

ORIGINAL

PUBLIC

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 IN PART AND DENYING IN PART
COMPLAINT COUNSEL’S MOTION FOR PROTECTIVE ORDER
REGARDING RULE 3.33 NOTICE OF DEPOSITION**

On February 14, 2014, Complaint Counsel filed a Motion for Protective Order Regarding Rule 3.33 Notice of Deposition (“Motion”). Complaint Counsel seeks to prevent Respondent from proceeding with a deposition of designee(s) of the Bureau of Consumer Protection of the Federal Trade Commission (“Bureau” or “BCP”). On February 26, 2014, Respondent LabMD, Inc., (“Respondent” or “LabMD”) filed an opposition to the Motion (“Opposition”).

Having fully reviewed the Motion and the Opposition, and having considered all arguments and contentions raised therein, the Motion is GRANTED IN PART AND DENIED IN PART, 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 by failing to take “reasonable and appropriate” measures to prevent unauthorized access to consumers’ personal information, which conduct caused, or is likely to cause, substantial injury to consumers. Complaint ¶¶ 6-11, 17-23. 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 1,718 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 was injured by the alleged security breach. Answer ¶¶ 17-23. Respondent’s answer also includes a number of affirmative defenses, including among others, 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 a “Notice of Deposition of the Bureau of Consumer Protection,” pursuant to Rule 3.33(a) and 3.33(c)(1) of the Commission’s Rules of Practice. Respondent’s Notice seeks a Bureau designee(s) to testify regarding matters known or reasonably available to the Bureau concerning the following topics:

- (1) The 1,718 file, including the Bureau’s relationship with Tiversa, Dartmouth College, and Eric Johnson;
- (2) All 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;
- (3) Consumers that have been harmed by LabMD’s allegedly inadequate security practices; and
- (4) The Bureau’s relationship with the Sacramento Police Department [SPD] relating to [LabMD] documents [that SPD] found at a Sacramento “flop house.”

(“Topics”) (Motion Exhibit B at 4).

II. Relevant Rules of Practice

Rule 3.33(c)(1) of the Commission’s Rules of Practice authorizes Respondent to notice the deposition of the BCP, and requires BCP to “designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf.”² The rule also requires that the deposition notice “describe with reasonable particularity the matters on which examination is requested,” so as to facilitate designation of those persons with applicable knowledge. 16 C.F.R. 3.33(c)(1).

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.

² Complaint Counsel objects that Respondent’s Notice, in defining “Bureau” as “[t]he Federal Trade Commission’s Bureau of Consumer Protection, and its directors, officers, and employees,” improperly attempts to reach the members of the Commission. Motion at 8-9. Respondent’s Notice properly mirrors the language of Rule 3.33(c)(1) and Respondent makes clear in its Opposition that it is not seeking to depose any members of the Commission pursuant to Rule 3.33(c)(1). Opposition at 2 n.1.

Rule 3.33(c)(1) depositions are also subject to the discovery limits of 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). If it is determined that “such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b),”³ the Administrative Law Judge may rule that a deposition shall not be taken. 16 C.F.R. § 3.33(b). Finally, as with any discovery, the Administrative Law Judge may disallow, or limit, a deposition by way of a protective order under Rule 3.31(d) (“The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.”).

In the instant case, Complaint Counsel seeks an order disallowing the noticed deposition in its entirety, pursuant to Rule 3.33(b) and 3.31(d). The burden of demonstrating an entitlement to this protective order is on Complaint Counsel. *In re LabMD Inc.*, 2014 FTC LEXIS 22, at *20 (Jan. 30, 2014). In the context of a Rule 30(b)(6) deposition sought from a government employee, one court has stated: “The burden is on the party seeking the protective order to demonstrate that good cause exists for the entry of [the protective] order by making a ‘particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.’” *Integra Bank Corp. v. FDIC*, 2014 U.S. Dist. LEXIS 3039, *6-7 (S.D. Ind. Jan. 10, 2014) (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16, (1981)).⁴ “In addition, ‘[b]efore restricting discovery, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it and taking into account society’s interest in furthering the truthseeking function.’” *Id.* at *7 (citation omitted). Thus, the burden is on Complaint Counsel to demonstrate that the deposition is not reasonably likely to lead to the discovery of relevant information, or that notwithstanding any such relevance, BCP should nevertheless be protected from deposition by Respondent.

III. Analysis

The Orders issued previously in this case hold that the Commission’s reasons for issuing a complaint and the information the Commissioners evaluated and considered prior to filing a complaint, including the standards that the Commissioners used in determining whether to issue a complaint, are outside the scope of discovery, absent extraordinary circumstances, which circumstances Respondent failed to demonstrate. *See* February 25, 2014 Order Granting Complaint Counsel’s Motion to Quash and to Limit Deposition Subpoenas Served on Commission Attorneys (February 25 Order); February 21, 2014 Order Denying Respondent’s Motion for a Rule 3.36 Subpoena (February 21 Order); January 30, 2014 Order on Complaint

³ Rule 3.43(b) states “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(b).

⁴ Commission Rule 3.33(c)(1) mirrors Rule 30(b)(6) of the Federal Rules of Civil Procedure. Where the Federal Rules of Civil Procedure are similar to the Commission’s Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating disputes. *In re Pom Wonderful LLC*, 2011 FTC LEXIS 42, *9 n.3 (March 16, 2011) (citations omitted).

Counsel's Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order (January 30 Order). Any "attempt to probe the mental processes of this agency in investigating respondents and the decision leading up to the complaint in this matter . . . is ordinarily privileged since [such information relates] to an integral part of the decision-making process of this agency." *In re School Services, Inc.*, 71 F.T.C. 1703, 1967 FTC LEXIS 125, *5 (June 16, 1967) (citation omitted) (denying respondent's application for depositions from the Secretary of the Commission, the Director of the Bureau of Deceptive Practices, and an attorney of the Commission).

Although Respondent is not entitled to discovery on the decision making process of the agency, it is entitled to discovery of facts that form the basis for the allegations of the Complaint. *FTC v. Cyberspy Software LLC*, 2009 U.S. Dist. LEXIS 132299, at *4 (M.D. Fla. May 26, 2009) ("A party is entitled to the facts relevant to the litigation."). See also 16 C.F.R. § 3.31(c)(1) ("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."). With these precepts in mind, the analysis turns to the four topics listed in Respondent's Rule 3.33 Notice of Deposition.

A. Deposition Notice Topics 1 and 4

Complaint Counsel argues that Respondent's Notice Topic 1 is improper because the "subjects on which Respondent seeks testimony regarding the 1,718 file," i.e., the Bureau's "relationships" with Tiversa, Dartmouth College, and Eric Johnson regarding the 1,718 file, are not stated with "reasonable particularity," as required by Rule 3.33(c). Complaint Counsel makes the substantially identical argument as to Topic 4 -- the Bureau's "relationship" with the SPD relating to certain LabMD documents found by SPD during the Sacramento Incident (hereafter, "LabMD Documents"). Motion at 4-5. According to Complaint Counsel, the term "relationship" is overbroad; no single witness has personal knowledge of the Bureau, and its directors, officers, and employees, as it relates to the 1,718 file or the LabMD Documents; and it would be impossible to educate a Bureau designee about every conceivable subject of examination regarding the 1,718 file or the LabMD Documents. Motion at 6.

Respondent counters that the meaning of "relationship" is sufficiently clear, and refers to "communications," "behavior," and "dealings" between two entities. Opposition at 4.⁵ Respondent further argues that the 1,718 file is clearly relevant to the Complaint (Complaint ¶¶ 11, 13-20) and that the Bureau's communications with Tiversa, Dartmouth College and/or Eric Johnson are narrowed to the topic of the 1,718 file. Opposition at 4-5. Respondent also states that the Complaint expressly refers to the LabMD documents found by the SPD (Complaint ¶ 21) and claims that FTC officials waited four months before contacting LabMD to inform them that the Day Sheets had been found by the SPD. Opposition at 8.

As an initial matter, Topics 1 and 4 are "reasonably particular" enough to enable BCP to designate those with applicable knowledge. The goal of the requirement in the analogous Fed.

⁵ Consistent with Respondent's definition, the Merriam-Webster Online dictionary defines "relationship" as "the way in which two or more people, groups, countries, etc., talk to, behave toward, and deal with each other." Opposition at 4.

R. Civ. Pro. 30(b)(6) that the notice of deposition “describe with reasonable particularity the matters for examination” is to “enable the responding organization to identify the person who is best situated to answer questions about the matter, or to make sure that the person selected to testify is able to respond regarding that matter.” Charles A. Wright, et al., 8A Fed. Prac. & Proc. Civ. § 2103 (3d ed. 2013). Rule 30(b)(6) requires only that the notice describe in terms as clear as possible the matters about which testimony is sought so that the organization can determine the identity and number of persons whose presence will be necessary to provide an adequate response to any potential questions. *Scovill Mfg. Co. v. Sunbeam Corp.*, 61 F.R.D. 598, 603-04 (D. Del. 1973).

As stated in the Notice, Topics 1 and 4 may appear to be overly broad; however, Respondent, in its Opposition, has made clear that the information it actually seeks is more narrow. With respect to Topic 1, Respondent seeks testimony on: “how [the] FTC came to possess the 1718 file.” Opposition at 9. With respect to Topic 4, Respondent seeks testimony on how the FTC learned of the Sacramento Incident and how the FTC handled or disseminated LabMD’s property after it learned of the Sacramento Incident. *Id.* The scope of Topics 1 and 4 is, accordingly, so limited.

Complaint Counsel further argues that a deposition of the Bureau regarding its “relationship” with Tiversa, Dartmouth College, and Eric Johnson is outside the scope of discovery under Rule 3.31(c)(1) because Respondent has propounded written discovery to Complaint Counsel regarding communications with these nonparties; issued a subpoena to, and taken the deposition of, Tiversa regarding communications with FTC, Dartmouth College, and Eric Johnson; and also will soon take the deposition of Tiversa employee Rick Wallace on these same matters. Complaint Counsel does not argue, however, that the requested deposition testimony from BCP is unreasonably cumulative or duplicative of other discovery, *see* 16 C.F.R. § 3.31(c)(2)(ii), and the mere fact that discovery is being sought from multiple sources or discovery methods is not a basis for denying discovery. *See* 16 C.F.R. § 3.31(a) (“Parties may obtain discovery by *one or more* of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission”) (emphasis added). Nor does Rule 3.33 require a showing of particular need, in order to take a deposition of designee(s) of the BCP.

Finally, Complaint Counsel contends that the requested information regarding the 1,718 file is outside the scope of discovery under Rule 3.31(c)(2), which states in part:

Complaint 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 and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices . . .

16 C.F.R. § 3.31(c)(2). Complaint Counsel asserts that the subject communications with Tiversa, Dartmouth College, and Eric Johnson regarding the 1,718 file “largely predate” the opening of the investigation of LabMD in January 2010 and were not “collected or reviewed” in

the course of the investigation or prosecution of this case. Thus, Complaint Counsel concludes, Respondent must demonstrate good cause to depose BCP. Motion at 5. By its express terms, however, Rule 3.31(c)(2) applies to “searches for materials.” It does not address deposition testimony, and there is no similar restriction to testimony sought under Rule 3.33. Thus, there is no basis for concluding that Rule 3.31(c)(2) requires Respondent to demonstrate good cause to depose BCP.

Accordingly, Complaint Counsel has failed to demonstrate that deposition testimony on Topics 1 and 4 should be barred in its entirety. However, nothing in this ruling is intended to overrule or alter the limitations cited in the January 30 Order and the February 25 Order that pre-complaint attorney communications with SPD, Tiversa, Dartmouth College, and Eric Johnson may not be elicited to derive the FTC’s decision making process in determining to investigate or prosecute this case.

B. Deposition Notice Topic 2

Respondent’s Notice Topic 2 asks for the Bureau’s designee(s) to provide testimony regarding “all 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.” (Motion, Ex. B at 4). Complaint Counsel argues that the basis “for the Commission’s commencement of this action” is “not relevant for purpose of discovery in an administrative adjudication” and that Notice Topic 2 does not correspond to any permissible affirmative defense and is foreclosed by the Commission’s January 16, 2014, Order Denying Respondent LabMD’s Motion to Dismiss, *In re LabMD Inc.*, 2014 FTC LEXIS 2 (Jan. 16, 2014) (“January 16 Commission Order”) and the January 30 Order. Motion at 7.

In its Opposition, Respondent acknowledges, as it must, the prior rulings in this case holding that Respondent may not discover the legal standards the FTC has used in the past and is currently using to enforce Section 5 in data security cases, in order to discover and challenge the Commission’s decision making processes in issuing the Complaint in this case. *See, e.g.*, February 25 Order; February 21 Order; January 30 Order. However, notwithstanding the broad language of Topic 2, Respondent does not appear to be seeking discovery of the “standards” for enforcement of Section 5 in data security matters generally. Rather, Respondent states that it is “apparent” that Complaint Counsel seeks to apply a “reasonableness” standard to whether Respondent’s data security practices may be deemed “unfair” under Section 5. Respondent further states that the Commission, in its Order Denying Respondent’s Motion to Dismiss, admitted that in order to establish its case, the FTC would need to determine, as a factual matter, “whether LabMD’s data security procedures were ‘unreasonable.’” Opposition at 6 (*citing* January 16 Commission Order at 18-19). Therefore, Respondent argues, Respondent is entitled to know the bases for the contention that Respondent’s data security practices were not reasonable.

Paragraph 10 of the Complaint alleges that Respondent “failed to provide reasonable and appropriate security for personal information on its computer networks” and cites seven alleged data security practices of Respondent as examples of Respondent’s failures. Complaint ¶ 10 (a)-(g). Respondent’s right to inquire into the factual bases for these allegations cannot credibly be

disputed.⁶ 16 C.F.R. § 3.31(c)(1). However, Respondent may not inquire into why, or how, BCP or the Commission determined to use a reasonableness standard to enforce Section 5, or why the alleged facts justify a conclusion of unreasonableness, because “a request for such justification is explicitly a request for the ‘mental impressions, conclusions, opinions or legal theories of a party’s attorney’” and is not permissible. *FTC v. Cyberspy Software LLC*, 2009 U.S. Dist. LEXIS 71270, at *7 (M.D. Fla. July 31, 2009). For the same reason, Respondent is not entitled to explore attorney thought processes as to which facts support which contentions, and which do not, or what inferences are being drawn from the evidence in the case. *Id.* at *10-11.

Based upon the foregoing, Complaint Counsel has not demonstrated that Topic 2 is entirely outside the scope of discovery, so as to bar any and all deposition testimony within its scope, and Respondent has articulated a valid line of inquiry. For these reasons, the deposition will not be barred; however, consistent with prior rulings in this case, Respondent may not inquire generally into the legal standards the FTC used in the past and is currently using to determine whether an entity’s data security practices are unfair under Section 5. In addition, to prevent improper inquiry into privileged matters, Respondent will also be barred from inquiring into the legal opinions, legal reasoning, mental processes or decision making of the Bureau, its directors, officers, or employees, or of the Commission, with respect to Section 5 enforcement standards. *See Cyberspy Software*, 2009 U.S. Dist. LEXIS 71270, at *10-11.

C. Deposition Notice Topic 3

Respondent’s Notice Topic 3 asks for the Bureau’s designee(s) to provide testimony regarding “[c]onsumers that have been harmed by LabMD’s allegedly inadequate security practices.” (Motion, Ex. B at 4). Complaint Counsel does not argue, and has not shown, that Topic 3 is not relevant for purposes of discovery. The Complaint in this matter alleges that Respondent’s asserted inadequate security “caused, or is likely to cause, substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.” Complaint ¶ 22. Thus, inquiry into the facts underlying the allegation of consumer injury is clearly relevant under Rule 3.31(c)(1).

Complaint Counsel nevertheless contends that Respondent should be barred from seeking discovery on the topic from BCP because Topic 3 “demands testimony that Complaint Counsel will present through expert witnesses.” Motion at 7. Complaint Counsel further contends that because Topic 3 “requires the Bureau to prematurely disclose the opinions of Complaint Counsel’s expert witnesses, it is not an appropriate subject for discovery pursuant to Rule 3.33(c)(1).” Motion at 8.

Respondent counters that “Complaint Counsel [is not] allowed to unilaterally restrict the scope of discovery by indicating its own choice of producing testimony [and that] LabMD is clearly entitled to discover [the] FTC’s position on facts regarding potential and/or actual harm

⁶ The February 21 Order held that “documents sufficient to show 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,” are outside the scope of discovery. *See* February 21 Order at 6-7. In the dispute resolved by that Order, Respondent argued that such discovery was relevant to its defense challenging the bases for the Commission’s decision to issue the Complaint against LabMD. For the reasons set forth in the February 21 Order, that argument was rejected. *Id.*

to consumers in this case without regard to [the] FTC's expert witness list." Opposition at 7.

Simply because Complaint Counsel intends to present expert opinion testimony on whether Respondent's practices caused or were likely to cause substantial injury to consumers does not relieve Complaint Counsel from its obligation to provide fact discovery on the topic of consumer injury, such as the identities of customers known to have been harmed and the factual basis underlying the allegation of consumer harm, or other facts that may be required to support these allegations in the Complaint.

Accordingly, Complaint Counsel has not met its burden of showing that inquiry into Topic 3 should be barred. However, Respondent is not entitled to inquire, and will be barred from inquiring, into the legal opinions, legal reasoning, mental processes or decision making of BCP, or its directors, officers, or employees, or of the Commission, with respect to the contention that Respondent's practices caused, or are likely to cause, consumer harm. *See Cyberspy Software*, 2009 U.S. Dist. LEXIS 71270, at *10-11 (barring discovery of "opposing counsel's thought processes as to which facts support these contentions (and which do not), or what inferences can be drawn from the evidence that has been assembled so far"). In this regard, Respondent may not inquire into why, or how, the factual bases of the allegations in the Complaint justify the conclusion that Respondent violated the FTC Act, because such inquiry is tantamount to "a request for the mental impressions, conclusions, opinions or legal theories" of the FTC.

IV. Conclusion and Order

Complaint Counsel has failed to demonstrate that the deposition of BCP should be barred in its entirety. Accordingly, to this extent, Complaint Counsel's Motion for a Protective Order is DENIED. However, to ensure compliance with prior discovery orders in this case, and to prevent improper inquiry into privileged matters, Complaint Counsel's Motion for Protective Order is GRANTED IN PART pursuant to Rule 3.31(d), and it is HEREBY ORDERED:

1. The Bureau shall designate one or more persons to testify on its behalf about information known or reasonably available to it with regard to Topics 1-4 of Respondent's deposition notice, as modified within this Order;
2. Topics 1 and 4 are limited to: how the FTC came to possess the 1718 file; how the FTC learned of the Sacramento Incident; and how the FTC handled or disseminated LabMD's property after it learned of the Sacramento Incident;
3. Notwithstanding the relief granted in this Order, Respondent is prohibited from inquiring into any privileged matters, including without limitation, the legal opinions or legal reasoning or mental impressions of any attorney involved in the investigation or prosecution of this case, and specifically including:

The decision making processes of the Bureau with respect to the investigation of Respondent or the prosecution of this case;

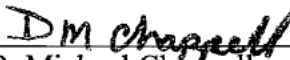
The legal standards the Bureau used in the past and is currently using to determine whether an entity's data security practices are unfair under Section 5;

The legal reasoning or mental processes of the Bureau with respect to the use of a reasonableness standard in the Complaint; and

The legal reasoning or mental processes of the Bureau with respect to the contention that Respondent's practices caused, or are likely to cause, consumer harm; and

4. The fact discovery deadline of March 5, 2014 is hereby extended for an additional 20 days from the date of this Order for the purpose of allowing the Rule 3.33 deposition noticed by Respondent on January 30, 2014, as limited by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Dated: March 10, 2014