

ORIGINAL



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

| | |
|--------------------|-----------------|
| _____) | |
| In the Matter of) | Public |
|) | |
| LabMD, Inc.) | DOCKET NO. 9357 |
| a corporation) | |
| _____) | |

M. ERIC JOHNSON'S MOTION TO QUASH

On May 2, 2014, LabMD served a subpoena on M. Eric Johnson to appear in the above captioned matter beginning on May 20, 2014. Pursuant to 16 C.F.R § 3.34(c) Mr. Johnson, through counsel, submits this Motion to Quash the subpoena. In support of this motion, Mr. Johnson provides the following information:

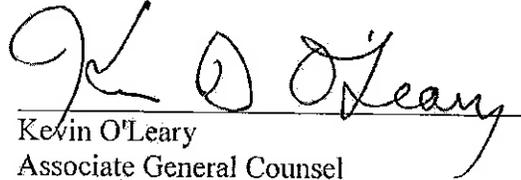
1. Mr. Johnson is not a party to this case, nor is he an employee or former employee of any party to the case.
2. Mr. Johnson's connection to this case arises out of research that he performed while on the faculty of the Tuck School of Business at Dartmouth College in 2008. As set forth in LabMD's Motion for Summary Decision, (Docket No. 569997), in 2008, Tiversa, Inc., came into possession of a LabMD insurance aging file and provided a copy of that file to Mr. Johnson. (Docket No. 569997, p. 4). Mr. Johnson referenced that document in his paper, *Data Hemorrhages in the Health Care Sector*, (See Docket No. 569997, Exhibit 2.)
3. LabMD subpoenaed Mr. Johnson to testify at a deposition earlier this year. Mr. Johnson appeared and testified on February 18, 2014. Counsel for LabMD and the FTC were in attendance and examined him. During his deposition, Mr. Johnson confirmed that LabMD's statement in its Motion for Summary Decision about the process by which he received the insurance aging file was correct. (See Johnson Deposition, pp. 37, 38, 38, 54, 60, attached hereto as Exhibit 1.)
4. In light of the undisputed fact that Mr. Johnson received the file in question from a third party and the fact that Mr. Johnson has appeared voluntarily in response to the subpoena and testified fully about the circumstances under which he received this file, there does not appear to be a legitimate reason to require him to appear and testify at the hearing.

5. Upon receipt of the subpoena via email on May 2, 2014, the undersigned emailed Attorney Williams and asked him to call to discuss it. On May 5, 2014, the undersigned advised Attorney Sherman that Mr. Johnson had a number of work and personal commitments, including a weeklong family vacation scheduled to start on Monday, May 26, 2014. The undersigned asked Attorney Sherman why he could not use Mr. Johnson's deposition testimony in lieu of having him appear. Attorney Sherman said he "want[ed] him there" and that he "had a right to have him there." Attorney Sherman then said that he did not believe that Mr. Johnson was candid in his testimony at the deposition and that he felt that "being in the pressure of the moment might compel him to tell the truth."
6. Neither Mr. Johnson nor the undersigned is aware of any basis for a view that his deposition testimony was not truthful. As set forth above, Mr. Johnson's testimony regarding his receipt of the LabMD file is consistent with the pleading that LabMD has filed in this matter. (See ¶ 2 and 3, above.) Moreover, the undersigned is not aware of any "right" that Attorney Sherman or his client have to have Mr. Johnson appear.
7. The undersigned also inquired of Attorney Sherman about which day Mr. Johnson needed to attend. Attorney Sherman advised that he could not identify a day for Mr. Johnson to attend. He reported that the case was scheduled to start on May 20, 2014 and that he had no idea how many days the FTC's case would take. He indicated that he would ask the FTC's counsel about taking Mr. Johnson out of order. To date, Attorney Williams had not advised if those efforts have been completed.
8. Appearing in response to the subpoena would disrupt Mr. Johnson's professional obligations. Mr. Johnson is currently the Dean of the business school at Vanderbilt University in Nashville Tennessee. In that role, he has a wide range of responsibilities and his schedule is very full. As Vanderbilt is about to conclude its academic year, the senior leadership team, including Mr. Johnson, is involved in meetings and other activities that should occur before the summer. Given his limited role in the case and the fact that he has already testified at a deposition, expecting Mr. Johnson to be available indefinitely beginning on May 20, 2014 will interfere with his work commitments and is unreasonable.
9. Furthermore, appearing in response to the subpoena would disrupt Mr. Johnson's personal obligations. Mr. Johnson is scheduled to leave on a family vacation beginning on Friday, May 23, 2014. This vacation has been scheduled for some time, certainly long before Mr. Johnson was aware that LabMD felt his testimony at trial was necessary. To expect Mr. Johnson to abandon his family vacation for a hearing where his role in the underlying issue is undisputed and his deposition testimony is available is unreasonable.

Wherefore, Mr. Johnson requests that his Motion to Quash be granted.

Dated: May 9, 2014

Respectfully submitted,

A handwritten signature in cursive script, reading "Kevin O'Leary". The signature is written in black ink and is positioned above a horizontal line.

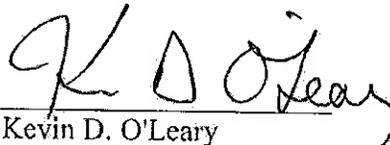
Kevin O'Leary
Associate General Counsel
Dartmouth College
63 South Main Street, Suite 301
Hanover, NH 03755
Telephone: 603-646-0101
Facsimile: 603-646-2447
Electronic mail:
Kevin.D.O'Leary@dartmouth.edu

CERTIFICATE OF SERVICE

I certify that on May 9, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm H-113
Washington, DC 20580

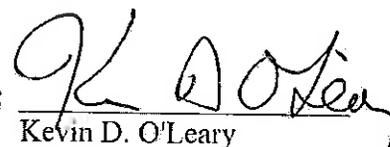
May 9, 2014

By: 
Kevin D. O'Leary
Associate General Counsel
Dartmouth College

I certify that I caused a copy of the foregoing Motion to Quash to be served via electronic email and first class mail copy to:

The Honorable D. Michael Chappell,
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm H-110
Washington, DC 20580

May 9, 2014

By: 
Kevin D. O'Leary
Associate General Counsel
Dartmouth College

I certify that I caused a copy of the foregoing Motion to Quash to be served via electronic email and first class mail copy to:

Allain Sheer
Laura Riposo Van Druff
Megan Cox
Margaret Lassack
John Krebs
Jared Brown
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave, N.W.
Mail Stop NH-8122
Washington, DC 20580

William Sherman
Reed Rubinstein
Sunni Harris
Dinsmore and Shohl, LLP
801 Pennsylvania Ave, NW Suite 610
Washington, DC 2004

Michael Pepson, Lorinda Harris,
Kent Huntington, Hallee Morgan,
Robin Burrows, Daniel Epstein
Cause of Action
1919 Pennsylvania Ave NW Suite 650
Washington DC 2006

May 9, 2014

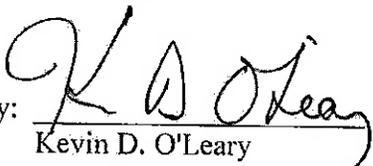
By: 
Kevin D. O'Leary
Associate General Counsel
Dartmouth College

Exhibit 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

In the Matter of

DOCKET NO. 9357

LabMD, Inc.,
A corporation.

-----x
February 18, 2014
9:55 a.m.

Deposition of M. ERIC JOHNSON, Ph.D.,
taken by Respondent, pursuant to subpoena,
at the offices of Henry H. Korn, PLLC, 220
East 42nd Street, New York, New York 10017,
before Alexis Perez Jenio, a Shorthand
Reporter and Notary Public of the State of
New York.

1
2 technology for the "Data Hemorrhaging"
3 article, how did you get the information?
4 For example, you indicated that, in your
5 article, that during the first phase of
6 your study, that there were 3,328 files
7 collected by random sampling. How did you
8 collect the files?

9 A. I believe the paper explicitly
10 details exactly how we collected the files.

11 Q. Well, it uses the
12 words "collected the files," and it does
13 give a frame work. I guess what I'm
14 looking for is, were the files transferred
15 from Tiversa to a computer at Dartmouth, or
16 were the files printed off from Tiversa and
17 mailed to Dartmouth, or was Dartmouth given
18 remote access to Tiversa's system and
19 collection activities?

20 A. We used different methods to
21 share information. Because of the size and
22 extent of the findings and the file
23 transfer technology at that time, in some
24 cases the files were shipped to us on DVD
25 or hard drive; in some cases we were

1
2 provided access through an FTP server that
3 will allow us to review the files remotely.

4 Q. Were these the only two methods
5 used?

6 A. No, I think there may have been
7 others. Possibly, in some cases by e-mail,
8 though typically, only in cases of maybe a
9 single file.

10 Q. You describe in your paper, on
11 the very first page, you say that the
12 research focused on inadvertent
13 disclosures. Do you agree with that?

14 A. Yes.

15 Q. How do you know that the
16 disclosures were inadvertent?

17 A. Presumed inadvertent on our part.

18 Q. Because?

19 A. Because these networks were
20 primarily used by individuals sharing
21 music, video, and pictures. But it's
22 possible that users may wish to share some
23 of these files and had planned to do so, so
24 it's a presumption on our part.

25 Q. Do you think it was a safe

1
2 A. Ones that were shared that we
3 were able to observe.

4 Q. How was the determination made
5 about which of the captured files that you
6 were able to observe would actually be made
7 available to Dartmouth by Tiversa? Or were
8 all of the captured files made available?

9 A. I believe all the captured files
10 were made available.

11 Q. Okay. By one of the three or
12 four ways that we discussed earlier?

13 A. Yes, comprising that sample of
14 3,328 files.

15 Q. Under Figure 2 on page 11 of
16 RX-3, you indicate that 50 percent of the
17 3,328 files were considered to be duplicate
18 copies. Is that correct?

19 A. Correct.

20 Q. And how would you define a
21 "duplicate copy"?

22 A. I feel it's self-evident.

23 Q. Well, would you tell us for the
24 record, please?

25 A. A copy that's the same as the

1

A. Yes.

2

3

Q. Why?

4

A. Because many of those terms are still vague, not specific, so they would often uncover many, many unrelated, as we report, files.

5

6

7

8

Q. And so to do a more specific and intentional search, what did you do?

9

10

A. Well, first, I need to qualify that by the fact that we didn't search, the Dartmouth team didn't search, any networks for any files ourself. Tiversa did all the searching.

11

12

13

14

15

And, secondly, to answer your question, we defined very specifically exactly what Tiversa did in that step.

16

17

18

Q. Now, did the Dartmouth team suggest that Tiversa take these steps, or did Tiversa suggest to Dartmouth that these were the steps that needed to be taken to do a more specific and intentional search?

19

20

21

22

23

A. I don't think I can answer that question.

24

25

Q. The question is: Was it the

1
2 host whose file that information was
3 captured from, you don't know whether or
4 not that browse host was identified in the
5 first stage of the research?

6 A. I don't know.

7 Q. Do you know when you received
8 this particular file from Tiversa?

9 A. I know the time frame. It's the
10 time frame described in the paper. The
11 exact date, we could look, look it up.

12 Q. When did the -- I understand that
13 during the first stage there were two weeks
14 in January of...

15 A. 2008.

16 Q. 2008 -- thank you -- where the
17 first stage was conducted. When did the
18 sixth month period begin for the second
19 stage?

20 A. It began shortly thereafter and
21 continued into the summer.

22 Q. So is it fair to say that there
23 was no large gap of weeks between the first
24 stage and the second stage?

25 A. There may have been weeks.