

ORIGINAL

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 ON RESPONDENT’S MOTION FOR SANCTIONS

I.

On August 14, 2014, Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed a Motion for Sanctions against the Federal Trade Commission (“Motion”). Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition to the Motion on August 25, 2014 (“Opposition”).

For the reasons set forth below, the Motion is DENIED.¹

II.

Respondent asserts that the FTC engaged in misconduct in the investigation and prosecution of this case. Among other things, Respondent avers that the FTC failed to authenticate or develop a chain of custody for the “1718 file,” a central piece of evidence in this case,² prior to commencing the litigation; and did not independently corroborate how Tiversa Holding Corp. (“Tiversa”) obtained the 1718 file, which Respondent asserts Tiversa stole from a

¹ On September 2, 2014, Respondent filed a reply in Support of its Motion. Pursuant to FTC Practice Rule 3.22(d) there is no right of reply without the permission of the Administrative Law Judge. Moreover, permitted replies must be limited to setting forth “recent important developments or controlling authority that could not have been raised earlier in the party’s principal brief.” 16 C.F.R. § 3.22(d). Respondent did not seek leave to file its reply. Moreover, the reply filed by Respondent does not raise any subsequent “important developments or controlling authority” that could not have been raised in Respondent’s Motion. Rather, the reply largely restates the facts and arguments of Respondent’s Motion, including the assertions that the “1718 file” (*see* footnote 2, below) was “stolen” from LabMD and that the FTC failed to validate evidence provided by Tiversa (*see* section II, *infra*). Because Respondent’s reply was filed without advance leave and does not conform to the substantive limitations of FTC Rule 3.22(d), it need not be considered. However, having reviewed the reply, in the exercise of discretion, the arguments and assertions made in the reply would not change the ruling herein.

² The “1718 file” is a shorthand phrase used by the parties to refer to a certain LabMD “Insurance Aging File,” which, according to the Complaint, was made available by LabMD on a peer-to-peer (“P2P”) network through use of the software program LimeWire. Complaint ¶¶ 17-20.


LabMD workstation. Respondent further alleges that the FTC engaged in an improper collaboration with Tiversa, which Respondent asserts had a financial interest in the FTC's taking enforcement action against Respondent, including with regard to Tiversa's creation of an entity called the "Privacy Institute," allegedly for the sole purpose of providing information to the FTC. Respondent further asserts that an employee of Tiversa, Richard Wallace, "created" a document purporting to show that the 1718 file was found at multiple Internet Protocol ("IP") addresses, and that the testimony of Tiversa's Chief Executive Officer, Robert Boback, is not credible as to where, when, and/or how the 1718 file was discovered. To sanction the FTC's conduct as described by Respondent, Respondent requests an order dismissing this action with prejudice and awarding Respondent reasonable attorney fees and costs. Respondent relies on FTC Rule 3.42(c) as legal authority for its request.

Complaint Counsel denies engaging in any misconduct in the investigation or prosecution of the case. Among other things, Complaint Counsel notes that Respondent has admitted that the 1718 file was located in a LimeWire "sharing" folder installed on a LabMD computer and that the evidence demonstrates that the 1718 file was found at multiple IP addresses. In addition, Complaint Counsel argues that the FTC's pre-Complaint investigation was extensive, but that, in any event, the adequacy of such investigation cannot be the basis for dismissing this litigation. Moreover, Complaint Counsel argues, precedent holds that the Commission's Rules of Practice do not authorize sanctions for litigation misconduct, citing *In re Gemtronics, Inc.*, No. 9339, 2010 FTC LEXIS 40, at *8 (Apr. 27, 2010). Complaint Counsel further notes that the Motion exceeds applicable word limits, and that Respondent improperly filed the Motion without first meeting and conferring with Complaint Counsel, as required by FTC Rule 3.22 and the Additional Provisions of the Scheduling Order issued in this case.³

III.

To support its Motion, Respondent asserts as fact numerous matters that are disputed by Complaint Counsel. Moreover, the assertion as to Mr. Wallace's testimony is, at present, mere allegation, given that Mr. Wallace has yet to testify. Resolving Respondent's Motion would require fact finding on disputed evidentiary issues, and since the evidentiary hearing in this case has not been completed, it would be premature and speculative to rule on Respondent's Motion at this time. For these reasons, Respondent's Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: September 5, 2014

³ In its reply, Respondent asserts that Complaint Counsel raises procedural issues as a "smokescreen" and cites authorities indicating that word limits and "meet and confer" requirements do not apply to a "dispositive motion," such as a request for dismissal. Reply at 2 n.2. Because Respondent's Motion is denied on substantive and not procedural grounds, *see* section III, *infra*, it is unnecessary to address or resolve the asserted procedural defects presented by Respondent's Motion.