

ORIGINAL

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



In the Matter of)

PUBLIC

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

Docket No. 9357

OPPOSITION TO MOTION TO COMPEL TESTIMONY

The Court should deny Respondent's Motion to Compel Testimony because the relief it seeks would violate prior orders of the Court, including the Protective Order that limited the scope of the Bureau designee's testimony. In addition, the discovery sought would not yield testimony that is relevant or material to any claim or defense.

BACKGROUND

The Complaint filed on August 28, 2013 alleges that Respondent "failed to provide reasonable and appropriate security for personal information on its computer network," and cites specific practices as examples of Respondent's failures. Complaint ¶ 10(a)-(g). On January 30, 2014, Respondent served a "Notice of Deposition of the Bureau of Consumer Protection." Among other topics, Respondent sought to depose a designee of the Bureau of Consumer Protection ("Bureau") regarding "[a]ll data-security standards that have been used by the [Bureau] to enforce the law under Section 5 of the Federal Trade Commission Act since 2005." See Notice of Deposition (Jan. 30, 2014) (attached as **Exhibit A**). On February 14, 2014, Complaint Counsel filed a Motion for a Protective Order relating to the noticed deposition. On

March 10, 2014, this Court granted in part and denied in part Complaint Counsel's requested protective order ("Protective Order").

In its Protective Order, this Court observed that "Respondent does not appear to be seeking discovery of the 'standards' for enforcement of Section 5 in data security matters generally." Protective Order, 6. In limiting the scope of Respondent's examination, this Court held that Respondent had a "right to inquire into the factual bases for the[] allegations" of Complaint ¶ 10, which relate to specific failures by LabMD to provide reasonable and appropriate security for personal information on its computer networks. *Id.* This Court's ruling noted specifically that discovery regarding "the standards the FTC used in the past and is currently using to determine whether an entity's data security practices violate Section 5 of the FTC Act" was not permissible. *Id.* 7 n.6 (citing Order Denying Respondent's Motion for Rule 3.36 Subpoena (Feb. 21, 2014)).

Respondent proceeded with the deposition of the Bureau of Consumer Protection's ("Bureau") designee, Deputy Director Daniel Kaufman, on April 14, 2014, the last day on which the Court permitted Respondent to conduct its examination. During the deposition, counsel for Respondent asked numerous questions regarding the standards for enforcement of Section 5 in the Commission's data security matters. See Ex. 1 to Mot. to Compel, at 119-38. In response to these questions, Complaint Counsel invited Respondent's counsel to reframe its questions to relate to the factual bases of the allegations of Paragraph 10. *See, e.g., id.* at 119-20 ("If you would like to reframe the question as it relates to [P]aragraph 10(a), in terms of the factual bases of Complaint [C]ounsel's allegations, I will permit Mr. Kaufman to answer"). Rather than examine the Bureau's designee regarding the factual bases of the allegations of Complaint Paragraph 10, counsel for Respondent persisted in asking questions relating *exclusively* to

standards used by the Commission in enforcing Section 5 in data security matters. *See, e.g., id.* at 119-38. Based on this Court’s Protective Order, Complaint Counsel instructed the Bureau’s designee to not answer the questions.

Eight days after the conclusion of its deposition, Respondent filed its Motion to Compel.¹ In its Motion, Respondent seeks an order requiring the Bureau’s designee to sit for a second deposition – days before trial begins – regarding “data security standards.” Mot. at 2.²

ARGUMENT

I. RESPONDENT’S PROPOSED RELIEF WOULD VIOLATE THE PROTECTIVE ORDER AND PRIOR RULINGS

This Court’s Protective Order reflects the prior rulings of this Court and the Commission, which have held that the Commission’s “standards” for enforcement of Section 5 in data security matters are not a proper subject of discovery. *See, e.g.,* Order Denying Resp’t Mot. for Rule 3.36 Subpoena (Feb. 21, 2014), at 6-7 (holding that “the standards the FTC used in the past and is currently using to determine whether an entity’s data-security practices violate Section 5” are “outside the scope of permissible discovery in this case”); Order Granting Mot. to Quash (Jan. 30, 2014) (“Order Quashing Subpoena”), at 6 (holding that the information regarding the bases for the Commission’s commencement of this action are “not relevant for purposes of discovery in an administrative adjudication”); *see also* Order Granting Mot. to Quash and Limit (Feb. 25, 2014), at 2 (holding that “the decision making process preceding . . . issuance [of an

¹ Also pending before this Court is Complaint Counsel’s April 22, 2014 Motion *in Limine* to Strike as a Live Trial Witness the Deputy Director of the Bureau of Consumer Protection, which addresses analogous issues in the context of Respondent’s anticipated trial examination of Deputy Director Kaufman.

² Respondent’s Motion is governed by Rule 3.38, 16 C.F.R. § 3.38, which is not cited in Respondent’s filing.

administrative complaint] is not discoverable in the ensuing litigation absent extraordinary circumstances”); Comm’n Order Denying Mot. to Dismiss (Jan. 16, 2014) (“MtD Denial”), at 14 (holding that the Commission may enforce Section 5 in data security cases without issuing “regulations addressing the specific conduct at issue”). The ostensible distinction Respondent’s Motion attempts to draw between “legal standards” and “data security standards” is specious. *See* Mot. at 2. The Commission’s standards – whether “legal” or otherwise – “used in the past and . . . currently us[ed] to determine whether an entity’s data-security practices violate Section 5” are “outside the scope of permissible discovery in this case.” Order Denying Resp’t Mot. for Rule 3.36 Subpoena, at 6-7.

If the Court were to grant the relief sought in Respondent’s Motion to Compel, it would contradict these prior rulings and the Protective Order governing the Bureau designee’s deposition by requiring the Bureau’s designee to appear for an extensive deposition regarding “data security standards.” Mot. at 2. The Court should thus deny Respondent’s Motion to Compel.

II. BUREAU DESIGNEE’S TESTIMONY REGARDING STANDARDS IS NEITHER RELEVANT NOR MATERIAL TO ANY CLAIM OR DEFENSE

The issue to be tried during the administrative proceeding is *not* the sufficiency of the FTC’s data security “standards.” Mot. at 2. The adequacy of the Commission’s notice regarding data security standards is *not* before this Court. *See* MtD Denial at 14-17 (holding that the Commission has “enforced Section 5’s prohibition of ‘unfair . . . acts or practices’ primarily through case-by-case adjudication and litigation from the time the statute was enacted” and “the three-part statutory standard governing whether an act or practice is ‘unfair’ . . . should dispel LabMD’s concern about whether the statutory prohibition of ‘unfair . . . acts or practices’ is sufficient to give fair notice of what conduct is prohibited”); *cf. FTC v. Wyndham Worldwide*

Corp., No. 13-1887, 2014 WL 1349019, *14 (D.N.J. April 7, 2014) (holding that “the contour of an unfairness claim in the data-security context, like any other, is necessarily ‘flexible’ such that the FTC can apply Section 5 ‘to the facts of particular cases arising out of unprecedented situations’”) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965)).

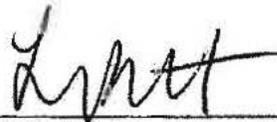
Instead, this Court will assess, *inter alia*, the factual question of “whether LabMD’s data security procedures were ‘unreasonable’ in light of the circumstances.” MtD Denial at 18-19. The FTC’s “data security standards” are not relevant to this LabMD-specific inquiry. *See, e.g., In re Basic Research*, 2004 FTC LEXIS 210, *10-11 (Nov. 4, 2004) (denying motion to compel, observing that “the issue to be tried is . . . not the Commission’s decision to file the Complaint”) (citations omitted); *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). Accordingly, the Court should deny Respondent’s Motion to Compel because Respondent’s proposed continued deposition of the Bureau’s Designee would yield testimony that is neither relevant nor material. *See* Rule 3.43(b), 16 C.F.R. § 3.43(b).

CONCLUSION

For the foregoing reasons, Respondent's Motion to Compel Testimony should be denied. Respondent's proposed relief would violate prior orders of the Court and would not yield testimony that is relevant or material to any claim or defense.

Dated: April 29, 2014

Respectfully submitted,



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Complaint Counsel

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

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

[PROPOSED] ORDER DENYING MOTION TO COMPEL TESTIMONY

Having carefully considered Respondent's Motion to Compel Testimony 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 April 29, 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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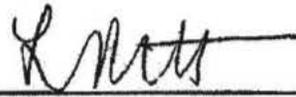
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CERTIFICATE FOR ELECTRONIC FILING

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.

April 29, 2014

By:



Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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

RESPONDENT'S NOTICE OF DEPOSITION OF THE BUREAU OF CONSUMER PROTECTION

PLEASE TAKE NOTICE that, pursuant to Rules 3.33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.33(a) and (c)(1), Respondent will take the deposition of the Bureau of Consumer Protection ("BOCP") or its designee(s), who shall testify on the BOCP's behalf about matters known or reasonably available to the BOCP. The testimony will be taken at Dinsmore & Shohl, 801 Pennsylvania Ave, Suite 610, Washington, DC 20004 beginning at 9:00 A.M on February 17, 2014, or the alternate agreed up on by Respondent and Complaint Counsel

DEFINITIONS

1. The term "**communication**" includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
2. "**Complaint**" means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
3. "**Dartmouth College**" means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
4. "**Document**" means 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, journal, agenda, minute, code book or label. **“Document”** shall also include electronically stored information (“ESI”). ESI means 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 electronically created or stored information, including, but 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 sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

5. **“Bureau of Consumer Protection”** or **“BOCP”** means the Federal Trade Commission’s Bureau of Consumer Protection, and its directors, officers, and employees.
6. **“Includes”** or **“including”** means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
7. **“LabMD”** means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
8. **“Or”** as well as **“and”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
9. **“Personal information”** means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
10. The terms **“relate”** or **“relating to”** or **“referring or relating to”** mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting,

explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.

11. **“Sacramento Police Department”** means the Sacramento Police Department and its officials, employees, and agents.
12. **“Tiversa”** means Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, Board members, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
13. **“1,718 File”** means the 1,718 page file Tiversa Holding Corporation (“Tiversa”) found on a peer-to-peer network and identified as having been created and stored on a LabMD computer

DEPOSITION TOPICS

1. The 1718 file, including the BOCP’s relationship with Tiversa, Dartmouth College, and Eric Johnson.
2. All data-security standards that have been used by the BOCP to enforce the law under Section 5 of the Federal Trade Commission Act since 2005.
3. Consumers that have been harmed by LabMD’s allegedly inadequate security practices.
4. Relationship with the Sacramento Police Department relating to documents it found at a Sacramento “flop house” belonging to LabMD.

January 30, 2014

By: 
William A. Sherman, II

CERTIFICATE OF SERVICE

This is to certify that on January 30, 2014, I served via electronic delivery a copy of the foregoing document to:

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January 30 2014

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