission Rule of Practice 3.31(c), which provides in pertinent part: "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." 16 C.F.R. § 3.31(c)(1). However, a party may not seek discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; or where the burden or expense of providing the discovery outweighs its likely benefit. 16 C.F.R. § 3.31(c)(2)(i); *see also* 16 C.F.R. § 3.31(d) (Administrative Law Judge "may also deny discovery . . . 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 light of the generally broad scope of permissible discovery, opposing trial counsel is not "absolutely immune from being deposed." *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), but such discovery is, nevertheless, generally disfavored. *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re*

Subpoena Issued to Dennis Friedman), 350 F.3d 65, 71-72 (2d Cir. 2003); *Nguyen v. Excel Corp.*, 197 F.3d 200, 208-09 (5th Cir. 1999); *Corporation v. American Auto. Centennial Comm'n.* 1999.U.S. Dist. LEXIS 1072, at * 3 (D.D.C. Feb. 2, 1999). “Most courts which have addressed [requests to depose opposing counsel] have held that the taking of opposing counsel’s deposition should be permitted only in limited circumstances and that, because of the potential for abuse inherent in deposing an opponent’s attorney, the party seeking the deposition must demonstrate its propriety and need before the deposition may go forward.” *American Casualty Co. v. Krieger*, 160 F.R.D. 582, 588 (S.D. Cal. 1995). Accordingly, when, as here, a party seeks to depose opposing trial counsel, the party seeking such discovery must show: “(1) no other means exist to obtain the information than to depose opposing counsel, . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.” *Shelton*, 805 F.2d at 1323; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); see *Friedman*, 350 F.3d at 71-72, and cases cited therein (hereafter, the “*Shelton* factors”). See *In re Hoechst Marion Roussel, Inc.*, 2000 WL 33944050, at *1 (Nov. 8, 2000) (applying *Shelton* factors to deny motion to compel depositions of, among others, FTC attorneys).

As the court stated in *American Casualty*:

There are good reasons to require the party seeking to depose another party’s attorney to bear the burden of establishing the propriety and need for the deposition. “While the Federal Rules do not prohibit the deposition of a party’s attorney, experience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney . . .”

160 F.R.D. at 588 (quoting in part *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987)).

Based on the foregoing, the analysis now turns to whether Respondent has met its burden of demonstrating that the information that Respondent seeks to obtain can only be obtained from Mr. Sheer; that the information is both relevant and nonprivileged; and that the desired information is crucial to Respondent’s case.

III. Analysis

A. Whether other means exist to obtain the information than to depose opposing counsel

Respondent argues that only Mr. Sheer can provide information regarding the FTC’s communications with nonparties SPD, Tiversa, and Dartmouth College, and “the FTC’s behavior . . .” regarding this case. Respondent sets forth, as an example of Mr. Sheer’s allegedly unique knowledge, that only Mr. Sheer “can testify why the FTC waited four months to notify LabMD about the Day Sheets [found in Sacramento and provided to the FTC by SPD] and why the FTC never contacted the consumers” to advise them that their personal information may have been compromised. Opposition at 5. However, the testimony of Ms.

In the instant case, permitting the requested deposition of Mr. Sheer implicates each of the foregoing concerns. Where, as here, it does not appear that Mr. Sheer possesses unique and/or crucial information, allowing the requested deposition risks disrupting trial preparation, increasing time and cost requirements, and countenancing potentially harassing trial tactics.

E. Protective Order

In addition to an order quashing the Sheer deposition subpoena, Complaint Counsel seeks an order barring Respondent from issuing any deposition subpoenas to Complaint Counsel generally. The burden of demonstrating an entitlement to this protective order is on Complaint Counsel. *In re Polypore Int'l*, 2008 FTC LEXIS 155, at *14-16 (Nov. 14, 2008); *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *5 (July 6, 2001).

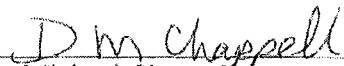
It cannot be determined on the present record that the requested protective order is warranted. Complaint Counsel does not contend that Respondent has issued any deposition subpoenas to Complaint Counsel other than that issued to Mr. Sheer. Moreover, as noted earlier, attorneys are not immune from being deposed. *Shelton*, 805 F.2d at 1327. Rather, as is clear from *Shelton* and related authorities, the determination of whether a counsel deposition can proceed is a fact-based inquiry. Complaint Counsel's invitation to issue a "blanket" prohibition against future subpoenas directed to yet-to-be determined counsel is declined.

Because Complaint Counsel has failed to meet its burden of demonstrating an entitlement to the requested protective order, Complaint Counsel's Motion for a Protective Order is DENIED.

IV. Conclusion

For all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART, and it is hereby ORDERED that Respondent's subpoena *ad testificandum* served on Complaint Counsel Alain Sheer is QUASHED. In all other respects, including Complaint Counsel's request for a protective order, the Motion is DENIED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: January 30, 2013

From: Yodaiken, Ruth <ryodaiken@ftc.gov>
Sent: Thursday, February 21, 2013 4:22 PM
To: Jestes, Karina <KJestes@pd.cityofsacramento.org>
Cc: Sheer, Alain <ASHEER@ftc.gov>
Subject: contact with FBI

Karina,

I have given your contact information to Patricia (Trish) Curran of the FBI as she or one of her colleagues might be trying to speak with you. I thought I would give you a heads up so you know how they found you.

Also, we did not receive notice that you been approved for us to share documents. If you have requested that access through sending the form to our General Counsel's office (or do so in the future), please let Alain and I know so we can follow-up.

I hope life is treating you well.

All the best,

Ruth