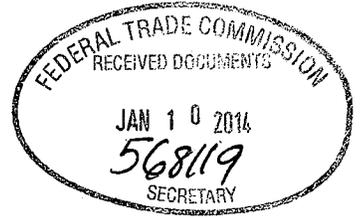


ORIGINAL

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 COMPEL RESPONSES
TO CERTAIN REQUESTS OF COMPLAINT COUNSEL'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCTION**

I.

On December 24, 2013, Complaint Counsel filed a Motion to Compel Responses to Certain Requests of Complaint Counsel's First Set of Interrogatories and Requests for Production ("Motion to Compel"), pursuant to Commission Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a). By Order dated December 27, 2013, the time for Respondent to respond to the Motion to Compel was extended to January 7, 2014. Respondent filed an opposition to the Motion to Compel on January 7, 2014 ("Opposition"). For the reasons set forth below, Complaint Counsel's Motion is GRANTED in part and DENIED in part.

Respondent's Opposition included a request for oral argument. That request is DENIED.

II.

The permissible scope of discovery is governed by 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). "Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied." *In re Daniel Chapter One*, No. 9329, 2009 WL 569694, at *2 (Jan. 9, 2009). If a party fails to comply with any discovery obligation under the rules, Rule 3.38 authorizes the opposing party to seek an order compelling such compliance. "Unless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that . . . documents, depositions, or [answers to] interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a). To determine whether Respondent's objections are justified, each Discovery Request is evaluated, below, in relation to the allegations of the Complaint, the defenses of Respondent, and the proposed relief. *See In re Rambus Inc.*, No. 9302, 2002 WL 31868184, at *2 (Nov. 18, 2002).

The Complaint in this action 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. The Complaint alleges that Respondent “failed to provide reasonable and appropriate security for personal information on its computer networks.” Complaint ¶ 10. Specifically, the Complaint alleges that Respondent failed to: identify foreseeable risks to its networks; adequately limit employees’ access to only the personal information they needed to do their jobs; maintain and update computer operating systems; and use readily available measures to prevent or detect unauthorized access to personal information on its networks. Complaint ¶ 10. In addition, the Complaint alleges that “Respondent could have corrected its security failures at relatively low cost using readily available security measures.” Complaint ¶ 11. In its Answer, Respondent denies these allegations.

Complaint Counsel seeks an order requiring Respondent to respond fully to Complaint Counsel’s Interrogatories 1, 2, and 9, and to Document Requests 3, 4, 13, 21, 27, and 28 (collectively, the “Discovery Requests”). Respondent raises three objections to the Discovery Requests. First, with respect to Interrogatories 1 and 2, and Document Requests 3, 4, and 27, Respondent asserts only that the Discovery Requests should be limited in time. Second, with respect to Interrogatory 9 and Document Requests 13 and 28, Respondent asserts that the information sought is inadmissible at trial, will not lead to the discovery of any admissible evidence, and is, therefore, not discoverable. Third, with respect to Document Request 21, Respondent asserts that the information sought is wholly irrelevant to the allegations of the Complaint. These three objections are addressed in turn below.

A.

Complaint Counsel asserts that Respondent refuses to respond fully to Interrogatories 1 and 2 and to Document Requests 3, 4, and 27, but has instead agreed to respond to those requests only for the time period 2007 through 2009. Complaint Counsel seeks an order compelling Respondent to respond with respect to the entire time period requested, 2006 through 2010.

As described by Complaint Counsel: (a) Interrogatories 1 and 2 request identification of LabMD employees with access to personal information and the types of personal information to which each employee had access; (b) Document Requests 3 and 4 seek information relating to “purchasing, maintaining, servicing, updating, or replacing” software and hardware used on LabMD’s computer networks; and (c) Document Request 27 seeks documents identifying “LabMD’s expenditures for information technology products or services that relate to Security Practices.” Complaint Counsel argues that the Order on Respondent’s Motion for a Protective Order, issued on November 22, 2013 (“November 22, 2013 Order”), settled the question of the time period relevant to this action, and thus discovery, as January 1, 2005 to present.

Respondent does not contest the relevancy of the subject matter of Interrogatories 1 and 2 and Document Requests 3, 4, and 27. Rather, Respondent contends that the relevant time-frame of this litigation is from May 1, 2008 through March 31, 2009, and thus all discovery requests should be restricted to this period. In a footnote, Respondent additionally maintains that the other Discovery Requests that are the subject of Complaint Counsel’s Motion to Compel should

also be limited to the time periods of May 1, 2008 through March 31, 2009.

Respondent asserts that the Complaint does not anywhere allege that LabMD's security failures, as alleged in the Complaint, began in 2005 and continued to the present time. Instead, Respondent points out that the Complaint alleges that: (a) in May 2008, Respondent received notice that its June 2007 insurance aging report was available on a P2P network; (b) Respondent had no business need for Limewire and removed it from its billing computer in May 2008; and (c) in October 2012, the Sacramento Police Department found more than 35 "Day Sheets"¹ in the possession of individuals who pleaded guilty to state charges of identity theft. Complaint ¶¶ 17, 18, 21. Respondent further asserts that while paragraph 21 of the Complaint would seem to suggest that LabMD committed an infraction in 2012, the latest date contained on the Day Sheets is March 2009. Thus, Respondent concludes, discovery should be limited to May 2008 to March 2009.

Respondent also contends that Complaint Counsel erroneously states that the November 22, 2013 Order held that the time period relevant to this litigation is from January 1, 2005 to present.

The November 22, 2013 Order stated as follows:

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. . . .

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.

November 22, 2013 Order at 7.

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.

The reasoning in the November 22, 2013 Order applies with equal force to the Discovery Requests in the instant motion. Respondent has not demonstrated that its objection is justified. Accordingly, Respondent is ORDERED to respond to Interrogatories 1 and 2 (as clarified by Complaint Counsel's December 16, 2013 letter, *see* Motion to Compel Exh. E) and Document Requests 3, 4, and 27, for the entire time requested, 2006 to 2010. In addition, for the remaining Discovery Requests, as addressed below, to the extent Respondent is ordered to provide responsive information, it shall do so for the time period requested.

B.

Document Request 13: This Discovery Request seeks "all internal and external assessments of LabMD's Security Practices, including formal and informal audits, evaluations, or reviews and reports assessing whether the Security Practices comply with federal or state law." Complaint Counsel asserts that such assessments may show the period over which particular vulnerabilities existed on Respondent's networks, when fixes were made available, and when the vulnerabilities were identified to the IT industry, all of which are relevant to Paragraph 10 of the Complaint.

Interrogatory 9 and Document Request 28: Interrogatory 9 seeks, for each month from May 2008 through December 2010, the cost of any changes to LabMD's Security Practices. Document Request 28, as narrowed, seeks documents sufficient to show LabMD's annual revenues, profits, and IT-related expenditures. Complaint Counsel asserts that such information is relevant to assessing the relative cost of available security measures that LabMD did not employ and thus is relevant to Paragraph 11 of the Complaint.

Respondent does not argue in its Opposition that this information is not relevant. Instead, Respondent's Opposition maintains that these Discovery Requests should be barred because the information sought is in contravention of Commission Rules of Practice 3.31(c)(1) and 3.43(b), as well as Rule 407 of the Federal Rules of Evidence ("Fed. R. Evid. 407").²

Rule 3.31(c) of the Commission's Rules of Practice states: "[i]nformation may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 16 C.F.R. § 3.31(c)(1). Rule 3.43(b) of the Commission's Rules of Practice states: "Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded." 16 C.F.R. § 3.43(b). Rule 407 of the Federal Rules of Evidence states: "When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction. . . ." Fed. R. Evid. 407.

² In a footnote, Respondent asserts that information sought in Discovery Request 13 is also protected by the self-critical analysis privilege. Opposition at 6 n.5. To the extent such a privilege exists, it is not applicable here. *See FTC v. TRW, Inc.*, 628 F.2d 207, 201-11 (D.C. Cir. 1980). Further, Respondent has not shown that it complied with Commission Rule 3.38(a).

With respect to Document Request 13, Respondent argues that “Complaint Counsel’s only logical use for this information post March 2009 is to prove LabMD’s alleged negligence and/or culpable conduct relating to its data security system, policies or procedures.” Opposition at 6. Thus, Respondent argues, the information sought is in direct conflict with Fed. R. Evid. 407 and thus inadmissible at the hearing and also will not lead to the discovery of other admissible evidence.

With respect to Interrogatory 9 and Document Request 28, Respondent argues that “Complaint Counsel is only interested in any remedial measures that LabMD may have taken with regard to its data network security” and that Complaint Counsel’s stated purpose for the information in Document Request 28 is to compare the relative costs of available security measures to LabMD’s gross income. Opposition at 6-7. Thus, Respondent argues, the information sought is in contravention of Fed. R. Evid. 407.

Although the Federal Rules of Civil Procedure, which govern discovery disputes in federal district court cases, where not in conflict with the Commission’s Rules of Practice, can provide an analytical framework for the disposition of related issues, *In re Crush Int’l*, 1972 FTC LEXIS 255, *5-6 (March 23, 1972), the Federal Rules of Evidence, which govern admissibility of evidence in federal trials, do not govern discovery disputes. Therefore, the evidentiary restriction of Fed. R. Evid. 407, and whether it applies, are not dispositive at this stage in the proceeding.

Respondent has not persuasively demonstrated that the information sought in Interrogatory 9 and Document Requests 13 and 28 is not reasonably calculated to lead to the discovery of admissible evidence. “As [Commission] Rule 3.31(c)(1) plainly indicates, it is not necessary to demonstrate that the requested information would in fact be admissible at the hearing.” *In re Intel Corp.*, 2010 FTC LEXIS 56, *9 n.4 (June 9, 2010).

A determination that the information sought by the Discovery Requests is discoverable does not mean that any evidence so produced will be admissible at the trial or, if admissible, what its effect will be. *See In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 184, *8 (Oct. 4, 2000). The Scheduling Order issued in this case, although discouraging them, does contemplate parties’ filing motions *in limine* to exclude anticipated prejudicial evidence. (Scheduling Order, Additional Provision 9). Respondent’s arguments, that this evidence is inadmissible under Fed. R. Evid. 407, are more properly addressed in that context.

Respondent has not demonstrated that its objection is justified. Accordingly, Respondent is ORDERED to respond to Interrogatory 9 and Document Requests 13 and 28, as narrowed, for the time period requested.

C.

Document Request 21: As narrowed by Complaint Counsel’s December 19, 2013 letter, (Motion to Compel Exh. F), this Discovery Request seeks the duties, salaries, and negative evaluations of the approximately 20 LabMD employees named on Complaint Counsel’s Preliminary Witness List. Complaint Counsel asserts the relevance of this information as

follows: (a) employee duties relate to both the types of personal information that employees needed to access on Respondent's computer network, and the skills that IT employees needed, in order to perform their jobs; (b) salaries relates to whether LabMD provided sufficient compensation to attract employees capable of performing their job duties; and (c) negative evaluations relate to Respondent's anticipated defense that employees who criticized LabMD's security practices were biased or poor performers.

Respondent objects to Document Request 21 on the grounds that it seeks information that is wholly irrelevant to the allegations of the Complaint. Respondent states that it conceded to Complaint Counsel that information related to the duties and performance evaluations of LabMD's IT staff may be reasonably related to whether LabMD provided appropriate security for personal information and is willing to provide such information. Respondent further asserts that personnel information related to persons employed outside the IT department, as well as the salaries of LabMD employees, are immaterial to LabMD's alleged data security failure.

Respondent has demonstrated that some of the information sought in Document Request 21 is not relevant. In this limited manner, Complaint Counsel's Motion is DENIED IN PART. In response to Document Request 21, Respondent is ORDERED to produce information, for the time period requested, on the duties and job descriptions and any negative evaluations of those people listed on Complaint Counsel's Preliminary Witness List who were employed in the IT department or had any duties or responsibilities with LabMD's security practices.

III.

For all of the above reasons, Complaint Counsel's Motion is GRANTED IN PART and DENIED IN PART. Respondent shall produce responsive documents, as ORDERED above, by January 22, 2014. This Order affects the scope of discovery only and is not a determination, and shall not be construed as a ruling, as to the admissibility of any evidence.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: January 10, 2014