

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



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

PUBLIC
Docket No. 9357

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF JAMES VAN DYKE

The Court should deny Respondent’s Motion *In Limine* to Exclude Expert Testimony of James Van Dyke. Mr. Van Dyke is qualified by experience as an expert in identity theft, and his testimony on the issue of the likelihood of quantifiable consumer harm through identity theft is based on reliable methodology applied to the facts of this case. Mr. Van Dyke’s testimony will be helpful to the Court in determining the likelihood of consumer harm resulting from LabMD’s inadequate data security practices, and the Court can best assess Respondent’s arguments about Mr. Van Dyke’s qualifications and methodology in the appropriate factual context at trial.

BACKGROUND

Mr. Van Dyke is qualified as an expert by his experience in the field of identity theft. In 2002, Mr. Van Dyke founded Javelin Strategy & Research (“Javelin”), a research firm focused on identifying trends in identity theft-related frauds. Expert Report of James Van Dyke, at 1, 104 (**Exhibit A**); Deposition of James Van Dyke (Apr. 14, 2014) at 7 (**Exhibit B**). Javelin has administered its Identity Fraud Survey for ten years to help consumers, government, and

businesses understand effective methods for fraud prevention, detection, and resolution.¹ Ex. A at 1, 104. The annual, independent survey is a comprehensive analysis of identity fraud trends. *Id.* at 28. It is the longest running survey on the issue of identity theft, and provides unique insights about identity fraud through its use of longitudinal data. *Id.* at 28, 79-80. Under Mr. Van Dyke's leadership, Javelin employs approximately twenty statisticians, practice leaders, analysts, and staff to undertake its research. Ex. B at 28-29. It is transparent about its methodology, collection, longitudinal trending, deviations year-to-year, margin of error, and confidence level in the survey. Ex. A at 2, 79-81. In addition to detecting trends in identity fraud, the survey also identifies key factors in consumers' susceptibility to and responses to identity fraud. *Id.* at 24.

Mr. Van Dyke has published dozens of articles about data breach fraud impact, banking identity safety, identity protection services, and online and mobile payments in the last ten years. *Id.* at 105-124. He presents frequently on issues related to identity theft and is routinely interviewed about matters connected to harms arising from identity theft. He has testified before the United States House of Representatives on the future of secure personal financial management and has presented to Federal Reserve Bank conferences, the Federal Reserve Board of Governors, and the RSA Security Conference on issues of payments, data security, and identity fraud. *Id.* at 1.

Complaint Counsel disclosed its experts to Respondent on February 3, 2014, and noted the subjects on which each would testify. On March 18, 2014, Complaint Counsel served Mr.

¹ Javelin uses the term "identity fraud" to refer to the unauthorized use of some portion of another person's personally identifiable information to achieve illicit gain. Ex. A at 3. This is also referred to as "identity theft." *Id.*

Van Dyke's expert report, in which he describes his opinions quantifying the substantial likelihood of consumer injury due to LabMD's failure "to provide reasonable and appropriate security" for consumers' personal information maintained on its computer networks. Compl. ¶ 10. Mr. Van Dyke does not provide an opinion on the reasonableness of LabMD's data security. Rather, Complaint Counsel asked Mr. Van Dyke to assume that LabMD failed to provide reasonable and appropriate security for consumers' personal information maintained on its computer networks. Ex. A at 2.

Mr. Van Dyke's expert report focuses on the likely injury to (1) consumers whose personally identifiable information has been disclosed by LabMD without authorization and (2) consumers whose personally identifiable information was not adequately protected from unauthorized disclosure. *Id.* at 2. Mr. Van Dyke quantifies the likely consumer injury from the unauthorized disclosure of the LabMD file containing the sensitive personal information of approximately 9,300 consumers that was shared to a public peer-to-peer ("P2P") file sharing network without being detected by LabMD (the "P2P Insurance Aging File"). *Id.* ¶¶ 10(g), 17-20. [REDACTED]

[REDACTED] Mr. Van Dyke also quantifies the likely consumer injury from the unauthorized disclosure of the LabMD documents containing the sensitive personal information of over 600 consumers ("Day Sheets") that were found by the Sacramento California Police Department in October 2012 in the possession of individuals who later pled no contest to state charges of identity theft. *Id.* ¶ 21. In March 2013, LabMD sent letters to the consumers whose personal information was included in the Day Sheets, notifying them that their personal information had been compromised. Ex. A at 7.

In forming his opinions, Mr. Van Dyke applied the findings from Javelin’s 2013 Identity Fraud Survey to the facts of the LabMD unauthorized disclosures. Ex. A at 4, 6, 11-13. Mr. Van Dyke concludes that consumers will experience [REDACTED] [REDACTED] due to the unauthorized disclosure of the P2P Insurance Aging File. *Id.* at 12. He further concludes consumers will experience [REDACTED] [REDACTED] hours resolving fraud due to the unauthorized disclosure of the Day Sheets. *Id.* Finally, Mr. Van Dyke concludes that LabMD risked exposing the 750,000 consumers whose information is stored on LabMD’s networks to a likelihood of a wide variety of identity frauds. *Id.* at 12-13.

ARGUMENT

Respondent’s Motion should be denied because Mr. Van Dyke is qualified by experience as an expert in identity theft, and his opinions concerning the likelihood of consumer harm as a result of LabMD’s failure to provide reasonable and appropriate security is based on reliable methodology applied to the facts of this case. The Court can best consider Respondent’s arguments concerning Mr. Van Dyke’s qualifications and methodology at trial through cross-examination.

“Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *19 (Apr. 20, 2009). When considering a motion *in limine*, the Court “may reserve judgment until trial, so that the motion is placed in the appropriate factual context.” *In re POM Wonderful LLC*, 2011 WL 2160775, at *2 (May 5, 2011). “When ruling on the admissibility of expert opinions, courts traditionally consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue.” *In re Basic Research*, 2006

FTC LEXIS 5, at *11-12 (Jan. 10, 2006) (citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 153-54 (1999)). See also Fed. R. Evid. 702.² “The court’s role as a ‘gatekeeper,’ pursuant to *Daubert*, to prevent expert testimony from unduly confusing or misleading a jury,” however “has little application in a bench trial.” *In re McWane*, 2012 FTC LEXIS 142, at *8 (Aug. 16, 2012). Vigorous cross-examination of the expert, alongside presentation of contrary evidence and a careful weighing of the burden of proof is the better approach for challenging expert testimony under *Daubert* in a bench trial. See *In re Basic Research*, 2006 FTC LEXIS 5, at *9 (Jan. 10, 2006).

I. MR. VAN DYKE IS QUALIFIED AS AN EXPERT ON IDENTITY THEFT

Mr. Van Dyke’s experience and knowledge qualify him as an expert whose testimony will aid the Court in understanding how to quantify identity theft as a consumer injury. An expert may be qualified by “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. “In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” Fed. R. Evid. 702 advisory committee’s note. See, e.g., *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (upholding admission of testimony of a handwriting examiner who had years of practical experience and extensive training); *Kumho*, 526 U.S. at 156 (“[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”).

² The Federal Rules of Evidence have not been adopted in the Commission’s Rules of Practice, and therefore, it is in the ALJ’s discretion to decide whether to follow *Daubert* in this administrative proceeding. See *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001) (stating *Daubert* does not directly apply in administrative proceedings “because it is based on Fed. R. Evid. 702, which agencies need not follow”).

Mr. Van Dyke has the knowledge and experience to provide expert testimony about the likelihood of harm that Respondent's security failures caused, or are likely to cause to consumers. Complaint Counsel offers Mr. Van Dyke as an expert on the narrow issue of the likelihood of consumer injury, and not as an expert on data security, as Respondent suggests. Mot. at 4.³ Complaint Counsel did not ask Mr. Van Dyke to offer opinions on the reasonableness of LabMD's data security, and he is not qualified to offer any such opinions.⁴

Under Mr. Van Dyke's leadership, Javelin has administered the Identity Fraud Survey for ten years in order to aid consumers, governments, and businesses in understanding effective methods of fraud prevention, detection, and resolution. Ex. A at 4. Mr. Van Dyke has worked with a team of statisticians and industry analysts to improve and build on the survey questions year-to-year, while maintaining the longitudinal integrity of the data. *Id.* at 1, 79; Ex. B at 28-29, 68. His work provides insights into the rates at which consumers experience various forms of fraud. Ex. A at 24, 28. Mr. Van Dyke has published dozens of articles about data breach fraud impact, banking identity safety, online and mobile payments, and identity protection services. *Id.* at 105-24. Moreover, in his expert report, he reviews other literature relevant to the field of identity theft, with a focus on the harm that can come to consumers whose information is disclosed without authorization, which includes financial harm, reputational harm, and time loss. *Id.* at 15-20.

³ Mr. Van Dyke's report states: "Federal Trade Commission (FTC) staff has asked me to assess the risk of injury to consumers whose personally identifiable information has been disclosed by LabMD, Inc. [] without authorization and to consumers whose personally identifiable information was not adequately protected from unauthorized disclosure." Ex. A at 2.

⁴ Complaint Counsel has proffered an expert witness, Professor Raquel Hill, to address data security issues. Respondent has not challenged Professor Hill's qualifications or opinions.

II. MR. VAN DYKE'S OPINIONS ARE BASED ON RELIABLE METHODOLOGY APPLIED TO THE FACTS OF THE CASE

A qualified expert may offer expert testimony when it is the product of reliable methods, and the expert has reliably applied the methods to the facts of the case. *See* Fed. R. Evid. 702. Contrary to Respondent's argument, Mr. Van Dyke's testimony is based on a reliable methodology that he applied to the facts of this case, and therefore should be admitted.

In forming his opinions, Mr. Van Dyke applied the findings from the 2013 Identity Fraud Survey to the facts of the LabMD unauthorized disclosures. Ex. A at 4. He concludes that consumers will experience [REDACTED] resolving fraud due to the unauthorized disclosure of the P2P Insurance Aging File. He further concludes consumers will experience [REDACTED] hours resolving fraud due to the unauthorized disclosure of the Day Sheets. *Id.* at 12, 14. Finally, he concludes that LabMD risked exposing the 750,000 consumers whose information is stored on LabMD's networks to a likelihood of a wide variety of identity frauds. *Id.* at 12-13.

The survey data, fielded using generally accepted methodologies, was collected from a nationally representative group. *Id.* at 4, 79-81. The 2013 Identity Fraud Survey examined the rates at which consumers experience various harms, including account fraud and medical identity theft. *Id.* at 8, 14. Mr. Van Dyke applied the findings from the survey to the facts of this case: Specifically he applied the incidence rates of existing card fraud, existing non-card fraud, and new account fraud to the LabMD disclosures, as requested by Complaint Counsel. *Id.* at 6, 8-12, 97-102. Mr. Van Dyke's calculations of the incidence rates as applied to the LabMD-specific disclosures are supplied in his report and are supported by accompanying spreadsheets demonstrating the calculations. *Id.* at 97-102. Javelin's 2013 Identity Fraud Survey's margin of


error and confidence level are disclosed as part of the survey and report. *Id.* at 81. Mr. Van Dyke determined that the incidence rates for various identity frauds in 2013, identified in the 2013 Fraud Survey, are applicable to the LabMD unauthorized disclosures, as the P2P file was available on a P2P network through at least November 2013 and LabMD sent notification letters to the consumers whose information was disclosed in the Day Sheets in March 2013. *Id.* at 7.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's Motion *In Limine* to Exclude the Expert Testimony of James Van Dyke.

Dated: May 1, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2014, I filed the foregoing document with the Office of the Secretary:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-113
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be delivered *via* electronic mail and by hand to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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Washington, DC 20580

I further certify that I caused a copy of the foregoing document to be served via electronic mail to:


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May 1, 2014

By: 

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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.

May 1, 2014

By: 

Megan Cox
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

Exhibit B

Transcript of the Testimony of **James E. Van Dyke**

Date: April 14, 2014

Case: In Re: LabMD, Inc.



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Page 26

1 think we covered all of your employment during that
2 period of time, I'm thinking that is about eight
3 years. And I might be being generous, so eight
4 years from 1996 takes us to 2004.
5 MS. RIPOSO VAN DRUFF: Is there a
6 question, counsel?
7 BY MR. SHERMAN:
8 Q I'm asking him if eight years from 1996
9 takes us to 2004?
10 A 1996, 1997, 1998, 1999, 2000, 2001, 2002,
11 2003, 2004, so eight or nine years, yes.
12 Q Eight or nine years?
13 A Uh-huh.
14 Q So between 2004 and 2013 how were you
15 employed?
16 A So I was with -- I started Javelin
17 Strategy & Research and ran that company
18 independently for 12 years before it was acquired by
19 Greenwich Associates.
20 Q Okay. So you founded it in 2002?
21 A Uh-huh.
22 Q And you were running it independently
23 since 2002 up until 2014?
24 MS. RIPOSO VAN DRUFF: Misstates prior
25 testimony, objection.

Page 27

1 THE WITNESS: That's not correct.
2 BY MR. SHERMAN:
3 Q What is correct then?
4 A Well, what I had previously stated about
5 when Greenwich was acquired.
6 Q Okay. So let me ask you this. When did
7 your employment with Jupiter end, what year?
8 A It ended in 2002.
9 Q How were you employed after that?
10 A I was self-employed.
11 Q Doing what for whom?
12 A I founded Javelin Strategy & Research.
13 Q Okay. And so from 2002 until January
14 of 2013 your employment was with Javelin Strategy &
15 Research; correct?
16 A Yes.
17 Q And you weren't employed by anybody else
18 during that time?
19 A No.
20 Q And what does Javelin Strategy & Research
21 do?
22 A Javelin provides market research on
23 electronic financial services and electronic
24 commerce.
25 Q And who seeks out Javelin's services? In

Page 28

1 other words, what kind of customers do you have?
2 MS. RIPOSO VAN DRUFF: I do not represent
3 either Mr. Van Dyke in his individual capacity nor
4 Javelin nor Greenwich, but to the extent you are
5 seeking information about specific clients, of
6 course that information may be governed by an NDA
7 but, Mr. Van Dyke, you may answer the question.
8 THE WITNESS: Javelin's clients include
9 financial institutions, technology vendors,
10 merchants, those are the three larger largest
11 categories.
12 BY MR. SHERMAN:
13 Q You indicate that there are, and we can go
14 back to Exhibit 1, second paragraph, page one, you
15 indicate areas of particular expertise include
16 consumer behavior, security technologies, personal
17 financial services and payments and the future of
18 identity management capabilities; did I read that
19 correctly?
20 A Yes, I believe you did.
21 Q Okay. Are those areas of expertise for
22 the company or for you personally?
23 A They are both.
24 Q So how many employees does Javelin have
25 currently?

Page 29

1 A Javelin currently has approximately 20
2 employees.
3 Q And these employees in category, what are
4 their functions, and I don't want you to go through
5 what each of the 20 employees do but kind of how is
6 Javelin set up, what to, you know, the groups of
7 employees actually do?
8 A So you are asking overall?
9 Q Yes.
10 A Okay. We have a group of data collection
11 and analysis specialists, we have practice leaders
12 over each specialty area, we have customer
13 representatives, and then people in finance and in
14 forward administration.
15 Q You mentioned practice areas?
16 A Uh-huh.
17 Q What are the practice areas?
18 A The practice areas of payments, mobile,
19 omni channels, and security and fraud.
20 Q So in each of these practice areas is it
21 fair to say that Javelin does research associated
22 with those practice areas?
23 A Yes.
24 MS. RIPOSO VAN DRUFF: Mr. Sherman, would
25 this be a good time to take a quick break?

Exhibit C

In the Matter of:

LabMD, Inc.

November 21, 2013

Robert J. Boback

Condensed Transcript with Word Index



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