

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 RESPONDENT'S MOTION FOR LEAVE
TO REDEPOSE DETECTIVE KARINA JESTES

I.

On February 19, 2014, Respondent, LabMD, Inc. ("Respondent" or "LabMD"), filed a Motion for Leave to Redepose Detective Karina Jestes ("Motion"). Complaint Counsel filed an Opposition to the Motion on March 3, 2014 ("Opposition"). For the reasons set forth below, Respondent's Motion is GRANTED.

II.

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 FTC Act by failing to take reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Complaint ¶¶ 6-11, 17-21, 23. Specifically, the Complaint alleges: "In October 2012, the Sacramento, California Police Department found more than 35 Day Sheets¹ and a small number of copied checks in the possession of individuals who pleaded no contest to state charges of identity theft." Complaint ¶ 21. Respondent's Answer denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23.

Pursuant to a subpoena *ad testificandum* issued by Complaint Counsel, Ms. Karina Jestes, a police detective with the Sacramento, California Police Department ("SPD"), was deposed in Sacramento, California on December 17, 2013. Respondent states that during her deposition, Detective Jestes had certain gaps in her recollection of events surrounding her communications

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.

with the FTC. Motion at 1-2. Respondent further states that after Detective Jestes' deposition, the SPD produced documents containing communications between Detective Jestes and the FTC ("Recently Disclosed Documents").² According to the declaration of Respondent's attorney, after reviewing the Recently Disclosed Documents, Respondent's counsel called Detective Jestes, read her excerpts of some of her e-mail communications with the FTC, and asked her whether they refreshed her recollection as to certain of her communications with the FTC, to which Detective Jestes responded in the affirmative. (Declaration of Lorinda Harris, ¶ 4, Motion Exhibit E). Respondent thus requests an opportunity to redepose Detective Jestes on the subject matter of the FTC's communications with Detective Jestes regarding: the LabMD documents found in Sacramento; the FTC's requests of the SPD with respect to the LabMD documents; and the FTC's role in the SPD's treatment and handling of the LabMD documents, and other issues reflected in the recently disclosed e-mail communications between the FTC and Detective Jestes. Motion at 2-3. Respondent states that it does not intend to extend the scope of Detective Jestes' second deposition beyond those topics about which she was previously unable to remember. Motion at 4.

Complaint Counsel contends that the delay in Respondent's receipt of documents is attributable to Respondent's delay in serving discovery requests on the SPD. Complaint Counsel further asserts that Detective Jestes provided substantive testimony regarding the very topics upon which Respondent seeks to redepose her. Complaint Counsel argues that Detective Jestes had sufficient recollection of those topics, and LabMD had myriad opportunities to obtain the Recently Disclosed Documents before proceeding with the December 17, 2013 deposition. Opposition at 7-8. Lastly, Complaint Counsel argues that a second deposition of Detective Jestes would prejudice Complaint Counsel.

III.

Under the Scheduling Order issued in this case, depositions are limited to a "single, seven-hour day, unless agreed to by the parties or ordered by the Administrative Law Judge." Scheduling Order at 6, Add'l Prov. 12. In addition, the ALJ may limit discovery that is "unreasonably cumulative or duplicative," or where "[t]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought" 16 C.F.R. § 3.31(c)(2)(i)-(ii).

According to the Declaration of Lorinda Harris, Sacramento Deputy City Attorney Mike Fry has consented to the taking of Detective Jestes' deposition for the limited purpose of examining Jestes concerning the documents the SPD produced in response to LabMD's subpoena that refreshed Jestes' recollection about her communications with the FTC. (Declaration of Lorinda Harris, ¶ 6, Motion Exhibit E). Respondent seeks to depose Detective Jestes on this narrow issue, based only upon the Recently Disclosed Documents. Thus, a second, limited deposition of Detective Jestes is not unreasonably cumulative or duplicative.

² For purposes of this Order, the term "Recently Disclosed Documents" means documents that Respondent received after the December 17, 2013 deposition of Detective Jestes and includes documents responsive to the FTC's subpoena *duces tecum* and documents responsive to Respondent's subpoena *duces tecum*.

Complaint Counsel's claims that it would be prejudiced if a second deposition of Jestes were allowed are unpersuasive. To the extent that the time or cost of a second deposition presents a burden, Complaint Counsel may participate in the deposition by telephone. Under the Revised Scheduling Order, March 5, 2014, was the deadline for the close of discovery and March 18, 2014 is the deadline for Complaint Counsel to provide expert witness reports. Complaint Counsel contends that its expert witnesses will not have a meaningful opportunity to review the transcript of Detective Jestes' testimony before finalizing their reports. (Opposition at 8 n.8). To the extent that Complaint Counsel's experts need to revise their reports to reflect any additional information from a second deposition of Detective Jestes, Complaint Counsel may, within seven days from the receipt of the deposition transcript, submit a supplemental expert witness report(s) based solely on this issue. Respondent may, within five days from receipt of any supplemental expert witness report(s), submit any responses from its own expert(s) that address the same issue.

IV.

Respondent's Motion to Redepose Detective Jestes is GRANTED. The deposition is limited to the narrow issue of Detective Jestes' communications with the FTC based upon the Recently Disclosed Documents.

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 deposition of Detective Jestes, as limited by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 12, 2014