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 ON RESPONDENT'S MOTION FOR A PROTECTIVE ORDER

I.

On November 5, 2013, Respondent LabMD, Inc. ("Respondent") filed a Motion for a Protective Order ("Motion") pursuant to Commission Rule of Practice 3.31(d), 16 C.F.R. § 3.31(d), seeking an order limiting or barring deposition and document subpoenas issued by Complaint Counsel to various nonparties.[1] Complaint Counsel filed an opposition to the Motion on November 15, 2013 ("Opposition"). For the reasons set forth below, Respondent's Motion is GRANTED in part and DENIED in part.

Respondent's Motion included a request for oral argument on its Motion. That request is DENIED.

II.

A.

The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, engaged in an unfair trade practice in violation of Section 5(a) of the FTC Act. Complaint ¶ 23. Specifically, the Complaint alleges that Respondent failed to maintain adequate network security to protect confidential patient information and that such failure caused, or is likely to cause, substantial consumer injury. Complaint ¶ 22. According to the Complaint, a third party informed Respondent that its June 2007 insurance aging report was available on a peer-to-peer, or "P2P," network through Limewire, a P2P file sharing application. Complaint ¶ 17. This file, the Complaint alleges, contained the names, dates of birth, Social Security

[1] According to the Motion, Respondent seeks protection from subpoenas for deposition and/or documents issued to: Allen Truett, 21st Century Oncology, Alison Simmons, Automated PC Technologies, David Lapides, Cyprus Communications, Eric Knox, Erick Garcia, Jeff Martin, Forensic Strategy Services, Karalyn Garrett, Josie Maldanado, John Boyle, Karina Jestes, Lawrence Hudson, Jeremy Dooley, Managed Data Solutions, Matt Bureau, MasterCard Worldwide, Patrick Howard, ProviDyn, Robert Hyer, Rosalind Woodson, Sacramento Police Dept., Sandy Springs GA Police Depart., Scott Moulton, Trend Micro, Inc., US Bank Nat'l Ass'n, Chris Maire, Visa Inc., Michael Daugherty, and Southeast Urology Network (hereafter, the "Nonparties"). *See* Motion at 2 n.1.

numbers, health insurance policy information, and other alleged confidential information for approximately 9,300 consumers. Complaint ¶ 19. The Complaint further avers:

> In October 2012, the Sacramento, California Police Department found more than 35 Day Sheets and a small number of copied checks in the possession of individuals who pleaded no contest to state charges of identity theft. These Day Sheets include personal information, such as names and SSNs, of several hundred consumers in different states. Many of these consumers were not included in the P2P insurance aging file, and some of the information post-dates the P2P insurance aging file. A number of the SSNs in the Day Sheets are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves.

Complaint ¶ 21.

Respondent's Answer admits that the alleged third party, Tiversa Holding Corporation ("Tiversa"), contacted Respondent in May 2008 and claimed to have obtained the P2P insurance aging file via Limewire but denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23.

B.

The permissible scope of discovery is governed by Commission Rule of Practice 3.31(c), which provides in pertinent part: "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). Even if discovery is reasonably expected to yield relevant information, however, discovery "shall be limited by Administrative Law Judge" if he determines that "(i) The discovery sought from a party or third party is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit." 16 C.F.R. § 3.31(c)(2). In addition, under Rule 3.31(d) the Administrative Law Judge "may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." 16 C.F.R. § 3.31(d).

As more fully discussed below, Respondent objects to certain categories of discovery, on varying grounds, such as relevance and undue burden. Complaint Counsel responds that the subpoenas properly seek information relevant to the allegations of the Complaint, to the proposed relief, and to Respondent's anticipated defenses, and that Respondent has not met its burden of showing that Complaint Counsel should be prevented from conducting relevant nonparty discovery. The burden of demonstrating that the challenged discovery should not proceed is on Respondent, as the proponent of the requested protective order. *In re Polypore Int'l*, 2008 FTC LEXIS 155, at *14-16 (Nov. 14, 2008); *In re Schering-Plough Corp.*, 2001 FTC LEXIS 105, at *5 (July 6, 2001).

As a preliminary matter, however, Complaint Counsel argues that Respondent lacks standing to challenge the subpoenas served on nonparties. Accordingly, Respondent's standing to challenge the discovery is addressed first.

III.

A.

Commission Rule 3.31(d) governing protective orders expressly authorizes protecting "a party or other person" against improper discovery. 16 C.F.R. § 3.31(d). Moreover, in *In re Horizon Corp.*, 88 F.T.C. 208, 1976 FTC LEXIS 209, at *4 n.5 (July 28, 1976), the Commission rejected the argument of complaint counsel in that case that the respondent had no standing to challenge nonparty discovery, stating:

> While a party may not ask for an order to protect the rights of another party or a witness if that party or witness does not claim protection for himself, *see Commercial Laundry v. Linen Supply Assn.*, 90 F. Supp. 470 (S.D.N.Y. 1950); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2035 at 261 (1970), he may seek an order if he believes his own interest is jeopardized. *Id.* Respondent, as the subject of an adjudicative proceeding, was entitled to raise its claim that the investigational subpoenas would jeopardize its procedural rights.

In addition, consistent with *Horizon*, numerous federal court jurisdictions permit a party to seek a protective order against discovery issued to nonparties, where the party claims that the discovery interferes with a right or privilege of the party itself, as opposed to the rights or burdens belonging to the subpoenaed nonparties. *Fleet Bus. Credit Corp. v. Hill City Oil Co.*, No. 01-2417, 2002 WL 1483879, at *2 (W.D. Tenn. June 26, 2002) ("Many district courts have acknowledged [Rule 26(c)] allows a party to file a motion for protective order on behalf of a non-party."); *U.S. v. Operation Rescue*, 112 F. Supp. 2d 696, 705 (S.D. Ohio 1999) ("As Plaintiff properly notes, several other federal courts have found that a party has standing to seek a protective order on behalf of non-parties."). *See also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d § 2035 ("A party may not ask for an order to protect the rights of another party or a witness if that party or witness does not claim protection for himself, but a party may seek an order if it believes its own interest is jeopardized by discovery sought from a third person.").

In holding that a party has standing to seek a protective order barring discovery issued to nonparties, courts have relied on the language of Federal Rule of Civil Procedure 26(c) which, similar to Commission Rule 3.31(d), explicitly refers to the right of "a party" as well as "any person from whom discovery is sought" to seek such protection. [2] *Underwood v. Riverview of*

[2] *See* Fed. R. Civ. Pro. 26(c) ("A party or any person from whom discovery is sought may move for a protective order . . . . The court may, for good cause, issue an order *to protect a party or person* from annoyance, embarrassment, oppression, or undue burden or expense, . . .") (emphasis added); Commission Rule 3.31(d) (Administrative Law Judge may "deny discovery or make any other order which justice requires *to protect a party or other person* from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.") (emphasis added).

Ann Arbor, 2008 U.S. Dist. LEXIS 107323, at *4 (E.D. Mich. Dec. 15, 2008). *Accord Shukh v. Seagate Tech., LLC*, 2013 U.S. Dist. LEXIS 140159, at *20 (D. Minn. Sept. 30, 2013); *GATX Corp. v. Appalachian Fuels, LLC*, 2011 U.S. Dist. LEXIS 103536, at *15 (E.D. Ky. Sept. 9, 2011).

Moreover, as further explained in *Shukh*, the scope of discovery is limited and a court is obliged to enforce such limitations to protect the rights of a party, even where the discovery is directed at nonparties:

> [Discovery] is limited to "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The Rule also provides that the court "on motion or on its own . . . must limit the frequency or extent of discovery otherwise allowed" by the Rules if "the discovery sought is unreasonably cumulative or duplicative" or "the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C). Where a party, such as Seagate, contends that subpoena requests are irrelevant, cumulative, and burdensome, they are not simply asserting the rights of the third party, but their own right to reasonable discovery and efficient disposition of the case. . . . Because the Court finds that Seagate is entitled, as a party to the litigation, to limit irrelevant and cumulative discovery, the Court concludes that the Magistrate Judge did not err in finding that Seagate had standing to bring its motion for a protective order.

Id. at *22-23. *See also Tarigo v. Aetna Life Ins. Co.*, 2012 U.S. Dist. LEXIS 183800, at *4 (S.D. Fla. Dec. 12, 2012) (holding that party had standing to seek a protective order under Federal Rule of Civil Procedure 26(c) against asserted irrelevant discovery subpoena to nonparty); *White Mule Co. v. ATC Leasing Co. LLC*, 2008 U.S. Dist. LEXIS 51344, at *13-14 (N.D. Ohio June 25, 2008); *Underwood*, 2008 U.S. Dist. LEXIS 107323, at *4-5 (holding that the "purposes of Rule 26(c) encompass the overall limit of Federal Rule of Civil Procedure 26 -- information that is relevant to a claim or defense"); *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 231 F.R.D. 426, 429-30 (M.D. Fla. 2005) (deeming defendants' motion to quash as a motion for a protective order under Rule 26(c), and holding that as parties, defendants "clearly have standing to move for a protective order if the [nonparty] subpoenas seek irrelevant information"); *United States v. Operation Rescue*, 112 F. Supp. 2d 696, 705 (S.D. Ohio 1999).[3]

B.

Complaint Counsel acknowledges the governing rule that a party has standing to object to nonparty discovery, provided the party is raising a personal right or privilege of its own, as opposed to the rights of the nonparties, but summarily asserts that Respondent has raised no such rights. Opposition at 4. Therefore, Complaint Counsel contends, Respondent lacks standing to

[3] Where the Federal Rules of Civil Procedure are similar to the Commission's Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating a dispute. *In re POM Wonderful LLC*, 2011 FTC LEXIS 42, at *9 n.3 (Mar. 16, 2011); *In re L.G. Balfour Co.*, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, at *4 (Oct. 5, 1962).

object to the nonparty subpoenas.[4] Having fully reviewed the Motion, Respondent's Motion, at least in part, raises Respondent's own rights with respect to the nonparty discovery, such as irrelevance and undue burden on Respondent. Accordingly, Respondent's motion for protective order will be considered to the extent it is based upon such arguments.

However, Respondent's Motion also includes arguments regarding the rights of, or burdens allegedly placed upon, the nonparties in connection with the requested discovery. For example, Respondent argues that the document subpoenas seek "thousands of documents" from the nonparties "many of which have already been provided by LabMD," and therefore the nonparties should not have to produce such "duplicative" information. Motion at 7-9. Similarly, Respondent notes that it spent "hundreds of hours" complying with document requests similar to those contained in the document subpoenas, and argues that the nonparties should not be required to expend such time and resources, and that in order to avoid this burden, the documents are better obtained from LabMD than from the nonparties. Motion at 8-9. In addition, Respondent asserts that the nonparty depositions should be barred, in part because they are allegedly "duplicative" of the document subpoenas to these nonparties, as well as duplicative of information that Respondent asserts Complaint Counsel already has. Each of the foregoing arguments clearly relies on alleged rights of, and burdens upon, the nonparties, rather than rights of, or burdens upon, Respondent itself. Because the legal authorities discussed above are clear that a party has no standing to obtain a protective order against nonparty discovery on the basis of asserted burdens on the nonparties, particularly where, as here, none of the nonparties has moved to quash the subpoenas, *In re Horizon Corp.*, 1976 FTC LEXIS 209, at *4 n.5, Respondent's arguments in this regard cannot, and will not, be considered.

IV.

A.

The categories of discovery at issue in Respondent's Motion can be generally summarized as follows:

(1) Discovery into the facts and circumstances of a Sacramento, California criminal case in which certain individuals were found in possession of LabMD patient information, and subsequently pled "no contest" to the unauthorized use of personal identifying information (the "Sacramento Incident");

(2) Discovery into any information involving a time period other than 2005-2008;

(3) Discovery into the nature of Respondent's computer network security, including its services contracts and communications with various Information Technology ("IT")

[4] Complaint Counsel cites some cases that appear to set forth an absolute rule that a party can *never* challenge subpoenas issued to nonparties. *See, e.g., US Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, 2012 U.S. Dist. LEXIS 158448 (S.D.N.Y. Nov. 5, 2012); *In re Basic Research LLC*, No. 9318, 2004 FTC LEXIS 237 (Dec. 9, 2004) (ALJ). To the extent that *US Bank* adopts such an absolute rule, it is contrary to numerous other federal jurisdictions and unpersuasive. The Administrative Law Judge's holding in *Basic Research*, because it appears to stand for an absolute prohibition against a party challenging a nonparty subpoena, is contrary to the Commission's holding in *Horizon* and is therefore inapplicable.

service providers;

(4) Discovery into the existence of any security incidents involving Respondent's computer network; and

(5) Discovery regarding a book written by Respondent's CEO Michael Daugherty.[5]

Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or the defenses of the respondent. 16 C.F.R. § 3.31(c)(1). Parties resisting discovery of relevant information carry a heavy burden of showing why discovery should be denied. *In re Polypore Int'l*, 2008 FTC LEXIS 155, at *16.

With respect to the Sacramento Incident, Respondent asserts that the individuals found in possession of personally identifiable patient information possessed LabMD's "Day Sheets" and that the "Day Sheets" were available only in hard copy, not on LabMD's computer network. Respondent thus asserts that discovery regarding the Sacramento Incident is not "strongly relevant" to LabMD's computer network security and urges that all subpoenas with respect thereto should, therefore, be barred. Motion at 6-7.[6] Complaint Counsel counters that it anticipates that subpoenas served on individuals with information related to the Sacramento Incident will yield information relevant to consumer injury, which is an element of the law violation alleged in the Complaint. Opposition at 8. Complaint Counsel further contends that because Respondent has asserted that no consumer has suffered injury, these subpoenas are reasonably anticipated to yield information relevant to Respondent's defenses.

Discovery into the Sacramento Incident, as alleged in the Complaint, is reasonably expected to yield information relevant to whether Respondent failed to provide reasonable and appropriate security for personal information on its computer networks and whether consumers suffered injury. Thus, Respondent has not met its burden of showing that discovery on the Sacramento Incident should be denied.

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[5] Respondent claims that the subpoenas seek a number of categories of discovery that do not, in fact, appear in the topics or specifications attached to the challenged subpoenas. For example, Respondent contends that the subpoenas seek "the names of all Consumers who requested credit monitoring services after receiving a Communication from LabMD related to any Security Incident;" and the "percentage of the total number of Consumers whose samples LabMD has tested . . . who: a. are uninsured, b. have commercial health insurance, c. have Medicare, and d. have Medicaid." Such requests do not appear in the subpoenas. *Compare generally e.g.*, Motion at 8, category nos. 5-6; Motion at 9-10, category nos. 6-7 *with* Motion Exhibit 1. For this reason, Respondent's assertions as to the propriety of such discovery will not be addressed.

[6] Respondent urges that third party subpoenas must have a stronger showing of relevance than party discovery. Motion at 5 & n.9, citing *Echostar Communications Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998); *Bio-Vita, Ltd. v. Biopure Corp.*, 138 F.R.D. 13, 17 (D. Mass. 1991). In both *Echostar* and *Bio-Vita*, it was the nonparties who sought the courts' protection from onerous discovery. Critical to each court's decision to impose a higher standard than mere relevance was the weighing of the burden on the nonparties to comply. Here, as discussed above, no nonparty has filed a motion to quash and Respondent does not have standing to protect the rights of the nonparties with respect to the burdens on those nonparties. Thus, case law holding that in order to protect nonparties from intrusive requests, discovery from nonparties must be "strongly relevant" is not applicable.

With respect to discovery into any information involving a time period other than 2005 to 2008, Respondent asserts that LabMD's technology and software, other than that in place at the time of the events in Complaint paragraphs 17-20, is irrelevant. Motion at 7. In its Opposition, Complaint Counsel asserts that LabMD's failures began before 2005 and continued past 2008 and that the subpoenas specify reasonable time periods that are appropriate to the discovery sought. Opposition at 1, 7 n.8.

A request for documents relating to the time period being investigated by Complaint Counsel is relevant. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 14, at *4 (Jan. 30, 2004). The Complaint does not allege that Respondent's "failures" began before 2005 and thus discovery of such information does not appear relevant to the allegations of the Complaint. Moreover, with one exception, the instructions on the subpoenas *duces tecum* limit the period covered by a document request to the period from January 1, 2005 or a later period to present.[7]

Information from the time period after 2008 may provide information on whether, in the time period since the alleged security breach, Respondent has employed reasonable and appropriate measures to prevent unauthorized access to personal information and thus may be relevant to the scope of the requested injunctive relief in this case. Accordingly, the subpoenas shall be limited to the period from January 1, 2005 to present.

Regarding discovery into the nature of Respondent's computer network security, including its services contracts and communications with various IT service providers, such information is relevant to whether Respondent failed to provide reasonable and appropriate security for personal information on its computer networks and thus is relevant to the allegations of the Complaint.

With respect to discovery into the existence of any security incidents involving Respondent's computer network, the Complaint alleges as "security incidents" the exposure of the P2P insurance aging file and the Sacramento Incident. It is not apparent that any other security incidents are relevant to the allegations of the Complaint; however, Respondent denies that its security practices caused any consumer injury. Therefore, the existence of other security incidents may be relevant to Respondent's defenses. In addition, the existence of additional security incidents may be relevant to the nature and extent of any appropriate relief in this case, should the alleged violations of the FTC Act be proven. Accordingly, Respondent has failed to demonstrate that the requested discovery is not reasonably likely to lead to the discovery of relevant evidence, or that the requested discovery should otherwise not be allowed.

As to discovery regarding a book written by Respondent's CEO Michael Daugherty, Complaint Counsel states that Mr. Daugherty's book concerns the circumstances relating to the exposure of the P2P insurance aging file and LabMD's business practices. Respondent argues that Mr. Daugherty's self-published manuscript, titled "The Devil Inside the Beltway," is critical of the FTC's conduct with regard to the investigation and litigation of the instant matter, and that the document subpoena to Mr. Daugherty – and Complaint Counsel's nonparty discovery

[7] The only subpoena *duces tecum* seeking documents from the period before 2005 was the one served on Automated PC Technologies.

generally – is retaliation for this criticism.

The document subpoena to Mr. Daugherty demands the following documents:

1. All drafts of the Manuscript that were reviewed by another third party prior to the Manuscript's publication.

2. All comments received on drafts of the Manuscript.

3. All documents related to the source material for drafts of the Manuscript, including documents referenced or quoted in the Manuscript.

4. All promotional materials related to the Manuscript, including, but not limited to, documents posted on social media, commercials featuring you, and presentations or interviews given by you.

The extent to which either party will attempt to use the book in this case is unknown. Regardless of whether the book itself and any of its contents may be relevant – which is not obvious – the relevance of drafts, related promotional materials, or the other materials listed in 1 through 4 above, is not at all apparent. Therefore, the requested materials exceed the scope of permissible discovery.

B.

Finally, Respondent argues that each of the proposed depositions should be barred. According to Respondent, the deponents include current and former employees of Respondent, as well as Respondent's clients and IT service providers.

Respondent first asserts that the testimony will be "duplicative" of information that Complaint Counsel already possesses, and also duplicative of document subpoenas issued to some of the deponents. As noted previously, however, this argument relies on the right or interest of the subpoenaed nonparties not to be burdened with producing duplicative information, which Respondent has no standing to assert in support of a protective order. *See* Section III.B.

Respondent further argues that the depositions are noticed for varying locations across the country, and that the expense that LabMD would expend in defending the depositions "would be astronomical, and outweigh" any benefit. Motion at 10. While Respondent has standing to assert that the depositions would unduly burden Respondent, Respondent fails to submit any evidence to support the claim of "astronomical" costs. "A party seeking to quash a subpoena has the burden of demonstrating that the request is unduly burdensome." *In re Lab. Corp. of Am.*, 2011 FTC LEXIS 31 at *7 (Feb. 28, 2011) (citations omitted). "A movant's general allegation that a subpoena is unduly burdensome is insufficient to carry its burden of showing that the requested discovery should be denied." *In re Lab. Corp. of Am.*, *Id.* at *8 (citations omitted) (finding that nonparty failed to meet its burden that subpoena was unduly burdensome where it provided no specific information regarding the burden or expense involved in producing the requested documents other than its unsupported statement that compliance with the requests

would take months and tens or even hundreds of thousands of dollars).

Moreover, Respondent's assertion that the depositions will take place all over the country is overstated. According to the subpoenas, most of the depositions are set to take place in one location – Atlanta, Georgia – where Respondent is located. In addition, Complaint Counsel asserts that Respondent can reduce its costs by appearing for the depositions telephonically. Opposition at 5. For all the foregoing reasons, Respondent has failed to demonstrate that defending the depositions would be unduly burdensome, as asserted in its Motion.[8]

V.

For all of the above reasons, Respondent's Motion is GRANTED, in part, as to (a) Complaint Counsel's requested discovery into the time period prior to 2005, and (b) Complaint Counsel's requested discovery into drafts, related promotional materials, and other materials listed in Specifications 1-4 of the October 24, 2013 Subpoena *Duces Tecum* issued to Respondent's CEO Michael Daugherty, but is in all other respects DENIED. This Order affects the scope of discovery only and is not a determination, and shall not be construed as a ruling, as to the admissibility of any evidence.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: November 22, 2013

[8] Respondent also avers that Mr. Daugherty and Mr. Boyle have already been deposed. Even if these individuals are current employees of Respondent and Respondent has an interest in preventing undue disruption to its operations caused by its employees being occupied with "duplicative" discovery, Respondent fails to support its claim. Moreover, Mr. Daugherty is not among the subpoenaed deponents. Finally, to the extent individuals may have provided sworn testimony during the investigative phase of this case, this would not bar deposing the individuals in connection with this adjudicative phase of the case. *See* 16 C.F.R.§ 3.33(b) ("The fact that a witness testifies at an investigative hearing does not preclude the deposition of that witness"); *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.").