

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)

) PUBLIC

LabMD, Inc.,)
a corporation.)
_____)

) Docket No. 9357

**RESPONDENT'S MOTION FOR AN EXTENSION OF TIME TO RE-DEPOSE
DETECTIVE KARINA JESTES**

Respondent, LabMD, Inc. ("LabMD"), by and through the undersigned counsel, files the following Motion for an Extension of Time to Re-Depose Detective Karina Jestes. For the reasons stated herein, LabMD requests an Order granting Respondent an additional ten days beyond the Court's April 1, 2014 deadline to re-depose Detective Jestes.

On March 12, 2014, this Court granted Respondent's Motion to Re-Depose Detective Karina Jestes, extending the fact discovery deadline of March 5, 2014 for an additional 20 days, or until April 1, 2014. Immediately upon receiving the Order, Respondent attempted to make arrangements to re-depose Detective Jestes. On March 14, 2014, Respondent's counsel spoke with Deputy City Attorney Michael Fry regarding the availability of Detective Jestes for deposition.¹ Fry indicated that Detective Jestes is presently on leave from the Sacramento Police Department and attending a training session away from her duty station until April 7, 2014.² While Respondent communicated that it was willing to accommodate Jestes' training schedule,³ the City of Sacramento rejected this offer⁴ and instead represented that Detective Jestes will be

¹ E-mail from Kent Huntington to Michael Fry (Mar. 14, 2014, 2:43 PM) (Ex. 1).

² E-mail from Michael Fry to Kent Huntington (Mar. 17, 2014, 12:02 PM) (Ex. 2).

³ E-mail from Kent Huntington to Michael Fry (Mar. 17, 2014, 5:27 PM) (Ex. 3).


⁴ E-mail from Michael Fry to Kent Huntington (Mar. 20, 2014, 12:46 PM) (Ex. 4).

available for deposition on April 7, 2014 or April 8, 2014.⁵ Complaint Counsel refuses to allow the Deposition of Detective Jestes to go forth on these dates.⁶

Through no fault of Respondent, Detective Jestes is unavailable during the time period contemplated by the Court's March 12, 2014 Order. Respondent therefore respectfully requests that this Court extend the time for re-deposing Detective Jestes for an additional ten days beyond the deadline stated in the Court's March 12, 2014 Order, or until April 11, 2014.

Dated: March 25, 2014

Respectfully submitted,



William A. Sherman, II, Esq.
Reed D. Rubinstein, Esq.
Sunni R. Harris, Esq.
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agencies

⁵ Ltr. from W. Sherman to M. Fry, dated March 21, 2014 (Exh. 5)

⁶ Complaint Counsel contends that Respondent misrepresented to this Court the Sacramento Police Department's ("SPD") willingness to allow Respondent to re-depose Detective Jestes. Specifically, Complaint Counsel asserts that the SPD only consented to allowing Detective Jestes to be re-deposed if Complaint Counsel consented. (*See* Exh. 6). Respondent's understanding of its communications with the SPD was that the SPD consented to the deposition of Detective Jestes, but would not present Detective Jestes as a witness over the objection of Complaint Counsel. Because Complaint Counsel indeed objected to the re-deposition of Detective Jestes, Respondent filed a Motion for Leave to Re-Depose Detective Jestes. (Exh. 6)

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, D.C. 20580

I also certify that I delivered via electronic mail and hand-delivered a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, D.C. 20580


I further certify that I delivered via electronic mail and hand-delivered a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., NW
Mail Stop NJ-8122
Washington, D.C. 20580

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.

Dated: March 25, 2014

By: 
William A. Sherman, II

EXHIBIT

1

From: Kent Huntington [<mailto:kent.huntington@causeofaction.org>]
Sent: Friday, March 14, 2014 2:43 PM
To: Michael Fry
Subject: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Mike—

You spoke with my colleague, Lorinda Harris, awhile back and I'm following up. Please give me a call when you have the opportunity. My direct dial is below and my cell number is 301.904.4036.

Would next Thursday work for you and Detective Jestes (in Sacramento, of course)?

Best regards-
Kent

Kent Huntington | Counsel | Cause of Action
1919 Pennsylvania Ave, N.W., Suite 650
Washington, D.C. 20006
Tel: 202.499.2426
kent.huntington@causeofaction.org

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EXHIBIT

2

From: Michael Fry [<mailto:MFry@cityofsacramento.org>]
Sent: Monday, March 17, 2014 12:02 PM
To: Kent Huntington
Cc: Desiree Stockton
Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Kent,

I just let you a voice mail message. Detective Jestes is out of the office and in training until April 7, 2014. She will reportedly be checking her email so I hope to receive a reply about her upcoming availability.

When I hear back from her I will let you know. Since it does not look like Thursday will work, are there any other dates you might be available after April 7, 2014?

Thanks,
Mike

Michael A. Fry
Deputy City Attorney
Office of the City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814
(916) 808-5346
email: mfry@cityofsacramento.org

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EXHIBIT

3

From: Kent Huntington [<mailto:kent.huntington@causeofaction.org>]

Sent: Monday, March 17, 2014 5:27 PM

To: Michael Fry

Cc: Desiree Stockton; Sherman, William

Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Hi Mike-

Thank you for your voicemail and email in response to my messages. Would it be possible to set a date in advance of Det. Jestes's return to the office on April 7th? Currently, we are operating under a court order that requires us to complete her deposition by April 1st. Otherwise, we would have no objection to the timeframe you have provided.

We would willingly work around her training and segment the deposition into two-consecutive weekdays, if that would be of assistance. Additionally, if a weekend date would be workable, we would view that as a viable option of us all, as well.

Thank you for working with us to achieve a mutually amenable deposition date.

Best regards,
Kent

EXHIBIT

4

From: Michael Fry [<mailto:MFry@cityofsacramento.org>]

Sent: Thursday, March 20, 2014 12:46 PM

To: Kent Huntington

Cc: Desiree Stockton; Sherman, William

Subject: RE: setting a date for the conclusion of the Det. Karina Jestes deposition in the LabMD matter

Kent,

As a follow up to my voice mail message, please be advised Detective Jestes is out of the office and will not return until after April 7, 2014. Having her pulled from training is not feasible.

In light of your representation there is a court ordered deadline for discovery, I do wish to address some matters that have been brought to my attention. The City of Sacramento recently learned that LabMD filed a motion to re-depose Detective Jestes following my conversations with Ms. Harris in February. According to the order issued by the Administrative Law Judge, the City consented to the retaking of Detective Jestes's deposition.

As a third party to this action, the City has attempted to avoid becoming involved in any potential discovery disputes between the parties. However, as I stated in my email to Ms. Harris on February 6, 2014, the City's consent to the retaking of the deposition was conditioned on whether the Federal Trade Commission had any objections and was amenable to stipulating to such a proposal. It appears the FTC did not agree to such a proposal, which necessitated the filing of LabMD's motion. The City was not noticed with the motion or given an opportunity to file any type of response or otherwise be heard on the matter.

I believe the present situation could have been avoided had LabMD involved all parties in its communications to re-take the deposition, had communicated to the City its need to file the motion, and noticed the City with the motion to ensure, that if ordered by the court, the City could make its witness available on a mutually convenient date before the close of discovery.

The City has repeatedly made every effort to work with LabMD and cooperate whenever possible. However, the City is unable to make Detective Jestes available prior to April 7, 2014 due to her prior scheduling commitment. The City leaves it up to you and your client on how you need to proceed at this point. However, to avoid any misunderstandings moving forward the City requests that counsel for the FTC be included in any future communications concerning attempts to schedule Detective Jestes's deposition. Should you need to file any additional motions which involve City employees or discovery connected to the City, the City also requests that it be given notice of any hearing and timely served with all pleadings.

Sincerely,
Mike Fry

Michael A. Fry
Deputy City Attorney
Office of the City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814
(916) 808-5346

email: mfry@cityofsacramento.org

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EXHIBIT

5



Legal Counsel.

DINSMORE & SHOHL LLP
801 Pennsylvania Avenue, N.W. ^ Suite 610
Washington, DC 20004
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William A. Sherman, II
(202) 372-9117 (direct) ^ (202) 372-9141 (fax)
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March 21, 2014

VIA E-MAIL

Michael Fry, Esq.
Office of the City Attorney
915 I Street, 4th Floor
Sacramento, CA 95814-2608
E-mail: mfry@cityofsacramento.org

Re: *In the Matter of LabMD*, FTC Docket No. 9357

Dear Mr. Fry:

This letter confirms your communications with Kent Huntington, counsel for LabMD this week. Based upon those discussions, we understand that Detective Karina Jestes is presently on leave from the Sacramento Police Department and attending a training session away from her duty station. Accordingly, Detective Jestes is currently unavailable for purposes of completing her deposition testimony in this matter, and she will not return to the office until April 7, 2014. In light of her absence, you have offered the dates of April 7th or April 8th to complete the deposition. Those dates are acceptable to us.

Also as discussed, the parties in the above referenced matter are subject to a discovery order, which mandates that Detective Jestes' deposition be completed by April 1, 2014. *See* Order dated March 12, 2014 (attached). We have attempted to contact counsel for the FTC, but have not yet heard whether they have any objections with regard to the dates you provided. We will let you know if they do, as soon as we hear back from them. We look forward to seeing you in Sacramento in early April.

On a related matter, in advance of the deposition, LabMD respectfully requests the return of the LabMD documents, which were seized during the October 5, 2012 arrest of Mr. Erick Garcia and Ms. Josie Maldonado in Sacramento. On December 17, 2013, Detective Jestes acknowledged that these documents had not yet been returned to LabMD, their rightful owner, and that they are still being maintained by the Sacramento Police Department under evidence "Tag #: SA755867-6" and "Tag #: SA755867-7". Det. Karina Jestes Dep. 60:1-3, Dec. 17, 2013; FTC-SAC-000084. Because the Sacramento police investigation is now closed, please forward all the

Michael Fry, Esq.
March 21, 2014
Page 2

seized LabMD documents—in their original and seized form—to my attention immediately, as trial counsel for LabMD in this matter.

Please expedite the delivery of the documents by sending them to me via Federal Express. My law firm FedEx number is 299709078, and I expressly authorize you to use this billing number for this purpose.

Thank you for your attention to these matters. Should you have any questions, please feel free to contact me or Kent Huntington at (202) 499-2426.

Sincerely,



William A. Sherman, II

cc: Laura Riposo VanDruff, FTC counsel

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PUBLIC

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 GRANTING RESPONDENT'S MOTION FOR LEAVE
TO REDEPOSE DETECTIVE KARINA JESTES

I.

On February 19, 2014, Respondent, LabMD, Inc. ("Respondent" or "LabMD"), filed a Motion for Leave to Redepose Detective Karina Jestes ("Motion"). Complaint Counsel filed an Opposition to the Motion on March 3, 2014 ("Opposition"). For the reasons set forth below, Respondent's Motion is GRANTED.

II.

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. Specifically, the Complaint alleges: "In October 2012, the Sacramento, California Police Department found more than 35 Day Sheets¹ and a small number of copied checks in the possession of individuals who pleaded no contest to state charges of identity theft." Complaint ¶ 21. Respondent's Answer denies that Respondent violated the FTC Act or that any consumer was injured by the alleged security breach. Answer ¶¶ 17-23.

Pursuant to a subpoena *ad testificandum* issued by Complaint Counsel, Ms. Karina Jestes, a police detective with the Sacramento, California Police Department ("SPD"), was deposed in Sacramento, California on December 17, 2013. Respondent states that during her deposition, Detective Jestes had certain gaps in her recollection of events surrounding her communications

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.

with the FTC. Motion at 1-2. Respondent further states that after Detective Jestes' deposition, the SPD produced documents containing communications between Detective Jestes and the FTC ("Recently Disclosed Documents").² According to the declaration of Respondent's attorney, after reviewing the Recently Disclosed Documents, Respondent's counsel called Detective Jestes, read her excerpts of some of her e-mail communications with the FTC, and asked her whether they refreshed her recollection as to certain of her communications with the FTC, to which Detective Jestes responded in the affirmative. (Declaration of Lorinda Harris, ¶ 4, Motion Exhibit E). Respondent thus requests an opportunity to redepose Detective Jestes on the subject matter of the FTC's communications with Detective Jestes regarding: the LabMD documents found in Sacramento; the FTC's requests of the SPD with respect to the LabMD documents; and the FTC's role in the SPD's treatment and handling of the LabMD documents, and other issues reflected in the recently disclosed e-mail communications between the FTC and Detective Jestes. Motion at 2-3. Respondent states that it does not intend to extend the scope of Detective Jestes' second deposition beyond those topics about which she was previously unable to remember. Motion at 4.

Complaint Counsel contends that the delay in Respondent's receipt of documents is attributable to Respondent's delay in serving discovery requests on the SPD. Complaint Counsel further asserts that Detective Jestes provided substantive testimony regarding the very topics upon which Respondent seeks to redepose her. Complaint Counsel argues that Detective Jestes had sufficient recollection of those topics, and LabMD had myriad opportunities to obtain the Recently Disclosed Documents before proceeding with the December 17, 2013 deposition. Opposition at 7-8. Lastly, Complaint Counsel argues that a second deposition of Detective Jestes would prejudice Complaint Counsel.

III.

Under the Scheduling Order issued in this case, depositions are limited to a "single, seven-hour day, unless agreed to by the parties or ordered by the Administrative Law Judge." Scheduling Order at 6, Add'l Prov. 12. In addition, the ALJ may limit discovery that is "unreasonably cumulative or duplicative," or where "[t]he party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought . . ." 16 C.F.R. § 3.31(c)(2)(i)-(ii).

According to the Declaration of Lorinda Harris, Sacramento Deputy City Attorney Mike Fry has consented to the taking of Detective Jestes' deposition for the limited purpose of examining Jestes concerning the documents the SPD produced in response to LabMD's subpoena that refreshed Jestes' recollection about her communications with the FTC. (Declaration of Lorinda Harris, ¶ 6, Motion Exhibit E). Respondent seeks to depose Detective Jestes on this narrow issue, based only upon the Recently Disclosed Documents. Thus, a second, limited deposition of Detective Jestes is not unreasonably cumulative or duplicative.

² For purposes of this Order, the term "Recently Disclosed Documents" means documents that Respondent received after the December 17, 2013 deposition of Detective Jestes and includes documents responsive to the FTC's subpoena *duces tecum* and documents responsive to Respondent's subpoena *duces tecum*.


Complaint Counsel's claims that it would be prejudiced if a second deposition of Jestes were allowed are unpersuasive. To the extent that the time or cost of a second deposition presents a burden, Complaint Counsel may participate in the deposition by telephone. Under the Revised Scheduling Order, March 5, 2014, was the deadline for the close of discovery and March 18, 2014 is the deadline for Complaint Counsel to provide expert witness reports. Complaint Counsel contends that its expert witnesses will not have a meaningful opportunity to review the transcript of Detective Jestes' testimony before finalizing their reports. (Opposition at 8 n.8). To the extent that Complaint Counsel's experts need to revise their reports to reflect any additional information from a second deposition of Detective Jestes, Complaint Counsel may, within seven days from the receipt of the deposition transcript, submit a supplemental expert witness report(s) based solely on this issue. Respondent may, within five days from receipt of any supplemental expert witness report(s), submit any responses from its own expert(s) that address the same issue.

IV.

Respondent's Motion to Redepose Detective Jestes is GRANTED. The deposition is limited to the narrow issue of Detective Jestes' communications with the FTC based upon the Recently Disclosed Documents.

The fact discovery deadline of March 5, 2014 is hereby extended for an additional 20 days from the date of this Order for the purpose of allowing the deposition of Detective Jestes, as limited by this Order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 12, 2014

EXHIBIT

6



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

March 24, 2014

VIA EMAIL

Kent Huntington
Cause of Action
1919 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006

Re: In the Matter of LabMD, Inc., FTC Docket No. 9357

Dear Mr. Huntington:

This letter memorializes our March 21, 2014 teleconference, which occurred at 2:54 PM, regarding LabMD's second deposition of Detective Karina Jestes. Ryan Mehm, Laura Riposo VanDruff, Robyn Burrows, you, and I participated in that call. As Ms. VanDruff explained during our call, Complaint Counsel will not consent to your proposal to take the deposition of Detective Jestes outside of the time period prescribed by the Court's March 12, 2014 Order.

I also write in response to your March 22, 2014 emails to Ms. VanDruff, Sacramento City Attorney Michael Fry, and me regarding this issue. It is clear from those communications that counsel for Respondent misunderstands Complaint Counsel's position. In order to remedy counsel's misunderstanding, and to prevent any potential misrepresentation of Complaint Counsel's position to the Court, an explicit statement of that position follows.

Specifically, Complaint Counsel does not object to and has not sought to prevent the deposition of Detective Jestes from proceeding subject to the restrictions and within the extended discovery deadline set forth in the Court's March 12th Order. That Order states that "the fact discovery deadline of March 5, 2014 is . . . extended for an additional 20 days from the [March 12, 2014] date of this Order for the purpose of allowing the deposition of Detective Jestes," as limited in scope by the March 12th Order. If Respondent intends to take Detective Jestes' deposition in compliance with the restrictions and deadline ordered by the Court, Complaint Counsel intends to comply in all respects with its obligations under both the Court's Orders and the Commission's Rules. If, however, Respondent intends to take the deposition after the deadline imposed by the Court has passed, it is Complaint Counsel's position that such a deposition would violate the Court's Scheduling Order, as amended by the Court's March 12th Order.

Kent Huntington
March 24, 2014
Page 2

Moreover, since the Court's March 12th Order, Complaint Counsel has discovered that Respondent's counsel materially misrepresented to the Court the position of the City of Sacramento regarding its consent to produce Detective Jestes for a second deposition. Specifically, counsel for Respondent represented in its February 19, 2014 Motion for Leave that the City of Sacramento had consented to the re-deposition of Detective Jestes. What Respondent's counsel did not bring to the Court's attention was the fact that the City of Sacramento and its counsel had explicitly made any such consent contingent upon Complaint Counsel's agreement to allow the second deposition. Complaint Counsel did not agree for the reasons set forth in its March 3, 2014 Opposition.

If Respondent elects to seek leave of Court to further extend the deadline by which it may conduct a second, limited examination of Detective Jestes, Complaint Counsel expects that Respondent's Counsel will disclose the information detailed in Mr. Fry's March 20, 2014 and March 21, 2014 emails to you, which you forwarded to Ms. VanDruff and me on March 22, 2014. Specifically, Complaint Counsel expects that you will advise the Court that its finding—that the City of Sacramento had consented to the re-deposition of Detective Jestes—was predicated on information furnished in Ms. Harris's February 15, 2014 declaration, which the City of Sacramento's counsel contends does "not accurately reflect the contents of [his] conversation or email with Ms. Harris."

Sincerely,



Megan Cox

cc: Michael Fry (*via email*)
William A. Sherman, II (*via email*)
Reed D. Rubinstein (*via email*)
Michael D. Pepson (*via email*)
Lorinda B. Harris (*via email*)
Hallee K. Morgan (*via email*)
Sunni Harris (*via email*)
Robyn Burrows (*via email*)
Daniel Epstein (*via email*)