

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 EMERGENCY MOTION TO REQUIRE COMPLAINT COUNSEL TO DESIGNATE A 3.33 WITNESS

The Court should deny Respondent’s Emergency Motion to Require Complaint Counsel to Designate a 3.33 Witness and all of the relief requested therein. Contrary to Respondent’s assertions, the Commission’s Rules of Practice do not require the recipient of a Rule 3.33(c)(1) deposition notice to identify its designee in advance of the deposition. In addition, Respondent LabMD, Inc. (“LabMD” or “Respondent”) will suffer no prejudice from not having advance notice of the identity of the Bureau of Consumer Protection’s (“BCP’s”) designee pursuant to LabMD’s Rule 3.33(c)(1) deposition notice, as limited by the Court’s March 10, 2014 Order granting in part Complaint Counsel’s motion for a protective order (“Deposition Notice”).

The only authority that LabMD cites in support of its contention that Complaint Counsel must provide advance notice of BCP’s designee pursuant to the Deposition Notice is the text of Rule 3.33(c)(1) itself.¹ Mot. at 2. Nowhere does Rule 3.33(c)(1) state that the recipient of a Rule 3.33(c)(1) deposition notice must identify its witness by name *in advance* of the deposition,

¹ LabMD also quotes “[t]he dictionary” definition of the word “designate” available at <http://dictionary.reference.com>. Mot. at 2.

as LabMD contends. To the contrary, Rule 3.33(c)(1) merely requires that the organization named in a Rule 3.33(c)(1) deposition notice “designate one or more . . . persons who consent to testify on its behalf,” and that the “persons so designated shall testify as to matters known or reasonably available to the organization.” 16 C.F.R. § 3.33(c)(1). Complaint Counsel has notified LabMD that it will designate an individual to testify on behalf of BCP concerning the topics in the Deposition Notice, as limited by the Court’s March 10, 2014 Order, and that it will produce the BCP designee for deposition on March 28, 2014, at 9:00 a.m. That is all that Rule 3.33(c)(1) requires.

LabMD’s contention that it will be prejudiced by not having advance notice of the identity of BCP’s designee is meritless. LabMD argues that it will be prejudiced because “it will be less prepared to question the witness regarding prior testimony and knowledge of relevant documents” with which the witness “may be intimately familiar.” Mot. at 2. LabMD will not be prejudiced by being “less prepared” to question the BCP designee about prior personal testimony or personal knowledge of relevant documents because the BCP designee will not testify based on his or her personal knowledge or experience. Rather, as Rule 3.33(c)(1) requires, the BCP designee will be prepared to testify on behalf of BCP “as to matters known or reasonably available to” BCP concerning the topics in the Deposition Notice, as limited by the Court’s March 10, 2014 Order. 16 C.F.R. § 3.31(c)(1). Therefore, any prior personal testimony or personal knowledge of relevant documents that the BCP designee may have is irrelevant.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's Emergency Motion to Require Complaint Counsel to Designate a 3.33 Witness and all of the relief requested therein.

Dated: March 26, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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
600 Pennsylvania Avenue, NW, Room H-110
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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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.

March 26, 2014

By:



Laura Riposo VanDruff
Federal Trade Commission
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