ORIGINAL

PUBLIC

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

In the Matter of	)	
	)	
LabMD, Inc.,	)	DOCKET NO. 9357
a corporation,	)	
Respondent.	)	

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO ISSUE SUBPOENAS FOR REBUTTAL EVIDENCE

I.

On July 8, 2014, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion for Leave to Issue Subpoenas for Rebuttal Evidence ("Motion"). Respondent filed an opposition to the Motion on July 18, 2014 ("Opposition").

Having fully considered the Motion and Opposition, the Motion is DENIED, as explained below.

II.

Under the Revised Scheduling Order in this case, the deadline for the completion of fact discovery was March 5, 2014. Trial commenced on May 20, 2014. Complaint Counsel rested its case on May 23, 2014.

Complaint Counsel asks for leave to take further discovery, as follows: (1) to issue deposition subpoenas to Tiversa Holding Corporation ("Tiversa") and its employee, Keith Tagliaferri, and (2) to issue a document subpoena to Tiversa. The proposed deposition subpoena to Tiversa, attached to the Motion, requests testimony as to the "times, dates, Internet Protocol ['IP'] addresses, geographic locations, and networks" on which, or from which, Tiversa located and/or obtained copies of an "insurance aging report" of LabMD's, referred to herein as the "1718 file," and how Tiversa obtained and maintained that information. Motion Exhibit D at 2. Complaint Counsel's proposed document subpoena to Tiversa requests "all documents" pertaining to the above, as well as Tiversa's "personnel files" and other documents relating to Mr. Richard Wallace, a former employee of Tiversa and a designated fact witness for Respondent, and/or relating to Mr. Wallace's termination from Tiversa. Motion Exhibit E at 5. Complaint Counsel argues that information regarding "how, when, and where" Tiversa found the 1718 file on P2P networks is for the purpose of rebutting proffered testimony of Mr. Wallace, as to which Complaint Counsel claims it had no knowledge until June 12, 2014 when Respondent's counsel made a proffer in court. Motion at 3-4.

Respondent counters that the Motion should be denied because Mr. Wallace has not yet testified, and therefore, what constitutes rebuttal cannot be determined at this time. In addition, Respondent argues that discovery ended months ago, that there is no authority for "rebuttal discovery," and that Complaint Counsel should have sought discovery related to Mr. Wallace much earlier in the proceedings, given that Complaint Counsel itself identified Mr. Wallace in its Initial Disclosures as a "person with knowledge," and that Mr. Wallace was included on Respondent's final witness list.

III.

On June 12, 2014, after Complaint Counsel had closed its case-in-chief and during Respondent's case, Respondent proposed to call Mr. Wallace. However, counsel for Mr. Wallace appeared and stated that, due to a pending Congressional investigation of Tiversa, including Tiversa's work with government agencies, JX3, Mr. Wallace would be invoking his Fifth Amendment rights against self-incrimination in response to any substantive questions. Counsel for Mr. Wallace also stated that Mr. Wallace was seeking immunity in exchange for his testimony regarding Tiversa's activities. In an *in camera* bench conference, Respondent's counsel made a proffer of Mr. Wallace's expected testimony. Thereafter, Mr. Wallace was called to testify, and invoked his Fifth Amendment rights. A recess was ordered to allow Mr. Wallace to continue his effort to obtain immunity for his testimony, including immunity for any testimony to be provided for the instant case.

Complaint Counsel's Motion is based on the assumption that Mr. Wallace will testify in this case and, also, on the additional assumption that Mr. Wallace will testify as asserted in the Motion. However, Mr. Wallace has not yet testified and, indeed, he may not testify if he is unable to obtain the desired immunity or for other unknown reasons. It cannot be assumed that Mr. Wallace will testify, or that his testimony will be in accordance with that proffered by Respondent's counsel and cited by Complaint Counsel in the Motion. Thus, on the present record, it cannot properly be determined what might constitute permissible rebuttal or impeachment evidence, much less whether there is good cause to reopen discovery, at this late stage of proceedings, to obtain such evidence. The issues presented by the Motion, to the extent they become relevant and valid, could only be appropriately addressed in the context of Mr. Wallace's actual testimony, if any.[1] Accordingly, for these reasons, Complaint Counsel's Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: July 23, 2014

[1] Notwithstanding the foregoing, it must be noted that Complaint Counsel's assertion that further discovery into "how, when, and where" Tiversa found the 1718 file on P2P networks is designed to rebut Mr. Wallace's expected testimony is questionable at best. Complaint Counsel elicited substantial evidence on this issue, over the objections of Respondent's counsel, at the trial deposition of Mr. Boback on June 7, 2014, which took place days before June 12, 2014 – the date that Complaint Counsel asserts it first learned of Mr. Wallace's expected testimony. Moreover, evidence regarding "how, when, and where" Tiversa found the 1718 File on P2P networks is part of Complaint Counsel's case-in-chief, which has concluded. *See, e.g.*, Complaint ¶¶ 17-19, 22; Complaint Counsel's Pre-hearing Brief at 49 (asserting that the 1718 File has been found on a public P2P network as recently as November 2013 and has been downloaded from four different IP addresses), citing CX0742 (Report of Complaint Counsel's proffered expert Rick Kam) at 19; CX0703 (Tiversa Dep.) at 9, 52, 58, 61-64.