



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 DENYING RESPONDENT’S MOTION TO DISMISS**

**I.**

On April 24, 2015, Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed a Motion to Dismiss, pursuant to Federal Trade Commission (“FTC”) Rule 3.22(a) (“Motion”).<sup>1</sup> FTC Complaint Counsel filed an opposition on May 6, 2015 (“Opposition”). Respondent filed a Reply in Support of its Motion to Dismiss on May 13, 2015 (“Reply”). For the reasons set forth below, Respondent’s Motion is DENIED.

**II.**

Respondent argues that Complaint Counsel engaged in “misconduct and indiscretions” in the investigation and prosecution of this case which, combined with what Respondent describes as a “statistical certainty” that the Commission will ultimately find a Section 5 violation by Respondent, violate Respondent’s due process rights to a fair adjudication. In support, Respondent asserts, among other things, that Complaint Counsel is relying on false evidence, which was provided by a biased, non-credible non-party witness, Tiversa Holding Company (“Tiversa”); and that FTC staff should have investigated the reliability and credibility of Tiversa’s claims regarding its possession of a certain LabMD insurance aging file (the “1718 File”), including Tiversa’s claims that the 1718 File had spread across the Internet, instead of

<sup>1</sup> The Motion to Dismiss addressed by this Order was filed by Respondent in addition to and separately from the motion to dismiss filed by Respondent on May 27, 2014 (“2014 Motion to Dismiss”). The 2014 Motion to Dismiss was made at the close of Complaint Counsel’s case, and asserted that Complaint Counsel’s evidence failed to establish a *prima facie* case. Pursuant to FTC Rule 3.22(a), “[w]hen a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge shall defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.” 16 C.F.R. § 3.22(a). Because the record has not yet been closed, it is not appropriate at this time to rule on Respondent’s 2014 Motion to Dismiss.

“blindly” relying on Tiversa. Respondent further contends that this action cannot be fairly adjudicated because, according to Respondent: this action was taken in retaliation for the publication by LabMD’s CEO, Michael Daugherty, of a book critical of the FTC; the Chairwoman of the FTC has had improper “involvement” in an investigation by the House Oversight and Government Reform Committee (“OGR”) into Tiversa, including Tiversa’s relationship with the FTC regarding LabMD; and, the Commission has “prejudged” the case.

Complaint Counsel responds that the Complaint should not be dismissed at this stage of the proceedings because Complaint Counsel has presented a *prima facie* case that Respondent engaged in unfair trade practices, including evidence that Respondent failed to use “reasonable and appropriate” data security practices and allowed the 1718 File to be made available for sharing through P2P software installed on a LabMD computer. Complaint Counsel further contends that Respondent’s due process arguments do not support dismissal of the Complaint at this stage of the case, and that Respondent’s request for dismissal is more akin to a motion under Rule 11 of the Federal Rules of Civil Procedure to sanction alleged litigation misconduct, which relief is not available under the FTC’s Rules of Practice.

In its Reply, Respondent states that the issue presented by its Motion is not whether Complaint Counsel has made a *prima facie* case, as argued by Complaint Counsel, but whether the case should nevertheless be dismissed because Respondent’s due process rights have been violated. In this regard, Respondent asserts, Complaint Counsel’s Opposition fails to dispute numerous factual assertions made by Respondent with respect to the conduct of the investigation and litigation in this case, and therefore Complaint Counsel should be deemed to have conceded their truth. In any event, Respondent contends, Complaint Counsel has failed to establish a *prima facie* case because, according to Respondent, Complaint Counsel’s evidence fails to show that Respondent’s alleged data security practices caused, or are likely to cause, any substantial injury to consumers.

### III.

Respondent’s due process claims rely on numerous allegations of fact, as well as alleged factual inferences. Indeed, Respondent devotes 27 pages to its alleged facts. Moreover, while some of Respondent’s factual assertions rely on exhibits that were admitted at trial or on trial testimony, other assertions refer to documents that have not been admitted into evidence. Resolving Respondent’s due process claims would require findings of fact, which, at this stage of the proceedings, where the evidentiary hearing is nearly complete, are more appropriately undertaken in the context of the initial decision to be issued in this case. *Cf. In re LabMD, Inc.*, 2014 FTC LEXIS 209 (Sept. 5, 2014) (denying as premature Respondent’s motion requesting dismissal as a sanction for alleged prosecutorial misconduct, because resolving Respondent’s motion would require fact finding on disputed evidentiary issues and evidentiary hearing was not yet complete).

Any ruling on the merits of these disputed issues would be premature at this stage of the proceedings. The issues raised by the Motion, to the extent they are material to the “issues of fact, law, or discretion presented on the record” (16 C.F.R. §3.51(c)), and are properly briefed by the parties in their post-hearing briefs, will be addressed in the initial decision. *See, e.g., In re*

*McWane, Inc.*, 2012 FTC LEXIS 174, at \*4-5 (Nov. 7, 2012); *In re North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 52, at \*7 (March 30, 2011).

Accordingly, Respondent's Motion to Dismiss is DENIED.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: May 26, 2015