

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 MOTION *IN LIMINE* TO STRIKE TRIAL WITNESS

On April 22, 2014, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion *in Limine* to Strike as a Live Trial Witness Deputy Director of Bureau of Consumer Protection (“Motion”). Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed its Opposition to the Motion on April 29, 2014.

As explained below, the Motion is DENIED.

I.

Complaint Counsel states that Respondent’s Final Proposed Witness List names as a trial witness Daniel Kaufman, Deputy Director of the Bureau of Consumer Protection (the “Bureau” or “BCP”), and the Bureau’s designee for purposes of Respondent’s Rule 3.33 deposition of the Bureau.¹ According to Respondent’s Final Proposed Witness List:

[Respondent expects] that Mr. Kaufman will testify live about the FTC’s regulatory scheme regarding data security, any published or unpublished FTC standards, guidelines or regulations which the FTC requires Covered Entities like LabMD to meet regarding the security of Protected Health Information from 2005 to the present; the initiation and evolution of the FTC’s standards, guidelines and regulations regarding data security and what these regulations and guidelines required Covered Entities like LabMD to have in place at all relevant times from 2005 to the present; the media by which the FTC alerted or informed Covered Entities like LabMD that these standards, guidelines and regulations existed.

Motion Exh. B at 2.

¹ FTC Rule 3.33 permits a party to name as a deponent “any bureau . . . of the Federal Trade Commission The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf” 16 C.F.R. § 3.33(c)(1).

Complaint Counsel argues that Respondent intends to elicit testimony from Mr. Kaufman “exclusively” on the “standards the Commission has used in the past and is using currently to determine whether an entity’s data security practices violate Section 5 of the Federal Trade Commission Act,” discovery of which Complaint Counsel asserts has been barred by prior orders in this case. Motion at 2-4. Complaint Counsel further argues that such evidence is not relevant and, therefore, is inadmissible as evidence at the hearing. Motion at 1-2. *See* 16 C.F.R. § 3.43(b) (“Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded.”). Further, Complaint Counsel argues, requiring a senior official of the Bureau to testify at trial on matters that are not relevant to the case would disrupt trial preparation, increase time and cost requirements, and risk harassment.

Respondent states that it did not inquire at the deposition of Mr. Kaufman, as designee of the Bureau, and does not intend to inquire of Mr. Kaufman at trial, regarding the FTC’s legal standards, such as the FTC’s “reasonableness” standard being applied in this case. Instead, Respondent asserts, it has “only sought, and only seeks, to inquire about the FTC’s data-security standards, if any.” Opposition at 2.

II.

“Motion *in limine*” refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984); *see also In re Motor Up Corp.*, 1999 FTC LEXIS 207, at *1 (Aug. 5, 1999).


Motions *in limine* are generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible. *Bouchard v. American Home Products*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002); *Intermatic Inc. v. Toepfen*, No. 96 C 1982, 1998 U.S. Dist. LEXIS 15431, at *6 (N.D. Ill. February 28, 1998). Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm’n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL)(AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

In re POM Wonderful LLC, 2011 FTC LEXIS 79, at *6-8 (May 6, 2011). “Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded.” *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009); *accord In re Gemtronics, Inc.*, 2009 FTC LEXIS 121, at *6-7 (May 26, 2009).

III.

Applying the foregoing standards, notwithstanding prior discovery orders in this case limiting discovery of the Commission's past and present legal standards for enforcing Section 5, Complaint Counsel has failed to demonstrate that Mr. Kaufman possesses no relevant information, or that any and all testimony from Mr. Kaufman would be "clearly inadmissible on all potential grounds." It cannot, and will not, be assumed, outside the context of trial and a specific proffer of evidence, that all evidence that Respondent may seek to elicit from Mr. Kaufman at trial is entirely irrelevant to any material issue in the case. Accordingly, Complaint Counsel's Motion is DENIED. This Order shall not be construed as a ruling on the admissibility of any testimony that may be proffered at trial.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 1, 2014