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 DENYING RESPONDENT'S MOTION TO EXCLUDE EVIDENCE

I.

On March 25, 2014, Respondent LabMD, Inc. ("Respondent" or "LabMD") filed a Motion to Exclude, requesting an order barring Complaint Counsel from seeking to use or offer into evidence six documents, identified as CX1007, CX1008, CX1009, CX1015, CX1016, and CX1017 ("Motion"). Federal Trade Commission ("FTC") Complaint Counsel filed an opposition to the Motion on April 6, 2015 ("Opposition").

Although Respondent's Motion is styled as a Motion to Exclude, based on the relief sought by Respondent, and the fact that the documents have not yet been offered into evidence by Complaint Counsel, Respondent's Motion is properly treated as a motion *in limine*. *See In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *18 (April 20, 2009) ("Motion *in limine* refers 'to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.'"). For the reasons set forth below, the Motion is DENIED.

II.

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, committed an unfair trade practice under Section 5(a) of the FTC Act by failing to use "reasonable and appropriate" data security measures to prevent unauthorized access to confidential patient information, Complaint ¶¶ 21-23, including by making an "insurance aging report" containing confidential patient information (the "1718 File") available for sharing via a peer-to-peer, or "P2P," file sharing application placed on a LabMD computer workstation. Complaint ¶¶18-19. As stated by Complaint Counsel, non-party Tiversa Holding Corp. ("Tiversa") found the 1718 File in the course of performing unrelated searches of P2P networks on behalf of one of Tiversa's clients and, according to Complaint Counsel, Tiversa eventually found the 1718 File at four separate IP addresses. Complaint Counsel's Pre-Trial Brief, May 6, 2014, at 45-46, 49. Respondent denies these allegations.

Trial in this matter commenced on May 20, 2014, and on May 23, 2014, Complaint Counsel rested its case-in-chief. Respondent thereafter began its defense, but was delayed pending completion of immunity proceedings and other circumstances related to the appearance of Respondent's designated witness, Mr. Richard Wallace, a former Tiversa employee. Trial is scheduled to resume with the testimony of Mr. Wallace on May 5, 2015.[1]

The documents at issue in this Motion (the "subject documents") are summarized as follows: CX1007 purports to be a one-page email, dated November 6, 2012, sent from Rick Wallace to Rick Wallace, with a subject line of "IPs." CX1008 purports to be a one-page email, dated November 9, 2012, sent from Rick Wallace to Robert Boback (Tiversa's Chief Executive Officer), with a subject line of "LAB MD Spread," indicating that a document is attached labeled, "LAB MD Spread.doc." CX1009 purports to be the "LAB MD Spread.doc" attached to CX1008, consisting of four pages. Based on the record, it appears that Tiversa first disclosed the documents now provisionally marked as CX1007-1009 as an exhibit to Tiversa's improperly filed October 14, 2014 "Notice of Information" regarding the immunity proceedings for Mr. Wallace. *See* Order on Respondent's Motion to Strike, November 19, 2014 (finding that the October 14 Notice of Information "was improperly filed" and stating that "the assertions and documents included therein will be disregarded and will not be considered for any purpose").

CX1015 purports to be a one-page document titled, "Tiversa Investigation Request Form," regarding an unspecified incident on April 18, 2008, identified as CIG00081. CX1016 purports to be a two-page document titled, "Tiversa Incident Record Form" for incident number CIG00081, referring to a file disclosure incident and referencing LabMD. CX1017 purports to be a "Tiversa Forensic Investigation Report," dated August 12, 2008, for incident number CIG00081, consisting of five pages, which references LabMD and the file disclosure incident referred to in CX1015 and CX1016. Based on the record, CX1015-1017 were produced by Tiversa to the U.S. House of Representatives Committee on Oversight and Government Reform ("OGR"), in connection with a pending investigation of Tiversa, and attached to a December 1, 2014 letter from Representative Darrell Issa, then-Chairman of the OGR, to FTC Chairwoman Edith Ramirez ("December 1, 2014 OGR letter"). It should also be noted that CX1015-1017 are the same documents that Respondent previously proffered for admission "for all purposes" as RX544-546, in its December 23, 2014 Motion to Admit. That motion was denied without prejudice for lack of proper evidentiary foundation. Order of February 12, 2015, at 4.

---

[1] On June 12, 2014, when Respondent called Mr. Wallace to testify, Mr. Wallace invoked his Fifth Amendment right against self-incrimination due to a then-pending Congressional investigation of Tiversa. On November 14, 2014, the Attorney General approved the request for authority to issue an order requiring Mr. Wallace, pursuant to 18 U.S.C. § 6004, to give testimony in this matter. Subsequent to that grant, and to subsequent requests to reschedule, trial in this matter is scheduled to resume on May 5, 2015. *See* Order Requiring Testimony Under Grant of Immunity, October 9, 2014; Order Granting Respondent's Renewed Motion for Order Requiring Testimony Under Grant of Immunity, December 29, 2014; Order Granting Motion for Continuance, February 24, 2015; and Order Rescheduling Resumption of Evidentiary Hearing, March 12, 2015.

III.

Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at *7-8 (May 6, 2011). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *20.

Respondent argues that each of the subject documents should be excluded because Tiversa failed to produce the documents in response to the FTC's September 30, 2013 subpoena *duces tecum* to Tiversa, which demanded, among other documents, all documents related to LabMD ("September 30 subpoena"), and that Complaint Counsel should have filed a motion to enforce its subpoena. Complaint Counsel's failure to seek such enforcement, Respondent argues, resulted in undue delay in production of the documents, and consequently, exclusion of the documents is appropriate pursuant to Commission Rule 3.43(b) to prevent unfair prejudice to Respondent and confusion of the issues in the case. *See* 16 C.F.R. §3.43(b) ("[relevant evidence] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or . . . based on considerations of undue delay . . . .").

Complaint Counsel argues that Respondent has not demonstrated that the documents Respondent seeks to exclude are inadmissible on all potential grounds. Complaint Counsel further argues that admission of the subject documents would not be unfairly prejudicial, create confusion of the issues, or result in undue delay. Complaint Counsel also notes that, given that the documents provisionally marked as CX1015-1017 are identical to RX544-546, which Respondent sought to admit "for all purposes," Respondent's argument now that those documents should be preemptively excluded strains credulity. Complaint Counsel also argues that admission of the documents will not cause undue delay in the proceedings because Complaint Counsel is endeavoring to establish the authenticity and admissibility of the subject documents via a declaration from Tiversa. Opposition at 4 and Opposition Exhibits F and G.

IV.

The present record in the case fails to support the conclusion that the subject documents are "clearly inadmissible" for all purposes. As noted above, Complaint Counsel rested its case on May 23, 2014. The documents at issue could be offered into evidence by Complaint Counsel, if at all, only as rebuttal evidence. As noted in a previous order in this case, whether or not rebuttal evidence will be allowed cannot be determined until completion of Respondent's defense case. *See* Order of July 23, 2014, denying Complaint Counsel's motion to issue subpoenas *ad testificandum* and *duces tecum* to Tiversa employee, Keith Tagliafierri. The admissibility of the subject documents is not presently at issue. Even if some rebuttal evidence will be permitted, the probative value of the particular documents at issue in this Motion cannot properly be determined on the present record. Consequently, it cannot be determined whether or not such probative value is outweighed by unfair prejudice or confusion of the issues, as argued by Respondent.

For the foregoing reasons, Respondent's Motion to preclude Complaint Counsel from seeking to use or offer the subject documents is DENIED. This Order shall not be construed as a ruling on the permissibility or scope of rebuttal in this case, or the admissibility of any particular evidence as rebuttal evidence.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: April 16, 2015