

ORIGINAL

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



_____)
In the Matter of _____)
_____)
LabMD, Inc., _____)
a corporation. _____)
_____)
_____)

DOCKET NO. 9357

**RESPONDENT LABMD, INC.'S MOTION *IN LIMINE* TO LIMIT THE
TESTIMONY OF ERIC JOHNSON**

LabMD moves to limit lay-witness Eric Johnson's testimony to exclude the opinion testimony that Complaint Counsel have stated they expect to elicit from him. Complaint Counsel's Supplemental Preliminary Witness List, served on counsel for LabMD, Inc. (LabMD) on February 27, 2014, contained a supplemental list of witnesses who "may testify for Complaint Counsel at the hearing in this action by deposition and/or investigational hearing transcript, declaration, or orally by live witness," including "M. Eric Johnson, Dean of Owen Graduate School of Management, Vanderbilt University." Exhibit 1, Complaint Counsel's Supplemental Preliminary Witness List, at 1, 3. Complaint Counsel stated that they expected Mr. Johnson "will testify about . . . the consequences of inadvertent disclosures of consumers' personal information." *Id.* at 3.

I. Complaint Counsel Improperly Intends To Elicit Expert Testimony From A Lay Witness.

Complaint Counsel improperly intend to elicit expert testimony from Mr. Johnson, a lay-witness whom they have not designated as an expert witness. The Scheduling Order in this case adopts Federal Rule of Evidence 701, which states that lay opinion is only admissible if it is

“rationally based on the witness’s perception” and is “not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. Rule 701 was designed “to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Fed. R. Evid. 701 Adv. Comm. Notes (2000 Am.). Instead, Rule 701 “channel[s] testimony that is actually expert testimony to Rule 702.” *Id.*; see, e.g., *Cook v. Rockwell Int’l Corp.*, 233 F.R.D. 598, 601 (D. Colo. 2005), *case overturned on other grounds*. “[A]ny part of a witness’ testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702.” Fed. R. Evid. 701 Adv. Comm. Notes (2000 Am.). Therefore, “the rule expressly prohibits the admission of testimony as lay witness opinion if it is based on specialized knowledge,” *Cook*, 233 F.R.D. at 601 (citation omitted), or if it is based on speculative rather than personal knowledge, *id.* at 602 n.7. In the instant case, testimony about the general “consequences of inadvertent disclosures of consumers’ personal information” is speculative and can be given only by an expert witness.

Any testimony from Mr. Johnson about the general “consequences of inadvertent disclosures” of “consumers’” information would not be based in fact, but in speculation and opinion of a type that can be given only by a witness designated as an expert. *Cf. United States v. Campbell*, 81 Fed. Appx. 532, 535 (6th Cir. 2003) (upholding a district judge’s decision to exclude the testimony of “an art professor asked to testify about child nudity as art . . . [because she was] offer[ing] her insight about the professional art world, not her knowledge regarding [the defendant’s child pornography] case,” despite having been called as a lay-witness). In order to form an opinion of the potential “consequences” that could befall generalized “consumers” through “inadvertent disclosures,” Mr. Johnson would have to base that opinion on his academic

research into data breaches, *i.e.*, “specialized knowledge” of the type that Rule 701 deems inadmissible as lay-witness opinion.

II. Eric Johnson’s Improper Testimony Would Prejudice LabMD.

LabMD would be substantially prejudiced if Complaint Counsel were permitted to bypass the rules designed to ensure not only that expert testimony is reliable, but also that the opposing party has fair notice and the opportunity to probe a witnesses offering expert testimony in order to be able to rebut his conclusions. *See Cook*, 233 F.R.D. at 601-02 (excluding expert testimony where a party sought to introduce an expert witness by calling her under the guise of a lay-witness without the advance disclosure required by Rule 702); Fed. R. Evid. 701 Adv. Comm. Notes (2000 Am.) (Rule 701 was designed prevent parties from evading the rules that require them to qualify their expert witnesses, simply by “proffering an expert in lay witness clothing.”). Complaint Counsel’s case boasts few concrete facts and no identifiable legal standards, and instead relies heavily on the testimony of expert witnesses. Here, Complaint Counsel is trying to smuggle yet another expert opinion into the case by a back door. It would substantially prejudice LabMD to be denied even the bare opportunity to read an expert report detailing the basis for that expert opinion, and to take an expert deposition to probe the nature and the strength of the expert opinion.

III. Complaint Counsel Has Ignored LabMD’s Offer To Meet And Confer.

Counsel for LabMD asked FTC to meet-and-confer about limiting Mr. Johnson’s testimony, but FTC ignored LabMD’s request. On March 14, 2014, Mr. William A. Sherman delivered a letter via email to Ms. Margaret L. Lassack, on which he cc’d all other FTC attorneys who have entered an appearance in this matter. See Exhibit 2, March 14 Letter from William A. Sherman to Margaret L. Lassack. The letter outlined LabMD’s objections to Complaint


Counsel's intent to elicit improper testimony from Mr. Johnson, and requested them either to agree to limit Mr. Johnson's testimony appropriately or to arrange for a meet-and-confer with LabMD counsel to discuss the issue. *See id.* More than a month later, Counsel for LabMD still has not received any response from Complaint Counsel.

Conclusion

For the forgoing reasons, LabMD respectfully requests that ALJ Chappell limit lay-witness Eric Johnson's testimony to exclude his expert opinions on the subject of "the consequences of inadvertent disclosures of consumers' personal information."

Dated: April 22, 2014

Respectfully submitted,



William A. Sherman, II, Esq.
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**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

_____)
In the Matter of)

CONFIDENTIAL

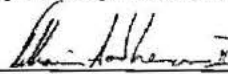
LabMD, Inc.,)
a corporation,)
Respondent.)
_____)

Docket No. 9357

MEET-AND-CONFER STATEMENT

Pursuant to ALJ Chappell's Scheduling Order, paragraph 4, Counsel for the moving party, Respondent, LabMD, Inc. (LabMD), hereby certifies that on March 14, 2014, Mr. William A. Sherman delivered a letter to Complaint Counsel via email¹ requesting a meet-and-confer on Complaint Counsel's intent to elicit expert testimony from Eric Johnson, in a good-faith effort to resolve by agreement the issues regarding LabMD's Motion In Limine To Limit The Testimony Of Eric Johnson. Counsel for LabMD still has not received any response from Complaint Counsel.

Respectfully submitted,



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Counsel for Respondent

¹ The letter and email were addressed to Ms. Margaret L. Lassack, and all other FTC attorneys who have entered an appearance in this matter were cc'ed on the letter and the email.

EXHIBIT

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

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

COMPLAINT COUNSEL’S SUPPLEMENTAL PRELIMINARY WITNESS LIST

Complaint Counsel hereby supplements its Preliminary Witness List in light of additional information that has become available since Complaint Counsel served its Preliminary Witness List to Respondent LabMD, Inc. (“LabMD” or “Respondent”) on December 19, 2013. Such additional information includes, but is not limited to, information relating to the wind down of LabMD’s business operations and the corresponding relocation of LabMD’s business premises.

In addition to the fact witnesses identified in Complaint Counsel’s Preliminary Witness List, the following seven additional fact witnesses may testify for Complaint Counsel at the hearing in this action by deposition and/or investigational hearing transcript, declaration, or orally by live witness:

1. Nicole Elliott, former LabMD IT employee

We expect that Ms. Elliott will testify about LabMD’s computer networks, including, but not limited to, remote access thereto; LabMD’s security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; LabMD’s IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

2. Kim Gardner, former LabMD Executive Assistant

We expect that Ms. Gardner will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; information relating to the wind down of LabMD's business operations and the corresponding relocation of LabMD's business premises; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

3. Nicotra Harris, former LabMD finance or billing employee

We expect that Ms. Harris will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

4. Lou Carmichael, former LabMD consultant

We expect Ms. Carmichael will testify about LabMD's security policies and practices, compliance program, and employee training.

5. Jonn Perez, Trend Micro Inc. employee

We expect Mr. Perez will testify about facts related to the admissibility of documents that may be produced in response to Complaint Counsel's subpoena *duces tecum* to Trend Micro Inc.

6. Matt Wells, Trend Micro Inc. employee

We expect Mr. Wells will testify about facts related to the admissibility of documents that may be produced in response to Complaint Counsel's subpoena *duces tecum* to Trend Micro Inc.

7. M. Eric Johnson, Dean of Owen Graduate School of Management, Vanderbilt University

We expect Dean Johnson will testify about facts related to his study entitled "Data Hemorrhages in the Health-Care Sector," including his research methodology and findings, the "P2P insurance aging file" referenced in Paragraph 17 of the Complaint, facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint, peer-to-peer file sharing applications and networks, and the consequences of inadvertent disclosures of consumers' personal information.

Complaint Counsel continues to reserve all rights reserved in its Preliminary Witness

List served to Respondent on December 19, 2013.

Dated: February 27, 2014

Respectfully submitted,

/s/ Margaret L. Lassack

Alain Sheer

Laura Riposo VanDruff

Megan Cox

Margaret Lassack

Ryan Mehm

John Krebs

Jarad Brown

Complaint Counsel

Federal Trade Commission

600 Pennsylvania Avenue NW

Room NJ-8100

Washington, DC 20580

Telephone: (202) 326-3713 - (Lassack)

Facsimile: (202) 326-3062

Electronic mail: mlassack@ftc.gov

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Complaint Counsel's Supplemental Preliminary Witness List to be served *via* electronic mail to:

Michael D. Pepson
Lorinda Harris
Kent Huntington
Hallee Morgan
Robyn Burrows
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Counsel for Respondent LabMD, Inc.

February 27, 2014

By: /s/ Megan Cox
Megan Cox
Federal Trade Commission
Bureau of Consumer Protection

EXHIBIT

2



Legal Counsel.

DINSMORE & SHOHL LLP
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VIA ELECTRONIC MAIL

March 14, 2014

Ms. Margaret L. Lassack
Complaint Counsel
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room NJ-8100
Washington, DC 20580
mlassack@ftc.gov

RE: *In the Matter of LabMD, Inc.*,
Eric Johnson: improper designation as expert witness

Dear Ms. Lassack:

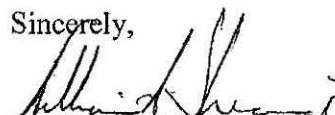
Complaint Counsels' Supplemental Preliminary Witness List, served on counsel for LabMD, Inc. (LabMD) on February 27, 2014, indicates that you anticipate M. Eric Johnson, Dean of Owen Graduate School of Management, Vanderbilt University, "will testify about ... the consequences of inadvertent disclosures of consumers' personal information."

Any testimony from Mr. Johnson about the general "consequences of inadvertent disclosures of consumers' personal information" would not be based in fact, but in speculation and opinion, and this would be more in the nature of expert testimony, which can be given only by a witness designated as an expert. Mr. Johnson does not have personal knowledge of any actual "consequences" caused to any known "consumers" by the specific "inadvertent disclosures" alleged in the administrative Complaint.

The deadline for Complaint Counsel to provide its expert witness list to LabMD was February 3, 2014. Complaint Counsel's Expert Witness List was served on LabMD on February 3, 2014, and Mr. Johnson's name was not listed on it.

By way of this letter we are requesting that you agree to amend the testimony of Mr. Johnson to exclude any testimony about "consequences of inadvertent disclosures of consumers' personal information." If you do not agree to limit Mr. Johnson's testimony, we are willing to meet and confer regarding this matter, so that we may file a motion *in limine* at the appropriate time.

Sincerely,



William A. Sherman, II

CC: Alain Sheer
Laura Riposo VanDruff
Megan Cox
Ryan Mehm
John Krebs
Jarad Brown

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 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

I also certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

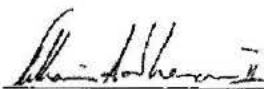
I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

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.

Dated: April 22, 2014

By: 
William A. Sherman

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

In the Matter of)
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LabMD, Inc.,)
a corporation.)
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_____)

DOCKET NO. 9357

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.'S MOTION
IN LIMINE TO LIMIT THE TESTIMONY OF ERIC JOHNSON**

Having considered Respondent LabMD, Inc.'s Motion *In Limine* To Limit The
Testimony Of Eric Johnson, I hereby ORDER that:

Respondent's Motion is GRANTED,

AND that the testimony of Eric Johnson shall be limited to exclude testimony about the
consequences of inadvertent disclosures of consumers' personal information,

AND that Complaint Counsel shall not attempt to elicit such testimony, or other expert
testimony, from Eric Johnson.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____