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 MOTIONS *IN LIMINE* TO EXCLUDE PROFFERED EXPERTS

I.

On April 22, 2014, Respondent filed two motions *in limine* directed at proposed expert reports and testimony to be offered at trial by Federal Trade Commission ("FTC") Complaint Counsel, as follows: (1) Motion *in Limine* to Exclude Expert Testimony of James Van Dyke; and (2) Motion *in Limine* to Exclude Expert Testimony of Rick Kam (collectively, "Motions"). Complaint Counsel filed an opposition to each motion on April 29, 2014 (collectively, "Oppositions"). Because the Motions and Oppositions are based upon substantially the same contentions, they will be addressed in this consolidated Order.

Having fully reviewed and considered the Motions and the Oppositions, and for the reasons that follow, the Motions are DENIED.

II.

As set forth in the Order Denying Respondent's recent Motion *in Limine* to Strike Trial Witness, issued May 1, 2014, a "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. Toeppen*, 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, I*nc., 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).

Moreover, when ruling on the admissibility of expert opinions, in particular, "courts consider whether the expert is qualified in the relevant field and examine the methodology the expert used in reaching the conclusions at issue. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and the many cases applying *Daubert*, including *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 153-54, (1999)." *In re McWane, Inc.*, 2012 FTC LEXIS 142, at *8 (Aug. 16, 2012). However, the court's role as a "gatekeeper," pursuant to *Daubert*, is to prevent expert testimony from unduly confusing or misleading a jury, which purpose has little application in a bench trial. *Id.*; *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *21-22 (Apr. 20, 2009) (citing *Clark v. Richman*, 339 F. Supp. 2d 631, 648 (M.D. Pa. 2004) (stating that "[a]s this case will be a bench trial, the court's 'role as a gatekeeper pursuant to Daubert is arguably less essential.'")); *Albarado v. Chouest Offshore, LLC*, Civil Action No. 02-3504 Section "J"(4), 2003 U.S. Dist. LEXIS 16481, at *2-3 (E.D. La. Sept. 5, 2003) (stating that "[g]iven that this case has been converted into a bench trial, and thus that the objectives of *Daubert* . . . are no longer implicated, the Court finds that defendant's motion should be denied at this time. Following the introduction of the alleged expert testimony at trial, the Court will either exclude it at that point, or give it whatever weight it deserves.")). Rather than excluding expert testimony, the better approach under *Daubert* in a bench trial is to permit the expert testimony and allow "vigorous cross-examination, presentation of contrary evidence," and careful weighing of the burden of proof to test "shaky but admissible evidence." *McWane*, 2012 FTC LEXIS 142, at *9; *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at *21; *see Fierro v. Gomez*, 865 F. Supp. 1387, 1396 n.7 (N.D. Cal. 1994) (quoting *Daubert*, 509 U.S. at 596)).

III.

Applying the foregoing principles, Respondent has failed to demonstrate that the proffered experts should be precluded, at this stage of the proceedings, from providing opinions and related testimony in this case.

A.

Respondent argues that Mr. Van Dyke's report and testimony should be excluded because he is not qualified by education or work experience to be an expert in the likelihood and quantification of consumer harm caused by identity theft, as proffered by Complaint Counsel. Specifically, Respondent asserts that Mr. Van Dyke has no expertise in information technology or statistical analysis. Moreover, according to Respondent, Mr. Van Dyke's "Identity Fraud

Survey," upon which his opinions are based, constitutes a flawed methodology because the Identity Fraud Survey is not predicated upon the facts of the instant case, and merely "parrots" Complaint Counsel's litigation position.

Complaint Counsel responds that Mr. Van Dyke is well qualified, based upon his role as leader of Javelin Strategy & Research ("Javelin"), which developed the Identity Fraud Survey, and based upon his experience working with a team of statisticians and industry analysts to improve the Identity Fraud Survey for ten years. Further, according to Complaint Counsel, the Identity Fraud Survey is reliable because it uses generally accepted methodologies, and is sufficiently connected to this case because the resulting data was applied to draw conclusions about the likely harm from the inadequate data security failures alleged to have occurred in this case.

It cannot be concluded from the foregoing that Mr. Van Dyke's opinions are clearly inadmissible. Rather, Respondent's assertions as to problems with Mr. Van Dyke's qualifications and conclusions go to the weight to be given to Mr. Van Dyke's opinions and not to their admissibility. *See Daniel Chapter One*, 2009 FTC LEXIS 85, at *23 (holding that contention that the proposed experts are insufficiently knowledgeable to render reliable opinions, addresses the weight, rather than the admissibility, of the experts' opinions). These assertions are best vetted through "vigorous cross-examination and presentation of contrary evidence." *Id.*; *McWane*, 2012 FTC LEXIS 142, at *9. Accordingly, Respondent's Motion *in Limine* to preclude opinions and testimony from Mr. Van Dyke is DENIED

B.

Respondent's arguments for precluding Mr. Kam from offering expert opinion at trial are substantially similar to those raised as to Mr. Van Dyke. According to Respondent, Mr. Kam, who is being proffered to testify regarding the risk of consumer injury resulting particularly from medical identity theft, is not qualified because he has no degree in information technology, mathematics or statistics, or data security matters. Further, Respondent challenges the methodology upon which Mr. Kam's opinions are based as unreliable because, according to Respondent, the methodology is not generally accepted, is not based upon anything more than his own experience, and is biased. Further, Respondent contends that Mr. Kam's statistical analysis is faulty.

Complaint Counsel replies that Mr. Kam is qualified, including through his work experience in the field of identity theft victim restoration, to give opinions as to consumer harm resulting from identity theft, particularly medical identity theft. His analysis and resulting opinions, Complaint Counsel further asserts, are based upon Mr. Kam's extensive work experience, and are reliably applied to the facts of this case.

Respondent's assertions as to the adequacy of Mr. Kam's qualifications and methodology, even if true, go to the weight to be given to Mr. Kam's opinions, not to their admissibility, and are best evaluated through cross-examination at trial. It cannot be determined at this stage of the proceedings, outside the context of trial, that Mr. Kam's methodology is so flawed as to render his analyses and opinions "unreliable" and, therefore, excludable under

Daubert. *See McWane*, 2012 FTC LEXIS 142, at *11-12. Therefore, Respondent's Motion *in Limine* to preclude opinions and testimony from Mr. Kam is DENIED.

IV.

Having fully considered both motions and the oppositions thereto, and for all the foregoing reasons, Respondent's Motion *in Limine* to Exclude Expert Testimony of James Van Dyke and Respondent's Motion *in Limine* to Exclude Expert Testimony of Rick Kam are DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of any expert testimony that may be offered at trial.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 5, 2014