

ORIGINAL



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

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

ORDER ON MOTIONS TO QUASH SUBPOENAS  
AND MOTIONS FOR PROTECTIVE ORDER

I.

On December 9, 2013, Respondent LabMD filed a Motion to Quash and for a Protective Order, seeking to preclude discovery sought by Complaint Counsel from Forensic Strategy Services, LLC (“Forensic Services”) and the company’s President, Scott Moulton (“Moulton”). On December 11, 2013, Moulton filed a Motion to Quash a Subpoena *Ad Testificandum* and Motion for Protective Order Regarding a Subpoena *Duces Tecum*, both served upon Moulton by Complaint Counsel. Also on December 11, 2013, Forensic Services filed a Motion for a Protective Order Regarding the Subpoenas *Duces Tecum* served upon Forensic Services and upon Moulton, and the deposition subpoena served upon Moulton. The foregoing motions are referred to collectively as the “Motions.” Noting that the Motions rely on substantially the same assertions of fact and arguments of law, Complaint Counsel filed a consolidated opposition to the Motions on December 19, 2013.

Having fully reviewed the Motions and Opposition and having considered all arguments raised therein, and as more fully analyzed and discussed below, the Motions are GRANTED.

II.

According to the specifications attached to the document subpoenas, Complaint Counsel seeks:

1. All communications between [Moulton/Forensic Services] and LabMD.
2. All documents considered to prepare the [Moulton/Forensic] affidavit of Scott Moulton, executed on January 12, 2012, in the matter captioned LabMD, Inc. v. Tiversa, Inc., Docket no. 11-cv-04044 (N.D. Ga.) (the “Moulton Affidavit”).

3. All contracts between [Moulton/Forensic] and LabMD.
4. All documents related to work [Moulton/Forensic Services] performed for LabMD.
5. All documents related to compensation received by [Moulton/Forensic Services] for services you provided to LabMD.

**A.**

In objecting to the foregoing discovery, the Motions collectively rely on essentially the same overarching contention; namely that Forensic Services and Moulton are nontestifying consulting experts in this matter, and pursuant to Commission Rule 3.31A(e), the facts and opinions of such persons are protected from discovery. That rule states in pertinent part: "A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness for the evidentiary hearing. . . ." 16 C.F.R. § 3.31A(e). *See also* Scheduling Order Additional Provision 19<sup>1</sup>.

The Motions are accompanied by affidavits asserting that in July 2011, LabMD hired Moulton, a computer forensic specialist, through Moulton's company, Forensic Services, to assist LabMD (1) in responding to the FTC's then-pending investigation of LabMD and potential litigation, and (2) with respect to separate litigation by LabMD against Tiversa Holding Corporation, in connection with Tiversa's obtaining a computer file of LabMD's (herein, the "1,718 file") through a peer-to-peer ("P2P") file sharing network (the "Tiversa Litigation"). That litigation, filed in Federal Court for the Northern District of Georgia, alleged that Tiversa behaved illegally in taking LabMD's 1,718 file via a P2P network and thereafter soliciting LabMD's computer security business. The district court granted Tiversa's motion to dismiss for lack of personal jurisdiction over Tiversa in Georgia, and the Tiversa litigation is now terminated.

The Motions assert that neither Forensic Services nor Moulton have been named as expert witnesses in the instant case, and the affidavit of Michael Daugherty, LabMD's Chief Executive Officer ("CEO"), further states that LabMD has not named, and will not in the future name, either Forensic Services or Moulton as expert witnesses in this case; or seek to elicit any testimony from Forensic Services or Moulton at trial or via deposition. Accordingly, the Motions argue, Commission Rule 3.31A(e), as well as the common-law work product doctrine, prohibit Complaint Counsel from discovering the facts known or opinions of either Forensic Services and Moulton.

**B.**

Complaint Counsel does not dispute the factual premises of the Motions, that Forensic

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<sup>1</sup> That provision states: "The parties are required to comply with Rule 3.31A and with the following: . . . (e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not designated by a party as a testifying witness."

Services and Moulton were hired by LabMD as consulting experts in anticipation of litigation; and will not be called to testify at trial. Nor does Complaint Counsel address that, under such circumstances, the plain language of Rule 3.31A(e) bars Complaint Counsel from its desired discovery. Rather, Complaint Counsel argues that Rule 3.31A(e) should not apply, as further discussed below, because the information sought is relevant, and further, that any protection against discovery pursuant to the work product doctrine was waived when LabMD submitted an affidavit from Moulton to support LabMD's opposition to Tiversa's motion to dismiss in the Tiversa Litigation in Georgia (the "Moulton Affidavit").

Complaint Counsel argues that the Moulton Affidavit asserts facts that are "directly relevant" to the allegations of the Complaint, the proposed relief, and LabMD's anticipated defenses. Complaint Counsel states that the Complaint in this matter alleges that LabMD failed to have "reasonable and appropriate computer security" in violation of Section 5 of the FTC Act, and to support this claim, alleges the exposure of LabMD's "1,718 file" on a P2P file sharing network. Complaint Counsel points to a paragraph in Moulton's Affidavit in which Moulton states that he: "examined the computer file presented to LabMD from . . . Tiversa on May 13, 2008 [the "1,718 file"]. The [1,718] file has a unique SHA-1 value."<sup>2</sup> Complaint Counsel also points to paragraph 15 of the Moulton Affidavit, which states that "[i]n connection with my forensic work on this [Tiversa] matter, I have not found any evidence that the [1,718] file exists on any other computer other than the LabMD computer where the file was saved." Moulton Affidavit, ¶ 15. Complaint Counsel argues that because the Moulton Affidavit refers to the 1,718 file obtained by Tiversa from a P2P file sharing network, the availability of which is a basis for the unfair trade practice claim in this case, Complaint Counsel is entitled to discovery from Forensic Services and Moulton. In addition, Complaint Counsel contends that LabMD has taken the position that Tiversa "stole" the 1,718 file, and that the 1,718 file was not widely available. Furthermore, Complaint Counsel asserts, the filing of the Moulton Affidavit in the Tiversa Litigation constituted a waiver of any work product protection that otherwise might have attached to Moulton's or Forensic Services' work for the instant litigation; and that Rule 3.31A(e) should not "shield" Forensic Services and Moulton from providing discovery.

The Motions assert that the Moulton Affidavit filed in the Tiversa litigation is not relevant to the present litigation because it was directed at supporting LabMD's position, in opposition to Tiversa's motion to dismiss for lack of personal jurisdiction in Georgia, that Tiversa had sufficient contacts with the state. Thus, the Moulton Affidavit opined that Tiversa's obtaining of LabMD's 1,718 file through a P2P file sharing network necessarily required contact with LabMD's computer in Georgia. Moreover, the Motions note, the Tiversa litigation is terminated and that, in any event, LabMD will not be calling Moulton or Forensic Services as witnesses, and will not offer the Moulton Affidavit into evidence, at the trial of this matter.

### III.

Before addressing the foregoing substantive arguments, there are two preliminary procedural issues that must be addressed: First, Complaint Counsel argues that the Motions

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<sup>2</sup> The Moulton Affidavit explains that all computer files being shared on a P2P network, such as Limewire, have their own unique file signature, known as a Secure Hash Algorithm, version 1, or "SHA-1." According to Moulton, the SHA-1 value is akin to the file's "DNA," or a mathematical "fingerprint" of the file. Moulton Affidavit, ¶ 11.

should be rejected as untimely under Rule 3.34(c), which requires motions to quash to be filed within 10 days of service of the subpoenas, or the time for response, whichever is earlier. Second, Complaint Counsel argues that Respondent's Motion should be rejected because Respondent previously submitted a Motion for Protective Order with respect to nonparty discovery, including the subpoenas issued to Forensic Services and Moulton. Complaint Counsel states that Respondent failed to make in the prior motion the arguments that Respondent now makes regarding Forensic Services and Moulton. Respondent's prior Motion for a Protective Order, filed November 5, 2013, was denied in substantial part<sup>3</sup> and, Complaint Counsel argues, Respondent should not receive a "second bite at the apple" through the instant motion.

The record shows that the subpoenas *duces tecum* to Forensic Services and to Moulton were served on or about October 24, 2013. The motions of Respondent and of Moulton to quash these subpoenas, filed December 9, and December 11, 2013, respectively, would appear to be untimely. However, this does not warrant summarily denying the Motions and permitting Complaint Counsel's requested discovery. First, Respondent and Forensic Services have also moved for a protective order with regard to the requested discovery, pursuant to Rule 3.31(d), which does not impose a time limitation. In addition, according to the exhibits to the Motions, Complaint Counsel reissued Moulton's deposition subpoena on November 27, 2013 and it was served on Moulton on or about December 2, 2013. Therefore, Moulton's Motion to Quash that subpoena was timely submitted within 10 days on December 11, 2013. Respondent's failure to assert in its November 5, 2013 motion for protective order that Forensic Services and Moulton were consulting, nontestifying experts outside the reach of discovery pursuant to Rule 3.31A(e), is also not a persuasive reason for denying the Motions without consideration of the merits. If, as the Motions argue, Complaint Counsel's subpoenas exceed the scope of permissible discovery, by seeking facts and opinions of nontestifying experts in contravention of Rule 3.31(A), such discovery is barred. Accordingly, the merits of the Motions will be addressed, notwithstanding the asserted procedural defects of the Motions.

#### IV.

Commission Rule 3.31A was promulgated in connection with substantial amendments to the Commission's Rules of Practice in 2009. Prior to 2009, discovery could be obtained from nontestifying experts under limited conditions, pursuant to former Rule 3.31(c)(4)(ii), which provided:

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

The Commission deleted the foregoing rule as part of the 2009 amendments, and substituted new Rule 3.31A(e), which creates a bright line disallowing any discovery of facts

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<sup>3</sup> See Order Denying Motion for Protective Order, November 22, 2013.

known or opinions held by a consulting expert, if they are not to be called as a witness. As noted above, there is no genuine dispute that Forensic Services and Moulton were hired by LabMD in anticipation of litigation, including the instant litigation, and will not be called as witnesses. Thus, under the plain language of the current Rule 3.31A(e), Complaint Counsel's requested discovery is impermissible.

The asserted relevance of information possessed by Forensic Services and Moulton, as argued by Complaint Counsel, is not dispositive of whether or not Complaint Counsel's requested discovery is permissible -- Rule 3.31A(e) creates a bright line rule prohibiting a party from taking discovery from an opposing party's nontestifying experts, even assuming relevance. In explaining the deletion of former rule 3.31(c)(4), which permitted discovery into information held by nontestifying experts in certain limited circumstances, and the substitution of the bright line rule prohibiting such discovery in 3.31A(e), the Commission stated:

The Rule also excludes from expert discovery anyone who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing unless he or she is expected to be called as a witness at the hearing, so as to prevent the discovery of the unpublished work product of non-testifying experts, particularly where such materials are proprietary and highly confidential. The discovery of such marginally relevant materials can be a major distraction from the central case and can have an adverse effect on the willingness of non-testifying experts to consult in the future.

74 Fed. Reg. 1804, at \*1814 (Jan. 13, 2009).

Complaint Counsel's contention that the facts and opinions possessed by Forensic Services and Moulton are discoverable because they were "published" via the Moulton Affidavit in the Tiversa Litigation (and also, Complaint Counsel asserts, in a book published by LabMD's CEO, Mr. Daugherty) is unpersuasive. The Moulton Affidavit was submitted for the limited purpose of establishing jurisdiction, in a different case, that is now terminated. In addition, despite any marginal relevance that may exist regarding the facts known and opinions held by Moulton and Forensic Services, allowing the requested discovery would be an unnecessary distraction from this case. Because LabMD states that it will not call Forensic Services or Moulton as expert witnesses at trial, and will not offer the Moulton Affidavit into evidence, any risk of undue prejudice to Complaint Counsel from being denied the requested discovery is not apparent.<sup>4</sup>

#### IV.

Having fully considered the Motions and the Opposition, and for all the foregoing reasons, the Motions are GRANTED, and it is hereby ORDERED that pursuant to Commission

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<sup>4</sup> There is no contention that information or materials developed by Forensic Services and/or Moulton for LabMD has been, or will be, relied upon by any other expert retained by Respondent, who Respondent intends to call as an expert witness at trial. Thus, this Order expresses no opinion whether or not such information or materials would be discoverable in those circumstances, notwithstanding Rule 3.31A(e).

Rule 3.31A(e), Complaint Counsel is not permitted to obtain the requested discovery, including any depositions, from Forensic Services, Inc. and/or Scott Moulton.

ORDERED:

  
D. Michael Chappell  
Chief Administrative Law Judge

Date: December 31, 2013