

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

ORIGINAL

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION TO LIMIT EVIDENCE TO THE TIME FRAME OF THE EXPERT REPORT AND OPINION

The Court should deny Respondent’s Motion to Limit Evidence regarding LabMD’s data security practices after July 2010 because (1) limitations on expert testimony do not require limitations on fact evidence; (2) excluding evidence about LabMD’s post-July 2010 security practices would prevent the Court from considering probative evidence that is relevant to the allegations of the Complaint and the scope of the requested injunctive relief; and (3) Respondent’s Motion it is an untimely filed motion *in limine*.

BACKGROUND

As set forth in the Court’s Revised Scheduling Order, Complaint Counsel provided Respondent with its expert witness reports, including Dr. Hill’s, on March 18, 2014. Respondent deposed Dr. Hill on April 18, 2014. Dr. Hill’s report explicitly states that her opinions are limited to the time period January 2005 through July 2010. *See* Expert Report of Raquel Hill, Ph.D. ¶¶ 4, 48, attached to Respondent’s Motion as Exhibit 2. Dr. Hill affirmed at her deposition that she did not express any opinion of LabMD’s data security practices after July 2010. *See* Hill

Dep. Tr. at 140, excerpt attached to Respondent's Motion as Exhibit 1. Consistent with Rule 3.31A(c)'s requirement that an expert report must "contain a complete statement of all opinions to be expressed," 16 C.F.R. § 3.31A(c), Complaint Counsel agreed during the meet-and-confer session regarding this motion that it will not seek to elicit at trial opinion testimony from Dr. Hill regarding the adequacy of LabMD's data security practices that are outside the temporal scope of her report.¹

Since at least January 24, 2014, Respondent has been on notice that Complaint Counsel intends to introduce evidence of LabMD's data security practices after July 2010. On that date, Complaint Counsel responded to Respondent's Interrogatory 22 by stating: "Complaint Counsel identifies the time period of January 1, 2005 through the close of evidence at the Hearing in the above-captioned matter," as the time frame in which Complaint Counsel claims LabMD's data security practices were not reasonable and appropriate. Compl. Counsel Resp. to Resp't First Set of Interrogs. at 16, excerpt attached as Exhibit A.² Respondent is also aware that Complaint Counsel has sought and obtained discovery regarding LabMD's post-July 2010 practices, as detailed in Section II, below.

¹ Respondent mischaracterizes Dr. Hill's report and testimony in stating that "Dr. Hill did not conclude that LabMD's data security was inadequate post July 2010." Resp't Mot. at 5. As is clear from Dr. Hill's deposition as excerpted in Exhibit 1 to Respondent's Motion, Dr. Hill has offered no opinion on the adequacy of LabMD's data security after July 2010.

² In response to concerns raised by Respondent regarding the verification of Complaint Counsel's interrogatory responses, Complaint Counsel served, on March 26, 2014, revised responses verified by Bureau of Consumer Protection Deputy Director Daniel Kaufman. The responses served on March 26, 2014 are substantively identical to those served on January 24, 2014 and differ only in the verification signatory.

ARGUMENT

I. EXPERT OPINION TESTIMONY DOES NOT AFFECT THE ADMISSIBILITY OR RELEVANCE OF FACT EVIDENCE

Complaint Counsel can prove its case with both fact and expert evidence. Complaint Counsel intends to present competent evidence of the state of LabMD's data security between January 2005 and the close of discovery in this matter. The fact that Complaint Counsel's expert, Dr. Hill, will testify about a subset of that time period does not in any way limit Complaint Counsel's ability to offer fact evidence addressing other portions of that time period. Respondent cites no legal precedent suggesting otherwise because there is none. Respondent's attempt to exclude Complaint Counsel's competent, relevant fact evidence should be denied.

II. POST-JULY 2010 EVIDENCE IS RELEVANT AND PROBATIVE TO THE FACT DETERMINATION IN THIS PROCEEDING

The Complaint alleges that Respondent "failed to provide reasonable and appropriate security for personal information on its computer networks." Compl. ¶ 10. This Court has previously determined that:

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.

Order on Resp't Mot. for a Prot. Order (Nov. 22, 2013) at 7. The Court ruled that discovery under the subpoenas at issue would cover the time "period from January 1, 2005 to present." *Id.*

Complaint Counsel has amassed a large volume of evidence relevant to the Complaint's allegations, including depositions of former LabMD Information Technology ("IT") employees. Several of these employees worked at LabMD after July 2010 and provided evidence relevant to LabMD's data security practices post-July 2010. In particular, Robert Hyer worked at LabMD from summer 2009 through March 2012. *See Hyer Dep. Tr.* (Dec. 13, 2013) at 15-16, 30-32, 46-

47, excerpts attached as Exhibit B. Brandon Bradley and Jennifer Parr were employed at LabMD from approximately May 2010 until February 7, 2014. *See* Bradley Dep. Tr. (Feb. 14, 2014) at 7-8, 11, excerpt attached as Exhibit C; Parr Dep. Tr. (Feb. 11, 2014) at 16-17, 114, excerpts attached as Exhibit D. Jeff Martin began working at LabMD on January 25, 2012, and was employed at the company through at least February 6, 2014. *See* Martin Dep. Tr. (Feb. 6, 2014) at 9, excerpt attached as Exhibit E. These and other former LabMD employees provided testimony regarding LabMD's post-July 2010 security practices, which will assist the Court in evaluating the allegations of the Complaint, the reasonableness of LabMD's data security practices, and the scope of the requested injunctive relief.

Evidence also shows that LabMD has moved its operations, including components of its computer network, to locations that include the personal residence of LabMD's President and Chief Executive Officer. *See* Ex. E (Martin Dep. Tr.) at 11-12; Daugherty, LabMD Designee, Dep. Tr. (Mar. 4, 2014) at 193-94, excerpt attached as Exhibit F; Daugherty Dep. Tr. (Feb. 10, 2014) at 21-23, excerpt attached as Exhibit G. Testimony and evidence relating to the security provided for the personal information maintained in LabMD's current locations of operation likewise is relevant to the allegations of the Complaint, the reasonableness of LabMD's data security, and the scope of the requested injunctive relief.³

III. RESPONDENT FAILED TO TIMELY FILE THE INSTANT MOTION *IN LIMINE*

This Court's Revised Scheduling Order set a deadline of April 22, 2014, for filing motions *in limine* to preclude admission of evidence, and Respondent filed three such motions on

³ Indeed, LabMD cites to such evidence in its own pre-trial brief, filed on May 9, 2014. *See* Resp't Pre-Trial Br. (May 9, 2014) at 27-28.

that date. Complaint Counsel served Dr. Hill's report on Respondent on March 18, 2014, over a month before Court's deadline for motions *in limine*. Her deposition also was completed before the deadline.

In its initial Scheduling Order, the Court described a motion *in limine* as “any motion . . . to exclude anticipated prejudicial evidence before the evidence is actually offered.” Sched. Order (Sept. 25, 2013) at 5 (citing *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *18-20 (Apr. 20, 2009)). While Respondent's motion is not styled as a motion *in limine*, it argues that “the adequacy of data security is a specialized field that is sufficiently complex such that the untrained layman is unable to intelligently determine the issue without guidance from an expert,” and therefore that submission of any evidence regarding LabMD's security practices outside the time period for which Dr. Hill will offer expert testimony “would be a waste of the Court's time.” Resp't Mot. at 5. To the extent the foregoing argues—albeit incorrectly—that evidence of LabMD's post-July 2010 security practices may confuse the Court and thereby prejudice Respondent, Respondent's motion is *in limine* and untimely. Respondent has provided no explanation for its dilatory filing.

CONCLUSION

For the foregoing reasons, Respondent's Motion to Limit Evidence should be denied. Respondent's proposed relief misconstrues the role of an expert witness; would exclude relevant, probative evidence from consideration by the Court; and violates the Court's deadline for motions *in limine*.

Dated: May 13, 2014

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
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Complaint Counsel

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

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

[PROPOSED] ORDER DENYING RESPONDENT’S MOTION TO LIMIT EVIDENCE TO THE TIME FRAME OF THE EXPERT REPORT AND OPINION

Having carefully considered Respondent’s Motion to Limit Evidence to the Time Frame of the Expert Report and Opinion, and Complaint Counsel’s opposition thereto, it is hereby ORDERED that Respondent’s Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 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.

May 13, 2014

By: 

Margaret Lassack
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

22. Identify the time frame in which the FTC claims that LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory to the extent it seeks a legal conclusion.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome, as discovery relating to LabMD's security practices is ongoing.

Subject to and without waiving any General or Specific objections, Complaint Counsel identifies the time period of January 1, 2005 through the close of evidence at the Hearing in the above-captioned matter.

VERIFICATION OF LAURA RIPOSO VANDRUFF

I am an attorney of record in this matter and am authorized to make this verification for and on behalf of Complaint Counsel. I have read the foregoing Complaint Counsel's Response to Respondent's First Set of Interrogatories, and am familiar with the contents thereof. The answers to the interrogatories are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the statements made in this Verification are true and correct.

Executed on January 24, 2014



Laura Riposo VanDruff

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014 I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Respondent LabMD, Inc.

January 24, 2014

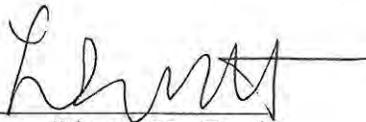
By: 
Laura Riposo VanDruff
Attorney

Exhibit B

In the Matter of:

LabMD, Inc.

December 13, 2013

Robert W. Hyer

Condensed Transcript with Word Index



For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

CONFIDENTIAL – REDACTED IN ENTIRETY

Exhibit C

In the Matter of:

LabMD, Inc.

February 14, 2014

Brandon Bradley

Condensed Transcript with Word Index



For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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Exhibit D

In the Matter of:

LabMD, Inc.

February 11, 2014

Jennifer Parr

Condensed Transcript with Word Index



For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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Exhibit E

In the Matter of:

LabMD, Inc.

February 6, 2014

Jeffrey Martin

Condensed Transcript with Word Index



For The Record, Inc.

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CONFIDENTIAL – REDACTED IN ENTIRETY

Exhibit F

In the Matter of:

LabMD, Inc.

March 4, 2014
Michael Daugherty

Condensed Transcript with Word Index



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

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Exhibit G

In the Matter of:

LabMD, Inc.

February 10, 2014
Michael Daugherty

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