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 COMPLAINT COUNSEL'S MOTION TO QUASH SUBPOENA SERVED ON COMPLAINT COUNSEL AND FOR PROTECTIVE ORDER

On January 6, 2014, Complaint Counsel filed a Motion to Quash Subpoena Served on Complaint Counsel and for a Protective Order ("Motion"). Complaint Counsel seeks an order quashing a subpoena *ad testificandum* served by Respondent LabMD ("Respondent" or "LabMD") on Senior Complaint Counsel Alain Sheer and barring Respondent in the future from serving any subpoena *ad testificandum* on any Complaint Counsel attorneys. Respondent filed its opposition on January 16, 2014 ("Opposition").

Having fully reviewed the Motion and the Opposition, and considered all arguments and contentions raised therein, the Motion is GRANTED IN PART AND DENIED IN PART, as explained below.

I. Introduction

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, including by making certain "insurance aging reports," allegedly containing confidential patient information, available on a peer-to-peer, or "P2P" file sharing application. Complaint ¶¶ 17, 19. The Complaint further avers that in October 2012, the Sacramento, California Police Department found more than 35 LabMD "day sheets," allegedly containing confidential patient information ("Day Sheets") [1], and a small number of copied checks in the possession of individuals who subsequently pleaded no contest to state charges of identity theft. Complaint ¶ 21.

[1] As alleged in the Complaint, Day Sheets are spreadsheets of payments received from consumers, which may include personal information such as consumer names, SSNs, and methods, amounts, and dates of payments. Complaint ¶ 9.

Respondent's Answer admits that an 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. Respondent's answer also includes a number of affirmative defenses, including among others, failure to state a claim, lack of subject matter jurisdiction, denial of due process and fair notice, and that the actions of the FTC are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with applicable law. Answer at pp. 6-7.

Although Respondent's subpoena does not designate any topics for Mr. Sheer's deposition, according to Respondent's Opposition, Respondent seeks to inquire into the following areas:

1. Mr. Sheer's communications with the Sacramento Police Department ("SPD") in or around December 2012 regarding SPD's discovery of LabMD Day Sheets;

2. Mr. Sheer's communications with Tiversa in meetings and/or conference calls taking place in 2009;

3. Mr. Sheer's communications with Dartmouth College via email in March 2009, regarding a study that Dartmouth conducted on health information available on P2P networks and whether the FTC and Dartmouth "exchanged information" regarding LabMD's alleged data security breach; and

4. Mr. Sheer's knowledge regarding the FTC's "analys[e]s and processes including any rules, regulations, and guidelines, which led the FTC to its decision to investigate LabMD and other similarly situated victims of cyber theft as a means to expand its authority under section 5." Opposition at 3-4.

II. Overview of Applicable Law

The general scope of discovery is set forth in 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). However, a party may not seek discovery that is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; or where the burden or expense of providing the discovery outweighs its likely benefit. 16 C.F.R. § 3.31(c)(2)(i); *see also* 16 C.F.R. § 3.31(d) (Administrative Law Judge "may also deny discovery . . . to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.").

In light of the generally broad scope of permissible discovery, opposing trial counsel is not "absolutely immune from being deposed," *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), but such discovery is, nevertheless, generally disfavored. *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman (In re*

Subpoena Issued to Dennis Friedman), 350 F.3d 65, 71-72 (2d Cir. 2003); *Nguyen v. Excel Corp.*, 197 F.3d 200, 208-09 (5th Cir. 1999); *Corporation v. American Auto. Centennial Comm'n*, 1999 U.S. Dist. LEXIS 1072, at * 3 (D.D.C. Feb. 2, 1999). "Most courts which have addressed [requests to depose opposing counsel] have held that the taking of opposing counsel's deposition should be permitted only in limited circumstances and that, because of the potential for abuse inherent in deposing an opponent's attorney, the party seeking the deposition must demonstrate its propriety and need before the deposition may go forward." *American Casualty Co. v. Krieger*, 160 F.R.D. 582, 588 (S.D. Cal. 1995). Accordingly, when, as here, a party seeks to depose opposing trial counsel, the party seeking such discovery must show: "(1) no other means exist to obtain the information than to depose opposing counsel, . . . ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton*, 805 F.2d at 1323; *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 628 (6th Cir. 2002); *see Friedman*, 350 F.3d at 71-72, and cases cited therein (hereafter, the "*Shelton* factors"). *See In re Hoechst Marion Roussel, Inc.*, 2000 WL 33944050, at *1 (Nov. 8, 2000) (applying *Shelton* factors to deny motion to compel depositions of, among others, FTC attorneys).

As the court stated in *American Casualty*:

> There are good reasons to require the party seeking to depose another party's attorney to bear the burden of establishing the propriety and need for the deposition. "While the Federal Rules do not prohibit the deposition of a party's attorney, experience teaches that countenancing unbridled depositions of attorneys constitutes an invitation to delay, disruption of the case, harassment, and perhaps disqualification of the attorney . . ."

160 F.R.D. at 588 (quoting in part *N.F.A. Corp. v. Riverview Narrow Fabrics, Inc.*, 117 F.R.D. 83, 85 (M.D.N.C. 1987)).

Based on the foregoing, the analysis now turns to whether Respondent has met its burden of demonstrating that the information that Respondent seeks to obtain can only be obtained from Mr. Sheer; that the information is both relevant and nonprivileged; and that the desired information is crucial to Respondent's case.

III. Analysis

A. Whether other means exist to obtain the information than to depose opposing counsel

Respondent argues that only Mr. Sheer can provide information regarding the FTC's communications with nonparties SPD, Tiversa, and Dartmouth College, and "the FTC's behavior . . ." regarding this case. Respondent sets forth, as an example of Mr. Sheer's allegedly unique knowledge, that only Mr. Sheer "can testify why the FTC waited four months to notify LabMD about the Day Sheets [found in Sacramento and provided to the FTC by SPD] and why the FTC never contacted the consumers" to advise them that their personal information may have been compromised. Opposition at 5. However, the testimony of Ms.

Jestes of the SPD, upon which Respondent relies, says nothing regarding whether or not the FTC notified LabMD about the Day Sheets. In addition, Ms. Jestes does not state that the FTC never contacted consumers, as Respondent asserts.[2] Accordingly, the factual premises underlying Respondent's argument are unsupported.

Respondent further asserts that only Mr. Sheer can testify as to the substance of communications with Tiversa because, according to Respondent, Mr. Bobak, CEO of Tiversa, "testified that he had conversations with Sheer, but could not remember the substance of them." Opposition at 5. This asserted example is also not supported by the record presented. According to the deposition excerpts provided by Respondent, Mr. Bobak testified that there were two meetings with FTC representatives in 2009. "One at Tiversa here in Pittsburgh. And one at the FTC in DC." Opposition Exh. 1 at 140. The pertinent testimony follows:

> Q: Do you recall who was in attendance at the meeting in Pittsburgh?
> A: I do. Alain Sheer and I believe it was a woman that was with him. But I don't know who she was.
> . . .
> Q: I'm sorry. Do you recall who was in attendance at [the DC meetings]?
> A: Alain Sheer, and I don't really recall. There were other people, maybe another person or two, but I don't specifically recall who they were.
> Q: At those meetings, was LabMD specifically discussed?
> A: In the meeting in Pittsburgh, no. In the meeting in DC it may have been, but only in the context of multiple organizations as well. . . . [T]here was no extended time on LabMD any more than any of the other organizations . . . .

Opposition Exh. 1 at 140-141.

Thus, while Mr. Bobak testified that he was unable to remember the names of all the FTC representatives with whom Tiversa met, Mr. Bobak clearly recalled that LabMD was not discussed at all at one of the two meetings involving Mr. Sheer, and that LabMD was discussed at the other meeting along with, and no more than, various other entities. Thus, contrary to Respondent's representation, according to the deposition excerpts provided by Respondent, Mr. Bobak did not testify that he could not remember the substance of his conversation(s) with Mr. Sheer. Indeed, the deposition record provided does not indicate that Mr. Bobak was asked any generalized questions about the substance of these conversations, but was asked only if LabMD was specifically discussed.

With regard to Mr. Sheer's asserted knowledge of the FTC's communications with Dartmouth College, Respondent has failed to demonstrate that it has sought to depose any representatives of Dartmouth, including the Dartmouth individual identified in the emails

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[2] Indeed, Ms. Jestes' testimony, provided by Respondent, contradicts Respondent's assertion that the FTC never contacted consumers. *See* Opposition Exh. 4 at 72 (Q: To this day are you aware whether the FTC has notified any of the people identified on the LabMD documents with respect to the fact their protected personal information may have been inappropriately released? A: Yes. . . . I received a phone call from a gentleman that received the letter . . . . We had a conversation of [how] he received the letter and what should he do, and I referred him back to the . . . links" from the FTC web page provided by the FTC to Ms. Jestes.).

upon which Respondent relies to show communications between Mr. Sheer and Dartmouth. Accordingly, Respondent has failed to meet its burden of demonstrating that Mr. Sheer's deposition testimony is "the only means" by which Respondent can obtain information regarding communications with SPD, Tiversa, or Dartmouth College. Moreover, Respondent failed to provide any facts or argument to support a conclusion that only Mr. Sheer can provide information regarding the FTC's analyses and/or processes underlying the decision to investigate LabMD or the decision to apply the FTC's Section 5 "unfairness" authority to address LabMD's patient information security practices.[3] Thus, Respondent has failed to prove the first prong of the *Shelton* factors.

B. Whether the information sought is relevant and nonprivileged

The second prong that Respondent must establish is that the information sought is both relevant and nonprivileged. As set forth below, Respondent has not met its burden on this prong of the *Shelton* factors.

Respondent asserts, without further explanation, that testimony from Mr. Sheer is relevant to "certain essential elements of Complaint Counsel's case." Such conclusory, unsupported assertions do not demonstrate relevance. *See In re Intel Corp.*, Docket No. 9341, 2010 FTC LEXIS 48, at *4 (May 28, 2010) (denying motion to quash where assertions that proposed deponents had no relevant knowledge were unsupported "conclusory assertions"). Respondent also asserts that the testimony sought from Mr. Sheer goes directly to certain elements of Complaint Counsel's case and to LabMD's defenses that: (1) the "Complaint fails to state a claim upon which relief can be granted;" (2) "the Commission is without subject-matter jurisdiction over the claims asserted in this case;" (3) "the Commission's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" (4) "the acts or practices alleged in the Complaint do not cause, and are not likely to cause, substantial injury to consumers that is not reasonably avoidable by consumers themselves;" and (5) "the enforcement in this action against LabMD violates the due process requirements of fair notice." Opposition at 6. Specifically, Respondent asserts, Respondent believes "that Sheer's testimony regarding his communications with Tiversa, Dartmouth, and the SPD will be helpful in determining whether the Commission's actions in investigating and filing a complaint against LabMD were arbitrary and capricious, an abuse of discretion, and in violation of due process." *Id.*

Complaint Counsel argues that testimony about the Commission's pre-complaint process and decision to issue a complaint against LabMD are not relevant or reasonably calculated to lead to the discovery of admissible evidence. Motion at 5-6.

In *In re Exxon Corp.*, Docket No. 8934, 83 F.T.C. 1759, 1974 FTC LEXIS 226 (June 4, 1974), the Commission held:

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[3] Respondent does not dispute Complaint Counsel's assertion that the only discovery Respondent has conducted in this case so far consists of document subpoenas issued to Tiversa and SPD; deposition subpoenas issued to Tiversa and Complaint Counsel; and interrogatories and document requests issued to Complaint Counsel.

> [I]t has long been settled that the adequacy of the Commission's "reason to believe" a violation of law has occurred and its belief that a proceeding to stop it would be in the "public interest" are matters that go to the mental processes of the Commissioners and will not be reviewed by the courts. Once the Commission has resolved these questions and issued a complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.

Id. at *2-3. *See also In re Exxon Corp.*, Docket 8934, 1981 FTC LEXIS 113, at *5-6 (Jan. 29, 1981) (quoting *Exxon*, 83 F.T.C. at 1760 and denying on relevance grounds respondent's renewed request for discovery into whether the Commission had "reason to believe" that a violation of law had occurred). "Once a complaint issues, 'only in the most extraordinary circumstances' will the Commission review its reason to believe and public interest determinations." *In re Boise Cascade Corp.*, 97 F.T.C. 246, 1981 FTC LEXIS 71, at *3 n.3 (March 27, 1981) (citing *TRW Inc.*, 88 F.T.C. 544 (1976)). Respondent has made no showing that any such extraordinary circumstances are present here.

Similarly, in *In re Basic Research*, 2004 FTC LEXIS 210, *10-11 (Nov. 4, 2004), respondent's motion to compel a response to an interrogatory seeking information regarding why the complaint was not filed prior to June 2004 was denied on the basis that such information was not relevant to any pending issues in the case. The ALJ stated, "the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission's decision to file the Complaint." *Id.* (citing *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772 (D. Del. 1980); *In re Exxon Corp.*, 1981 FTC LEXIS 113 (Jan. 19, 1981)). *See also In re Hoechst Marion Roussel, Inc.*, 2000 WL 33944050, at *1 (Nov. 8, 2000) (denying respondent's motion to compel depositions of certain FTC attorneys and others concerning pre-complaint discussions that they had with the respondent).

It is beyond dispute that Respondent's purpose in eliciting information concerning the pre-Complaint investigation and the Commission's decision making in issuing the Complaint is to challenge the bases for the Commission's commencement of this action. Precedent dictates that such matters are not relevant for purposes of discovery in an administrative adjudication. Moreover, Respondent fails to cite any Commission case where discovery of such matters was permitted, much less through questioning of trial counsel. Accordingly, Respondent has failed to demonstrate that the information it seeks is relevant.

The second prong of the *Shelton* factors requires that Respondent demonstrate both that the requested discovery is relevant and that the information sought is nonprivileged. Because Respondent has failed to demonstrate relevance, it is not necessary to determine whether Respondent has also demonstrated that the requested information is nonprivileged. Moreover, the record presented is insufficient to make such determination, and in such circumstances, it is inappropriate to resolve the issue. *See In re Gillette Co.*, 98 F.T.C. 875, 1981 FTC LEXIS 2, at *9 (Dec. 1, 1981) (reversing order denying application of informant's privilege where facts were insufficiently developed to "militate either in favor of overcoming or retaining the privilege," and remanding for further factual development).

C. Whether the information is crucial to the preparation of the case

Respondent argues that the requested information is crucial "to support its defenses that the Commission's actions toward LabMD are arbitrary, capricious, an abuse of discretion and in contravention of due process and fair notice." Opposition at 8. This conclusory assertion is unpersuasive. In any event, however, as shown above, Respondent has failed to demonstrate that the requested information is relevant, or that no other means exist to obtain the information. Having failed to demonstrate the first two of the three required *Shelton* factors, Respondent's effort to depose Mr. Sheer must fail. Accordingly, whether or not Respondent has met the third required prong by demonstrating that the information is crucial to the preparation of Respondent's case need not, and will not, be decided.

D. Policy considerations

Because Respondent has failed to meet its burden under *Shelton*, Respondent may not depose Mr. Sheer. Policy considerations further support applying *Shelton* to deny the requested deposition. As the court noted in *Sterne Kessler Goldstein & Fox, PLLC, v. Eastman Kodak Co.*, 276 F.R.D. 376, 380 (D.D.C. 2011), "[c]ourts confronted by demands for counsel depositions have noted a number of concerns that such discovery poses," including that:

> depositions of opposing counsel present a "unique opportunity for harassment." *Marco Island Partners v. Oak Dev. Corp.*, 117 F.R.D. 418, 420 (N.D. Ill. 1987); *see also Shelton,* 805 F.2d at 1330 ("The harassing practice of deposing opposing counsel (unless that counsel's testimony is crucial and unique) appears to be an adversary trial tactic that does nothing for the administration of justice but rather prolongs and increases the costs of litigation, demeans the profession, and constitutes an abuse of the discovery process."); . . . [In addition, t]ime involved in preparing for and undergoing such depositions will disrupt counsels' preparation of parties' cases and thus decrease the overall quality of representation. *See In re Subpoena Issued to Dennis Friedman,* 350 F.3d 65, 70 (2d Cir. 2003) ("Courts have been especially concerned about the burdens imposed on the adversary process when lawyers themselves have been the subject of discovery requests, and have resisted the idea that lawyers should routinely be subject to broad discovery."); *Shelton*, 805 F.2d at 1327 (depositions of opposing counsel "not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation."); *Jennings v. Family Mgmt.*, 201 F.R.D. 272, 276-77 (D.D.C. 2001) ("[C]ourts regard attorney depositions unfavorably because they may interfere with the attorney's case preparation and risk disqualification of counsel who may be called as witness."); . . . . [Also] such depositions may lead to the disqualification of counsel who may be called as witnesses. *See Marco Island*, 117 F.R.D. at 420; *Jennings,* 201 F.R.D. at 276-77.

Sterne, 276 F.R.D. at 381-82.

In the instant case, permitting the requested deposition of Mr. Sheer implicates each of the foregoing concerns. Where, as here, it does not appear that Mr. Sheer possesses unique and/or crucial information, allowing the requested deposition risks disrupting trial preparation, increasing time and cost requirements, and countenancing potentially harassing trial tactics.

E. Protective Order

In addition to an order quashing the Sheer deposition subpoena, Complaint Counsel seeks an order barring Respondent from issuing any deposition subpoenas to Complaint Counsel generally. The burden of demonstrating an entitlement to this protective order is on Complaint Counsel. *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).

It cannot be determined on the present record that the requested protective order is warranted. Complaint Counsel does not contend that Respondent has issued any deposition subpoenas to Complaint Counsel other than that issued to Mr. Sheer. Moreover, as noted earlier, attorneys are not immune from being deposed. *Shelton*, 805 F.2d at 1327. Rather, as is clear from *Shelton* and related authorities, the determination of whether a counsel deposition can proceed is a fact-based inquiry. Complaint Counsel's invitation to issue a "blanket" prohibition against future subpoenas directed to yet-to-be determined counsel is declined.

Because Complaint Counsel has failed to meet its burden of demonstrating an entitlement to the requested protective order, Complaint Counsel's Motion for a Protective Order is DENIED.

IV. Conclusion

For all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART, and it is hereby ORDERED that Respondent's subpoena *ad testificandum* served on Complaint Counsel Alain Sheer is QUASHED. In all other respects, including Complaint Counsel's request for a protective order, the Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January 30, 2013