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 GRANTING COMPLAINT COUNSEL'S MOTION TO QUASH AND TO LIMIT DEPOSITION SUBPOENAS SERVED ON COMMISSION ATTORNEYS

On February 10, 2014, Complaint Counsel filed a Motion to Quash Subpoena Served on Commission Attorney Carl Settlemyer and to Limit Subpoena Served on Commission Attorney Ruth Yodaiken ("Motion"). Respondent LabMD, Inc. ("Respondent" or "LabMD") filed an opposition to the Motion on February 20, 2014 ("Opposition").

Having fully reviewed the Motion and the Opposition, and considered all arguments and contentions raised therein, the Motion is GRANTED, 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 Federal Trade Commission ("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 ("the 1718 file"). Complaint ¶¶ 17, 19. The Complaint further avers that in October 2012, the Sacramento, California Police Department ("SPD") 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 (the "Sacramento Incident"). Complaint ¶ 21.

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

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

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.

On January 30, 2014, Respondent served two subpoenas *ad testificandum*, one directed to FTC attorney Carl Settlemyer and one directed to FTC attorney Ruth Yodaiken. Complaint Counsel seeks to quash the Settlemyer subpoena in its entirety and to limit the Yodaiken subpoena to the topic of the substance of Ms. Yodaiken's communications with the SPD. Motion at 1.

II. Scope of Discovery

Under Rule 3.31(c)(1), "[p]arties 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).

As set forth in the Orders of January 30, 2014 and February 21, 2014, issued in this case, once an administrative complaint is issued, the decision making process preceding such issuance is not discoverable in the ensuing litigation absent extraordinary circumstances. Order of January 30, 2014 at 5-6, citing *In re Exxon Corp.*, 83 F.T.C. 1759, 1974 FTC LEXIS 226, at *2-3 (June 4, 1974) ("Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred."); *In re Boise Cascade Corp.*, 97 F.T.C. 246, 1981 FTC LEXIS 71, at *3 n.3 (March 27, 1981) (holding that once a complaint issues, the Commission's determinations in issuing the complaint are reviewed "only in the most extraordinary circumstances"); Order of February 21, 2014 (denying Respondent's Motion for Issuance of Rule 3.36 Subpoena to obtain communications to, from, or between FTC employees and the Commissioners relating to the 1718 file and the Sacramento Incident, in part based upon *Boise/Exxon* Rule). *See also In re Exxon Corp.*, 1981 FTC LEXIS 113, at *5-6 (Jan. 29, 1981) (denying on relevance grounds respondent's renewed request for discovery into whether the Commission had "reason to believe" that a violation of law had occurred); *In re Basic Research LLC*, 2004 FTC LEXIS 210, *10-11 (Nov. 4, 2004) (denying as not relevant discovery into the Commission's decision to file the complaint); *In re Metagenics, Inc.*, 1995 FTC LEXIS 23, *1 (Feb. 2, 1995) (denying as irrelevant discovery of documents that "led up to the complaint" and discovery related to respondent's claim that it had been unfairly singled out for prosecution).

Respondent asserts that "[i]t is believed that both [Mr. Settlemyer and Ms. Yodaiken] were FTC employees involved with: (1) FTC's handling of LabMD's property when importuned from the [SPD]; (2) FTC's interactions with Tiversa . . . preceding this adjudication, including but not limited to Tiversa's possession and transmittal of LabMD [documents] to the FTC; and, (3) communications involving Dartmouth College's (Dartmouth) data security study," which Respondent identifies as "Data Hemorrhages in the Health-Care Sector, Dartmouth College," by M. Eric Johnson, Presented at Financial Cryptography and Data Security, Feb. 22-25, 2009

(available at http: //cds.tuck.dartmouth.edu/cds- uploads/researchprojects/pdf/Johnson HemorrhagesFC09Proceedingd.pdf). Opposition at 1-2. Respondent states, *inter alia*, that "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 [Protected Health Information]. (Attached as Ex. 2)." Opposition at 2. Complaint Counsel represents that Mr. Settlemyer had no communications with SPD, and that Ms. Yodaiken had no communications with either Tiversa or Dartmouth College.

Respondent contends that notwithstanding the fact that Mr. Settlemyer and Ms. Yodaiken are FTC attorneys, they may be deposed in this case because they are "fact witnesses," citing *In re Hoechst Marion Roussel, Inc.*, 2000 WL 33944050, at *1 (Nov. 8, 2000) (stating that deposition of counsel is "permissible where the attorney is a fact witness . . . . [W]here 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"). Putting aside the fact that discovery was denied in *Hoechst* for failure to demonstrate that the subject FTC attorneys and staff member had any relevant knowledge, the cited rule is not being challenged in this Motion. Complaint Counsel does not argue that Mr. Settlemyer or Ms. Yodaiken are immune from deposition, or even that these individuals' status as FTC attorneys requires application of a higher standard to allow such discovery, such as that applicable to a deposition of a party's litigation counsel. *See Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (holding that a party seeking deposition of a party's litigation counsel 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"). Rather, the issue here is whether Mr. Settlemyer and Ms. Yodaiken have knowledge of facts that are themselves relevant, or will likely lead to the discovery of relevant evidence, pursuant to Rule 3.31(c)(1).

III. Deposition Subpoena to FTC Attorney Settlemyer

A. Communications with Tiversa

It appears from the undisputed representations of the parties and from the exhibits attached to the Motion and Opposition that Mr. Settlemyer is an attorney in the FTC's Bureau of Consumer Protection, Division of Advertising Practices. On June 25, 2008, Mr. Settlemyer sent a letter to Tiversa advising that the FTC had received a request for information from a congressional committee, to which certain materials Tiversa had submitted may be responsive, and that Tiversa's submissions may be disclosed pursuant to that request. (Motion Ex. E). Furthermore, on January 26, 2009, Mr. Settlemyer contacted Tiversa by email, with the subject line "P2P ID Theft Research – Conference Call?", requesting a conference call between Tiversa representatives and FTC representatives to discuss a then-recent press release issued by Tiversa. A series of scheduling emails were exchanged over the next 6 weeks, culminating on March 4, 2009, with an agreement to a conference call for March 5, 2009. (Motion Ex. F). Robert Boback, Chief Executive Officer of Tiversa, testified at his deposition that he had two meetings with FTC representatives in early 2009, one in Pittsburgh and one at the FTC headquarters in Washington, D.C. Mr. Boback did not recall Mr. Settlemyer personally. He further stated that

only Senior Complaint Counsel Mr. Alain Sheer and an unidentified woman attended the Pittsburgh meeting, and that LabMD was not discussed at this meeting. (Opposition Ex. 4 (Dep. of Robert Boback 138-141, 145)). As to the Washington, D.C. meeting, Mr. Boback was unable to recall any attendees other than Mr. Sheer and the unidentified woman. He further testified that LabMD might have been discussed at the Washington, D.C. meeting, but not for any extended time and no more than any other organizations that were discussed. (*Id.*).

Complaint Counsel argues that Mr. Settlemyer's communications with Tiversa are beyond the scope of discovery under Rule 3.31(c)(1) because the Commission's decision making with regard to issuing the Complaint is not relevant. Complaint Counsel further contends that these communications constitute "materials" that were not "collected or reviewed in the course" of the investigation of LabMD or the prosecution of this case, and are therefore protected from discovery by Rule 3.31(c)(2), absent a showing of good cause.[2]

Respondent's Opposition fails to properly articulate or persuasively explain why communications between an FTC staff attorney and Tiversa, prior to the commencement of the investigation of LabMD, are themselves relevant, or are reasonably calculated to lead to the discovery of relevant evidence. For example, Respondent states that "the Civil Investigative Demand [CID] 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)." Opposition at 4. In the cited testimony, Mr. Boback explains that Tiversa was at that time being considered for acquisition; that he did not want Tiversa to be "under" a CID; and that in order to create some "distance" between Tiversa and the CID, the CID was provided to a third party, the "Privacy Institute," and "funneled" to Tiversa which then produced the requested documents to the Privacy Institute, which in turn provided Tiversa's responsive documents to the FTC. Even if it is assumed for purposes of argument that the method by which Tiversa provided documents to the FTC can be characterized as "unusual," Respondent fails to articulate how additional discovery on the topic relates to any claim or defense in this case. Similarly, Respondent argues, Mr. Boback could not recall a conference call or meeting that was referenced in Mr. Settlemyer's emails of February and March 2009, and, therefore, Respondent needs to obtain the information from Mr. Settlemyer. Yet, again, Respondent fails to articulate how the substance of such call or meeting pertains to any claim or defense. To the extent that Respondent seeks to discover the FTC's communications with Tiversa in order to challenge the Commission's actions, processes, or decision making leading up to the issuance of the Complaint in this case, "[p]recedent dictates that such matters are not relevant for purposes of discovery in an administrative adjudication." Order of January 30, 2014, at 6. Indeed, that Order, applying the *Exxon* rule, specifically denied discovery of pre-Complaint attorney communications with Tiversa on the ground, *inter alia*, that such communications are not relevant to this case. *See also* Order of February 21, 2014 (denying Respondent's Request for Issuance of Rule 3.36 Subpoena in part on the basis of the *Exxon* rule).

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[2] Rule 3.31(c)(2) states, in pertinent part, absent a showing of good cause,"[c]omplaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case . . . ." 16 C.F.R. § 3.31(c)(2).

Accordingly, based on the foregoing, the Tiversa-related information that Respondent seeks from Mr. Settlemyer is beyond the scope of permissible discovery under Rule 3.31(c)(1).

B. Communications with Professor Eric Johnson

It appears from the undisputed representations of the parties and from the exhibits attached to the Motion and Opposition that on February 3, 2009, Mr. Settlemyer contacted Professor Eric Johnson of Dartmouth College by email, with the subject line "New Article," requesting a copy of Professor Johnson's "new article coming out concerning health info available on P2P networks . . . . As you know from our past discussions, this is an area of interest to us [and the article] sounds like . . . a significant expansion of your prior work." (Opposition Ex. 2). Professor Johnson proceeded to send the article to Mr. Settlemyer. (*Id.*). A series of emails followed that transmission, with the subject line, "Health Care Data Leaks via P2P," to arrange a conference call among Mr. Johnson, Mr. Settlemyer, and Mr. Sheer for March 12, 2009.

Complaint Counsel contends that Respondent seeks to discover Mr. Settlemyer's communications with Dartmouth College in order to litigate the adequacy of the FTC's pre-Complaint process, and that, therefore, these communications are not relevant under the *Exxon* rule, summarized above, and previously applied to discovery disputes in this case in the Orders of January 30 and February 21, 2014. Complaint Counsel further argues that any such communications constitute "materials" that were not "collected or reviewed in the course" of the investigation or prosecution in this case, and are therefore barred from discovery under Rule 3.31(c)(2). In addition, Complaint Counsel contends, even if Mr. Settlemyer's communications with Dartmouth were relevant, Respondent does not need to depose Mr. Settlemyer on such communications because it can obtain the information from a representative from Dartmouth, pursuant to Respondent's issuance of a deposition subpoena on January 30, 2014.

Complaint Counsel states that it does not intend to call Mr. Settlemyer as a witness, and Professor Johnson has not been included as a potential witness on Complaint Counsel's Preliminary Witness List. However, the Motion does not state whether or not Complaint Counsel plans to rely at trial upon Professor Johnson's article regarding health care data leaks. Nor does Complaint Counsel assert that Professor Johnson possesses no relevant knowledge. In any event, even if the article and Mr. Johnson's related testimony may be relevant in this matter, Respondent fails to articulate why or how Mr. Settlemyer's *communications* with Mr. Johnson pertain to any claim or defense. Moreover, the Order of January 30, 2014, relying on the *Exxon* rule, rejected Respondent's argument that the FTC's pre-Complaint communications with, *inter alia*, Dartmouth College are discoverable to show that "the Commission's actions in investigating and filing a complaint" in this matter were contrary to law, as claimed by Respondent in its Answer. Order of January 30 at 5-6.

For all the foregoing reasons, deposition testimony from Mr. Settlemyer regarding FTC communications with Dartmouth College is beyond the permissible scope of discovery under Rule 3.31(c)(1).

C. Communications with SPD

Finally, Complaint Counsel represents that Mr. Settlemyer had no communications with SPD, and that Respondent has been advised accordingly. Respondent does not dispute this representation, and there is nothing in the record presented to contradict Complaint Counsel's assertion. Accordingly, there is no basis for permitting the deposition for the purpose of discovering such communications.

In summary, because it does not appear that any of Respondent's proposed discovery from Mr. Settlemyer is relevant, or reasonably calculated to lead to the discovery of relevant evidence, Complaint Counsel's Motion to Quash the subpoena to Mr. Settlemyer is GRANTED.[3]

IV. Deposition Subpoena to FTC Attorney Yodaiken

According to Complaint Counsel, Ms. Yodaiken participated in the Commission's investigation of LabMD from January 2010 through July 2013. Complaint Counsel states that in February 2013, Ms. Yodaiken represented the Commission at two investigational hearings in this matter, conducting the examination of LabMD President and Chief Executive Officer Michael J. Daugherty. Ms. Yodaiken has not entered an appearance in this litigation.

The record presented shows that Ms. Yodaiken was a party to conversations with SPD regarding the Sacramento Incident, including with regard to the transmittal of LabMD documents to the FTC and arrangements for contacting consumers whose information appeared on the LabMD documents confiscated by SPD as part of the Sacramento Incident. Complaint Counsel states that it identified Ms. Yodaiken in its Response to Respondent's First Set of Interrogatories as an "individual[] at the FTC who communicated with" the SPD regarding the Sacramento Incident. *See also* Opposition Ex. 3 (Dep. of Detective Karina Jestes, Dec. 17, 2013, 65-67). Complaint Counsel does not object to producing Ms. Yodaiken for a deposition limited to the topic of such communications. For all these reasons, Respondent is entitled to depose Ms. Yodaiken as to the substance of her communications with SPD.

Complaint Counsel states that Ms. Yodaiken has not had any communications with Tiversa or Dartmouth College, and that Respondent has been advised accordingly. Respondent asserts, however, that Ms. Yodaiken may have been a party to correspondence and meetings with Tiversa and Dartmouth because Ms. Yodaiken "customarily" works with Mr. Sheer; was a contact on a CID issued to LabMD; and may be the unidentified woman who, along with Mr. Sheer, attended the 2009 Pittsburgh and Washington, D.C. meetings with Tiversa. Opposition at 6. However, when specifically asked at his deposition if Ms. Yodaiken was the woman present at these meetings, Mr. Boback responded, "It may have been her . . . I don't know her name at all." The foregoing is insufficient to conclude that Ms. Yodaiken communicated with Tiversa and Dartmouth, considering the representation of Complaint Counsel that Ms. Yodaiken has not had any communications with Tiversa or Dartmouth. In addition, as noted above, to the extent

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[3] Because the requested communications with Tiversa and Dartmouth are beyond the scope of discovery under the *Exxon* rule, it need not be determined whether such communications are also shielded from discovery under Rule 3.31(c)(2), as argued by Complaint Counsel.

that Respondent seeks to discover through Ms. Yodaiken the FTC's communications with Tiversa or Dartmouth in order to challenge the Commission's actions in investigating and filing the Complaint in this case, such pre-Complaint communications are not relevant, or reasonably likely to lead to the discovery of relevant evidence, and thus are not discoverable.

Based on the foregoing, Complaint Counsel's Motion to Limit the subpoena issued to Ms. Yodaiken to the topic of Ms. Yodaiken's communications with SPD is GRANTED.

V. Conclusion

Based on full consideration of the Motion and Opposition, and for all the foregoing reasons, Complaint Counsel's Motion is GRANTED, and it is hereby ORDERED that (1) the subpoena *ad testificandum* served on Carl Settlemyer is QUASHED, and (2) the subpoena *ad testificandum* served on Ruth Yodaiken is LIMITED to testimony about the substance of her communications with the Sacramento Police Department. [4]

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: February 25, 2014

[4] Moreover, as noted in the Order of February 21, 2014, limiting Respondent's discovery as provided herein does not prejudice Respondent's ability to pursue at a later phase of the case its claim that the Commission's actions in investigating and filing the Complaint were unlawful. *See FTC v. Standard Oil Co. of California*, 449 U.S. 232, 245-46 (1980).