

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 LABMD, INC.’S MOTION FOR A PROTECTIVE ORDER**

INTRODUCTION

Respondent LabMD, Inc.’s (“LabMD”) Motion for a Protective Order, which would prevent Complaint Counsel from conducting ordinary, third-party discovery, fails for three reasons. First, Respondent lacks standing to challenge the Third Party Subpoenas. Second, Respondent has not met its heavy burden to show that Complaint Counsel should be prevented from conducting relevant third-party discovery. Finally, the Third Party Subpoenas properly seek information relevant to the allegations of the Complaint, to the proposed relief, and to LabMD’s anticipated defenses.

BACKGROUND

The Complaint alleges that LabMD engaged in fundamental, systemic security failures that put at risk sensitive personal information consumers had entrusted to the company. Compl. ¶¶ 6-11, 17-21. LabMD’s failures, which began before 2005 and continued well past 2008, included the following: (1) not developing, adopting, or maintaining a comprehensive information security program to protect personal information; (2) not identifying commonly

known or reasonably foreseeable risks to sensitive consumer information; (3) not limiting employees' access to only the consumer information needed to do their jobs; (4) not adequately training employees about security risks and practices; (5) not appropriately authenticating users; (6) not adequately updating computer operating systems and equipment; and (7) not adequately preventing and detecting unauthorized access to personal information. *Id.* ¶ 10. LabMD's practices in this regard defy common sense security principles developed and used by industry and government.

As a result of LabMD's failures, a file containing the sensitive personal information of about 9,300 consumers ("the P2P insurance aging file") was shared to a public file sharing network without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20. As alleged in the Complaint, identity thieves value the types of sensitive personal information LabMD maintains. *Id.* ¶¶ 6-7, 9, 12, 21.¹ LabMD's failure to adopt reasonable and appropriate security measures to protect this information caused or is likely to cause substantial consumer harm that is not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or competition. Compl. ¶ 22; *see* 15 U.S.C. § 45(n).

LabMD initially cooperated with staff's investigation, responding to questions, attending meetings, and producing documents.² Subsequently, however, LabMD resisted staff's continued investigation and required the Commission to enforce its Civil Investigative Demands in federal court. In 2013, pursuant to an order entered by the District Court for the Northern District of

¹ Indeed, LabMD documents containing consumers' sensitive personal information were found in the possession of identity thieves in Sacramento, California ("Sacramento Incident"). Compl. ¶ 21.

² Respondent ultimately produced fewer than 800 documents.

Georgia, staff conducted Investigational Hearings of LabMD's corporate representative and its Chief Executive Officer, Michael Daugherty. Staff also conducted Investigational Hearings of two former LabMD employees. The information collected during staff's Part II investigation provided the Commission with reason to believe that LabMD had violated the FTC Act. *See* 15 U.S.C. § 45(b) (standard for issuing a complaint). On August 28, 2013, the Commission voted unanimously to issue the Complaint.

ARGUMENT

Complaint Counsel reasonably expects that its subpoenas to third parties (collectively "Third Party Subpoenas")³ will yield information relevant to the allegations of the Complaint, to the proposed relief, or to LabMD's defenses.⁴ No third party has sought relief from the Third Party Subpoenas.⁵ Indeed, as of the date of this filing, two companies have produced documents responsive to the Third Party Subpoenas and six deponents have agreed to schedule their depositions for dates certain.

³ The only subpoenas not subject to Respondent's Motion for a Protective Order were issued to Tiversa Holding Corporation ("Tiversa") (Resp. Mot. 2 n.1), the company that informed LabMD that the P2P insurance aging file was available on a peer-to-peer network. Compl. ¶¶ 17-19. Contrary to Respondent's assertion in its Memorandum, however, the parties dispute "how and when Tiversa took the PI file." Resp. Mot. 7.

⁴ Prior to the September 25, 2013 Scheduling Conference, Respondent's counsel proposed limiting deposition discovery to ten depositions per party. Complaint Counsel did not agree to this modification of the Commission's Rules or the Court's proposed Scheduling Order. At the subsequent Scheduling Conference, Respondent's counsel took the position that there should be *no* changes to the Court's proposed Scheduling Order, which did not limit the number of depositions. *See* Hearing Tr. 5 (Sept. 25, 2013).

⁵ For most recipients of the Third Party Subpoenas, the deadline for motions to quash passed on November 6, 2013. 16 C.F.R. § 3.34(c).

I. RESPONDENT LACKS STANDING TO CHALLENGE THIRD PARTY SUBPOENAS

A party to litigation generally lacks standing to object to a third-party subpoena. *See In re Basic Research LLC*, No. 9318, 2004 FTC LEXIS 237, at *11-12 (denying, on standing grounds, Complaint Counsel’s motion for a protective order to limit subpoenas issued to four non-parties); *US Bank Nat’l Ass’n v. PHL Variable Ins. Co.*, 12 Civ. 6811, 2012 U.S. Dist. LEXIS 158448, at *5-6 (S.D.N.Y. Nov. 5, 2012) (denying Defendant’s motion for a protective order because Defendant lacked standing to challenge subpoenas served on non-parties). Only where a party has a right or privilege personal to it—such as an interest in preserving proprietary confidential information or an interest in maintaining a privilege—may it properly seek relief. *Id.* at *5; *see also Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979); *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir. 1975); *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997). Here, Respondent makes no claim of a personal right or privilege in the information sought in the Third Party Subpoenas, and the Court should deny its Motion.

II. RESPONDENT HAS NOT DEMONSTRATED THAT IT IS UNDULY BURDENED BY THIRD PARTY SUBPOENAS

To the extent that the Court holds that Respondent may have standing to challenge the Third Party Subpoenas, which it does not, Respondent has not made the requisite showing for the Court to enter a Protective Order. A party seeking to limit the discovery of relevant information carries “a heavy burden of showing why discovery should be denied.” *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *4 (July 6, 2001).

Respondent moves for relief from the Third Party Subpoenas chiefly because it claims (1) that LabMD provided the requested information to Complaint Counsel during the Part II

investigation or could provide it during discovery and (2) that attending third-party depositions would generate expenses.⁶ These arguments lack any legal basis.

As a preliminary matter, Complaint Counsel disputes that any of the Third Party Subpoenas are “duplicative.” Rather, as explained in detail below, each subpoena seeks information relevant to the allegations of the complaint, to the proposed relief, or to Respondent’s anticipated defenses. In any event, this Court repeatedly has held that discovery is not unreasonably duplicative, burdensome, or otherwise subject to limitation because it is duplicative of information obtained during a Part II investigation. *See, e.g., In re Polypore Int’l, Inc.*, 2008 FTC LEXIS 155, at *9 (“Simply because the agents of Respondents were examined during the pre-complaint investigation does not preclude Complaint Counsel from taking the depositions of these individuals in accordance with Part III of the Commission’s Rules of Practice.”); *In re Hoechst Marion Roussel, Inc.*, No. 9293, 2000 WL 33596436, at *3 (F.T.C. Oct. 12, 2000) (same). Similarly, LabMD cites no valid authority supporting its assertion that “[s]ubpoenas should not be enforced where the information is as easily obtainable from a party to the action as a third party.” Resp. Mot. 9. The only case LabMD cites, *Schering Corp. v. Amgen, Inc.*, No. 98-97, 1998 U.S. Dist. LEXIS 13452, at *8-9 (Aug. 4, 1998), is inapposite. The court in *Amgen* quashed subpoenas seeking testimony from unretained experts in order to protect against a taking of their intellectual property. *Id.* at *6-7. No testimony from unretained experts is at issue here. Finally, the Third Party Subpoenas impose no unavoidable burdens on Respondent, which is not required to attend the noticed depositions and may limit its costs by appearing telephonically.

⁶ Respondent’s relevancy arguments are addressed in Section III, *infra*.

III. THIRD PARTY SUBPOENAS PROPERLY SEEK INFORMATION RELEVANT TO ALLEGATIONS, PROPOSED RELIEF, AND DEFENSES

The Commission’s “Rules of Practice adopt a liberal approach to discovery.” *In re Chain Pharmacy Ass’n, Inc.*, 1990 FTC LEXIS 193, at *3 (June 20, 1990). “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.” 16 C.F.R. § 3.31(c)(1). Nowhere do the Commission’s Rules of Practice subject third-party subpoenas to a higher relevancy standard than party discovery, and Respondent cites no authority from this Court in support of that proposition.⁷ To the contrary, this Court repeatedly has held that, “[e]ven where a subpoenaed *third party* adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost”—which is not the case here, where *no* third party has sought relief—“that will not excuse producing information that appears generally relevant to the issues in the proceeding.” *In re Phoebe Putney Health Sys., Inc.*, 2013 FTC LEXIS 84, at *6 (May 28, 2013) (emphasis added) (citation omitted); *see also, e.g., In re Polypore Int’l Inc.*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009) (denying third party’s request to limit subpoena).

The Third Party Subpoenas seek relevant information from the following third parties: (1) current and former LabMD employees; (2) LabMD information technology (“IT”) providers; (3)

⁷ The opinions on which Respondent relies are principally cases in which *third parties* sought to protect themselves from a party’s discovery under the Federal Rules of Civil Procedure, not the Commission’s Rules of Practice. *E.g., Echostar Commc’ns Corp. v. News Corp. Ltd.*, 180 F.R.D. 391 (D. Colo. 1998); *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44 (S.D.N.Y. 1996). These opinions are inapplicable here, where no third party has filed a Motion to Quash. Respondent’s citation to *Bio-Vita, Ltd. v. Biopure Corp.*, 138 F.R.D. 13, 17 (D. Mass 1991), is similarly misplaced, as the holding relates to the peculiar process by which a party may compel a nonparty to subject itself to an inspection, pursuant to Federal Rules of Civil Procedure 34(c).

physician clients with access to LabMD's computer network; (4) individuals and entities involved in the Sacramento Incident; (5) companies involved in processing credit card payments to LabMD; and (6) Mr. Daugherty.⁸

First, Complaint Counsel served subpoenas *ad testificandum* on current and former employees of LabMD who Complaint Counsel reasonably expects will provide testimony relating to Respondent's practices regarding unauthorized access to consumers' personal information.⁹ Compl. ¶¶ 6-11, 17-21. The Commission's Part II investigation revealed that many of Respondent's practices were informal and not memorialized in contemporaneous company documents. Accordingly, testimony from current and former employees, each of whom worked at LabMD during different time periods, is reasonably expected to yield information relevant to Complaint Counsel's allegations, proposed relief, and LabMD's anticipated defenses.

Second, Complaint Counsel served subpoenas on Respondent's IT providers seeking information regarding Respondent's computer hardware, software, and information security practices.¹⁰ Compl. ¶¶ 6-11, 17-21. One such third party, ProviDyn, Inc., has already produced

⁸ The Third Party Subpoenas specify reasonable time periods that are appropriate to the discovery sought. *See In re N. Tex. Specialty Physicians*, No. 9312, 2004 WL 527340, at *2 (F.T.C. Jan. 30, 2004).

⁹ Complaint Counsel's served subpoenas *ad testificandum* on: former billing employees (Karalyn Garrett and Rosalind Woodson); former sales personnel (Lawrence Hudson and Eric Knox); and current and former IT staff (John Boyle, Matt Bureau, Jeremy Dooley, Patrick Howard, Robert Hyer, Chris Maire, Jeff Martin, and Allison Simmons).

¹⁰ Complaint Counsel served subpoenas *ad testificandum* on: Cypress Communications, LLC; Scott Moulton; and Allen Truett. Complaint Counsel also served subpoenas *duces tecum* on: Automated PC Technologies; Cypress Communications, LLC; Forensic Strategy Services, LLC;

documents relevant to the Complaint’s allegations, the proposed relief, and LabMD’s anticipated defenses. Complaint Counsel reasonably expects that Respondent’s contracts and communications with other IT providers will yield similarly relevant information, such as security recommendations and the costs of available security measures. Compl. ¶¶ 10, 11.

Third, Complaint Counsel served two of LabMD’s physician clients, located in geographically diverse locations, with subpoenas relating to the allegation that Respondent “provides [computers] to some health care providers” as part of its business.¹¹ Compl. ¶ 8. Complaint Counsel expects that testimony and documents from Respondent’s physician clients will be relevant to the Complaint’s allegations regarding the security of consumers’ personal information while in transit between Respondent and its physician clients. Compl. ¶¶ 8-9. Complaint Counsel also expects that information responsive to the subpoenas will be relevant to LabMD’s assertion that it is not engaged in interstate commerce. Resp. Mot. to Dismiss 28.

Fourth, Complaint Counsel served subpoenas on individuals with information related to the Sacramento Incident.¹² Complaint Counsel anticipates that these subpoenas will yield information relevant to consumer injury, which is an element of the law violation alleged in the Complaint. Compl. ¶¶ 12, 21-22. Because LabMD asserted recently that no consumer has

Managed Data Solutions, Inc; Scott Moulton; ProviDyn, Inc.; Trend Micro, Inc.; and Allen Truett.

¹¹ Complaint Counsel issued subpoenas *duces tecum* and *ad testificandum* to 21st Century Oncology, LLC, d/b/a UroSurg Associates (Florida), and Southeast Urology Network, P.C. (Tennessee).

¹² Complaint Counsel issued subpoenas *duces tecum* to: the Custodian of Records of the Sacramento Police Department; the Sandy Springs Police Department. Complaint Counsel also issued subpoenas *ad testificandum* to: Detective Karina Jestes (Sacramento); Detective David Lapidés (Sandy Springs, Georgia); Erick Garcia (Sacramento Defendant); and Josie Martinez Maldonado (Sacramento Defendant).

suffered injury (Resp. Mot. to Dismiss 6, 28), these Third Party Subpoenas are also reasonably anticipated to yield information relevant to Respondent's defenses.

Fifth, Complaint Counsel served subpoenas *duces tecum* on three companies involved in processing credit card payments for LabMD.¹³ They are likely to have relevant information because, in order to obtain approval for payment card transactions, LabMD agreed to secure payment card information in accordance with the Banks' requirements.

Finally, Complaint Counsel served a subpoena *duces tecum* on Mr. Daugherty.¹⁴ It seeks only documents related to Mr. Daugherty's recently self-published book. The book concerns the circumstances relating to the exposure of the P2P insurance aging file and LabMD's business practices, all of which are relevant to allegations in the Complaint. Compl. ¶¶ 1-11, 13-21.

¹³ Complaint Counsel issued subpoenas *duces tecum* to: Visa Inc.; MasterCard Worldwide; and Respondent's bank, U.S. Bank National Association, ND ("the Banks").

¹⁴ Contrary to Respondent's assertion, Complaint Counsel has not served a subpoena *ad testificandum* on Mr. Daugherty. Resp. Mot. 4 n.3. Even if Complaint Counsel had served such a subpoena, Respondent's argument that it would be improper because Commission staff took testimony from him during the Part II investigation is without merit. Commission Rule 3.33(b) states explicitly: "The fact that a witness testifies at an investigative hearing does not preclude the deposition of that witness." 16 C.F.R. § 3.33(b).

CONCLUSION

For the foregoing reasons, Respondent's Motion for a Protective Order should be denied in its entirety.

Dated: November 15, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2013, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system.

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

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November 15, 2013

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