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December 11, 2014

John Ley, Clerk of Court
U.S. Court of Appeals – Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *LabMD, Inc. v. Federal Trade Commission*
11th Cir. Appeal No. 14-12144-EE

Dear Mr. Ley:

Pursuant to Fed. R. App. P. 28(j) and 11th Cir. I.O.P. 28-6, Plaintiff/Appellant LabMD, Inc. (“LabMD”) respectfully submits supplemental authority specifically addressing a question from the bench and a statement by the government regarding LabMD’s First Amendment retaliation claim, the fifth claim for relief in the complaint.

At oral argument in this case, a question arose concerning whether the First Amendment retaliation claim is inextricably intertwined with the issues in the administrative proceeding *In re LabMD, Inc.*, FTC Docket No. 9357, pending before the FTC. The government argued that the retaliation claim is intertwined with the issues in the administrative proceeding.

In the administrative proceeding, however, the FTC objected to LabMD’s discovery directed to its retaliation claim because LabMD did not assert retaliation as a defense, but instead made that claim in a separate lawsuit. The administrative law judge (“ALJ”) denied LabMD’s motion to compel production of documents after concluding that documents “expected to show whether or not ‘the FTC violated [Michael] Daugherty’s First Amendment rights by retaliating against LabMD’ are not relevant to the allegations of the Complaint, the proposed relief or

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the defenses of the respondent.” ALJ’s Order Denying Respondent’s Motion For A Rule 3.36 Subpoena (Feb. 21, 2014) (copy attached as Exhibit A) (emphasis added). Thus, the ALJ refused to allow any discovery on LabMD’s First Amendment retaliation claim and foreclosed pursuing that claim in the administrative proceeding.

Respectfully submitted,

/s/ Ronald L. Raider

Ronald L. Raider
Burleigh L. Singleton
William D. Meyer

Reed D. Rubinstein
Dinsmore & Shohl, LLP
801 Pennsylvania Ave. NW, Suite 610
Washington, D.C. 20004
(202) 372-9120

Prashant K. Khetan
Cause of Action
1919 Pennsylvania Ave. NW, Suite 650
Washington, D.C. 20006
(202) 499-4232

Counsel for Plaintiff/Appellant

Copy: All Counsel of Record

Attachment

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of December, 2014, the foregoing was filed in the Eleventh Circuit Court of Appeals using the CM/ECF system. I further certify that electronic copies of the foregoing were served via the CM/ECF system, and paper copies were served via U.S. Mail to:

Lauren E. Fascett, Esq.
Perham Gorji, Esq.
Trial Attorneys
U.S. Department of Justice
Civil Division
Consumer Protection Branch
450 5th Street NW
Washington, DC 20001
lauren.fascett@usdoj.gov
perham.gorji@usdoj.gov

Mark B. Stern, Esq.
Abby C. Wright, Esq.
U.S. Department Of Justice
Civil Division
950 Pennsylvania Ave., N.W.
Room 7252
Washington, D.C. 20530

This 11th day of December, 2014.

/s/ Ronald L. Raider
Counsel for Appellant LabMD, Inc.

EXHIBIT

A

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 FOR A RULE 3.36 SUBPOENA**

On January 30, 2014, Respondent filed a Motion for a Rule 3.36 Subpoena to require the production of documents that are in the possession, custody, or control of the FTC Commissioners or the FTC's Office of Public Affairs ("Motion"). Complaint Counsel filed its opposition on February 10, 2014 ("Opposition").

Having fully reviewed the Motion and the Opposition, and having considered all arguments and contentions raised therein, the Motion is DENIED, 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 by failing to take reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Complaint ¶¶ 6-11, 17-21, 23. Allegations of the Complaint relevant to the Motion are:

- 1) one of LabMD's files containing confidential patient information ("the 1718 file") was accessible through a public peer-to-peer ("P2P") file sharing network; Complaint ¶¶ 10(g), 17-20;
- 2) 35 LabMD "Day Sheets,"¹ containing confidential patient information, and a small number of copied checks were found in the possession of individuals who subsequently pleaded no contest to state charges of identity theft ("the Sacramento Incident"); Complaint ¶ 21; and

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

3) “[s]ince at least 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks.” Complaint ¶ 16.

Respondent’s Answer denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23. Respondent’s Answer asserts a number of affirmative defenses, including:

1) “Section 5 of the FTC Act does not give the Commission statutory authority to regulate the acts or practices alleged in the Complaint and therefore the Commission’s actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.” Third Defense, Answer at p. 6; and

2) “[B]ecause the Commission has not published any rules, regulations, or other guidelines clarifying and providing notice, let alone constitutionally adequate notice, of what data-security practices the Commission believes Section 5 of the FTC Act forbids or requires and has not otherwise established any meaningful standards, this enforcement action against LabMD violates the due process requirements of fair notice and appropriate standards for enforcement guaranteed and protected by the Fifth Amendment to the U.S. Constitution and the Administrative Procedure Act.” Fifth Defense, Answer at p. 7.

Respondent seeks a Rule 3.36 subpoena to obtain the following four categories of documents:

- 1) all communications to, from, or between FTC employees and the Commissioners relating to the 1718 file and the Sacramento Incident;
- 2) all communications to, from, or between FTC employees and the FTC’s Office of Public Affairs relating to LabMD, the 1718 file, or the Sacramento Incident;
- 3) all documents sufficient to show the standards the FTC used in the past and is currently using to determine whether an entity’s data-security practices violate Section 5 of the Federal Trade Commission Act; and
- 4) all documents sufficient to show that since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks.

For each of these four categories, Respondent seeks production of documents for the time period of January 1, 2005 through the present, except to the extent that the documents are protected by privilege. Motion at 2.

II. Relevant Rules of Practice

Under Rule 3.36(a) of the Commission's Rules of Practice:

An application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a request requiring the production of or access to documents, other tangible things, or electronically stored information for the purposes described in § 3.37(a), in the possession, custody, or control of the Commissioners, the General Counsel, any Bureau or Office not involved in the matter, the office of Administrative Law Judges, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs . . . , or for the issuance of a subpoena requiring the appearance of a Commissioner, the General Counsel, an official of any Bureau or Office not involved in the matter, an Administrative Law Judge, or the Secretary in his or her capacity as custodian or recorder of any such information, or their respective staffs, . . . shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a).

16 C.F.R. § 3.36(a).

Under Rule 3.36(b) of the Commission's Rules of Practice, a motion seeking the issuance of a 3.36(a) subpoena for purposes of discovery must demonstrate that the material sought is reasonable in scope, falls within the limits of discovery under § 3.31(c)(1), and cannot reasonably be obtained by other means; and that the subpoena meets the requirements of § 3.37.²

16 C.F.R. § 3.36(b).

Production of documents in discovery is also governed by Rule 3.31(c)(2), which provides:

Complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession, custody or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics. The Administrative Law Judge may authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to § 3.36. Neither complaint counsel, respondent, nor a third party receiving a discovery request under these rules is required to search for materials generated and transmitted between an entity's counsel (including counsel's legal staff or in-house counsel) and not shared with anyone else, or between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good cause to provide such materials.

16 C.F.R. § 3.31(c)(2).

² Rule 3.37 governs production of documents and electronically stored information. 16 C.F.R. § 3.37.

III. Analysis

A. Communications to, from, or between FTC employees and the Commissioners relating to the 1718 file and the Sacramento Incident

To support the issuance of a Rule 3.36 subpoena for communications to, from, or between FTC employees and the Commissioners relating to the 1718 file and the Sacramento Incident, Respondent asserts that it assumes that Complaint Counsel will be required to prove that LabMD's data security was inadequate relevant to the 1718 file and the Sacramento Incident, and that Complaint Counsel will be required to present the data security standards that Complaint Counsel asserts LabMD violated. Respondent further asserts that "[c]ommunications to, from, or between the FTC and the Commissioners will show the type of information the Commissioners evaluated and considered prior to filing the complaint, and the data security standards that were used to determine that a complaint should be filed against LabMD." Motion at 5. Respondent thus asserts that such communications are relevant to its defense that the Commission's action in the issuance of the Complaint was arbitrary and capricious.

Complaint Counsel responds that discovery on Respondent's arbitrary and capricious defense has been precluded by the January 30, 2014 Order Granting Complaint Counsel's Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order ("January 30 Order"). Additionally, Complaint Counsel asserts, Rule 3.31(c)(2) creates a default rule that materials generated and transmitted between Complaint Counsel and non-testifying Commission employees are not discoverable absent a ruling that there is good cause to provide these materials.

Discovery in adjudicative proceedings is limited to information that "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). By seeking to discover "the type of information the Commissioners evaluated and considered prior to filing the complaint," including the standards that the Commissioners used in determining whether to issue a complaint (Motion at 5), Respondent seeks information that is outside the scope of discovery, absent extraordinary circumstances.³ January 30 Order. *E.g., In re Metagenics, Inc.*, 1995 FTC LEXIS 23, *1 (Feb. 2, 1995) (denying as irrelevant discovery that related to respondent's claim that it had been unfairly singled out for prosecution); *In re Basic Research LLC*, 2004 FTC LEXIS 210, *10-11 (Nov. 4, 2004) (denying discovery, stating, "the issue to be tried is whether Respondent disseminated false and misleading advertising, not the Commission's decision to file the Complaint"). *See also In re Synchronal Corp.*, 1992 FTC LEXIS 61, *5 (March 5, 1992) (striking affirmative defense that the investigation was not in the public interest and was the result of selective prosecution as irrelevant and noting "[p]rejudice would occur from time and money spent in defending this irrelevant defense"). Once the Commission has issued a

³ Although applicable precedent holds that the Commission's decision making in issuing a complaint is outside the scope of discovery in the ensuing administrative litigation, the Supreme Court has held that issuance of a complaint is reviewable on appeal of any resulting cease and desist order and noted that the FTC Act expressly authorizes a court of appeals to order that the Commission take additional evidence. *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 245-46 (1980) (citing 15 U.S.C. § 45(c) and stating that "a record which would be inadequate for review of alleged unlawfulness in the issuance of a complaint can be made adequate"). Thus, limiting Respondent's discovery as provided herein does not prejudice Respondent's ability to pursue its claim at a later phase of the case.

complaint, “only in the most extraordinary circumstances” will the Commission review its reasons for issuing a complaint. *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)); *In re Exxon Corp.*, 83 F.T.C. 1759, 1974 FTC LEXIS 226 (June 4, 1974). Respondent has not presented “extraordinary circumstances” to obtain discovery on the type of information the Commissioners evaluated and considered prior to filing the complaint.

In addition, Commission Rule 3.31(c)(2) excludes from discovery, materials “between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good cause to provide such materials.” 16 C.F.R. § 3.31(c)(2). Respondent has not shown good cause to support its request for discovery from the Commissioners on the Commission’s reasons for issuing the Complaint.

Therefore, with respect to all communications to, from, or between FTC employees and the Commissioners relating to the 1718 file and the Sacramento Incident, Respondent has not made the required showing for issuance of a Rule 3.36 subpoena.

B. Communications to, from, or between FTC employees and the FTC’s Office of Public Affairs relating to LabMD, the 1718 file, or the Sacramento Incident

To support the issuance of a Rule 3.36 subpoena for communications to, from, or between FTC employees and the FTC’s Office of Public Affairs, Respondent asserts: “[t]he FTC through its Office of Public Affairs has published disparaging statements in the media about LabMD which have had a negative commercial impact on the company” and that “[i]t is LabMD’s position that these statements were published in retaliation for statements made by LabMD’s CEO Michael Daugherty [who] criticized the FTC’s investigation of LabMD’s data security practices.” Motion at 3. Respondent further states that the requested communications are relevant to show that the FTC violated Daugherty’s First Amendment rights by retaliating against LabMD for speech criticizing the FTC’s actions. *Id.*

Complaint Counsel responds that Respondent has not asserted a First Amendment defense in this administrative proceeding. Instead, Complaint Counsel asserts, Mr. Daugherty’s First Amendment claims are the subject of a separate lawsuit, *LabMD v. FTC*, 13-cv-01787 (D.D.C. filed Nov. 14, 2013).⁴ Complaint Counsel further asserts that, to the extent that Respondent is attempting to tie its First Amendment claims to its Third Defense, discovery on such matter has been precluded by the January 30 Order. Additionally, Complaint Counsel asserts that Respondent has not shown good cause to abrogate the default rule set forth in Rule 3.31(c)(2) that materials generated and transmitted between Complaint Counsel and non-testifying Commission employees are not discoverable.

⁴ In its complaint against the FTC in federal district court, LabMD alleges that the FTC learned of Mr. Daugherty’s criticisms of the FTC and retaliated against LabMD through the issuance of this administrative complaint. *LabMD v. FTC*, 13-cv-01787 (D.D.C. Complaint ¶¶ 13-16, filed Nov. 14, 2013). On February 19, 2014, LabMD filed a Notice of Voluntary Dismissal Without Prejudice in that action.

Documents that may be reasonably expected to show whether or not “the FTC violated Daugherty’s First Amendment rights by retaliating against LabMD” in filing this Complaint are not relevant to the allegations of the Complaint, the proposed relief, or the defenses of Respondent. A careful review of Respondent’s Answer shows that the Answer does not assert such a defense. Accordingly, the requested material does not fall within the limits of discovery under § 3.31(c)(1). Furthermore, as analyzed above, discovery on the Commission’s reasons for issuing a complaint is improper, absent extraordinary circumstances.

In addition, Commission Rule 3.31(c)(2) excludes from discovery, materials “between complaint counsel and non-testifying Commission employees, unless the Administrative Law Judge determines there is good cause to provide such materials.” 16 C.F.R. § 3.31(c)(2). Respondent’s claim, that the FTC’s filing of this administrative complaint was in retaliation for Mr. Daugherty’s exercise of his First Amendment rights, does not provide “good cause” for discovery in this administrative adjudication.

Therefore, with respect to communications to, from, or between FTC employees and the FTC’s Office of Public Affairs, Respondent has not made the required showing for issuance of a Rule 3.36 subpoena.

C. Documents on standards the FTC uses to evaluate entities’ data-security practices

To support the issuance of a Rule 3.36 subpoena for all documents sufficient to show the standards the FTC used in the past and is currently using to determine whether an entity’s data-security practices violate Section 5 of the Federal Trade Commission Act, Respondent asserts that such documents will show the standards that the Commission utilized in determining to bring a complaint against LabMD. Motion at 4. Respondent also asserts that such documents are relevant to its defense that the Commission’s behavior toward LabMD was “arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.” Motion at 4. Respondent further asserts that because the Commission failed to publish rules, regulations, and guidelines constituting fair notice, this information is relevant and necessary to determine whether the Complaint was issued in order to retaliate against Daugherty for exercising his First Amendment rights in criticizing the FTC.

Complaint Counsel responds that this request relates to Respondent’s Third Defense and Fifth Defense. Complaint Counsel argues that the Commission’s January 16, 2014, Order Denying Respondent LabMD’s Motion to Dismiss (January 16 Commission Order) and the January 30 Order on Complaint Counsel’s Motion for Protective Order foreclosed discovery on these topics.

Respondent’s arguments in support of obtaining this category of documents mirror its arguments for obtaining documents addressed above in Parts III.A. and B. For the reasons stated above, Respondent’s request for documents to show: the standards that the Commission utilized in determining to bring a complaint against LabMD; that the Commission’s behavior towards LabMD was “arbitrary and capricious”; and that the issuance of the Complaint was motivated by

retaliation for Daugherty's exercise of his First Amendment rights, are all matters that are outside the scope of permissible discovery in this case.

Therefore, for the reasons set forth in Parts III.A and B, above, with respect to the request for all documents sufficient to show the standards the FTC used in the past and is currently using to determine whether an entity's data security practices violate Section 5 of the FTC Act, Respondent has not made the required showing for issuance of a Rule 3.36 subpoena.

D. Documents sufficient to show that since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks

To support the issuance of a Rule 3.36 subpoena for documents to show that since 2005, security professionals and the Commission have warned of the risks of P2P networks, Respondent asserts that "Complaint Counsel, by the drafting of its own Complaint, calls into question whether the Commission has warned that P2P applications present a risk." Motion at 4. Complaint Counsel does not address this argument, but instead focuses on whether the requested discovery is relevant to Respondent's Fifth Defense that "the Commission has not published any rules, regulations, or other guidelines clarifying and providing any notice . . . of what data-security practices the Commission believes Section 5 of the FTC Act forbids" ("fair notice defense") and asserts that the January 16 Commission Order foreclosed discovery into Respondent's fair notice defense. Opposition at 6.

Regardless of whether, in denying Respondent's Motion to Dismiss for failure to provide fair notice of applicable security standards, the Commission "precluded" discovery on Respondent's fair notice defense, the Complaint specifically avers, "[s]ince at least 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks." Complaint ¶ 16. Thus, documents sufficient to show that since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks are relevant to the allegations of the Complaint and therefore fall within the limits of discovery under Rule 3.31(c)(1).

While Respondent has demonstrated that the requested documents are relevant to the allegations of the Complaint, it has not met the requirement of Rule 3.36(b)(3) that the information sought cannot reasonably be obtained by other means. 16 C.F.R. § 3.36(b)(3), as Respondent has failed to demonstrate why it cannot obtain this information directly from Complaint Counsel. Indeed, Complaint Counsel states that it has produced 9,966 pages of documents consisting of publications and statements of the Commission and its staff relating to the dangers posed by P2P file-sharing and to data security, including cases, business and consumer education, testimony before Congress and state agencies, speeches, staff reports, and workshop materials.

To the extent it has not already done so in response to discovery requests served upon it, Complaint Counsel is ordered to "search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case and that are in the possession,

custody, or control of the Bureaus or Offices of the Commission that investigated the matter, including the Bureau of Economics” (16 C.F.R. § 3.31(c)(2)) relevant to the Complaint’s allegation that, since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks, and to produce non-privileged, responsive materials within 14 days.⁵ Complaint Counsel is not required to produce materials “between complaint counsel and non-testifying Commission employees,” as Respondent has not provided any basis for finding that good cause exists to require such production. 16 C.F.R. § 3.31(c)(2).

With respect to documents sought from employees of the Commission not involved in the matter, Respondent has not made the required showing for issuance of a Rule 3.36 subpoena.

IV. Conclusion

For all the foregoing reasons, Respondent’s Motion for a Rule 3.36 Subpoena is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 21, 2014

⁵ Complaint Counsel will be precluded from offering into evidence in this matter any responsive documents or other information not produced that relate to or might support the allegations in paragraph 16 of the Complaint.