

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

In the Matter of)	PUBLIC
LabMD, Inc.,)	Docket No. 9357
a corporation,)	
Respondent.)	REVISED¹ UNOPPOSED MOTION

**RESPONDENT LABMD, INC.’S REVISED UNOPPOSED MOTION FOR AN ORDER
REQUIRING RICHARD WALLACE TO TESTIFY IN PERSON
UNDER A GRANT OF IMMUNITY PURSUANT TO COMMISSION RULE 3.39(b)**

Pursuant to Commission Rule 3.39(b) (16 C.F.R. § 3.39(b)) and 18 U.S.C. §§ 6002 and 6004, Respondent LabMD, Inc. (“LabMD”) hereby requests an order requiring Richard Wallace to testify in person at the trial of this matter, and granting immunity to Mr. Wallace with regard to such testimony. Under Rule 3.39(b), such a request should be granted if the testimony is “necessary to the public interest” and the witness has refused to testify on the basis of his privilege against self-incrimination (which privilege Mr. Wallace invoked on June 12, 2014). As discussed below, this testimony is not only “necessary to the public interest” but goes to the heart of this administrative action, which has broader implications for FTC’s authority under Section 5. Indeed, Mr. Wallace is expected to testify regarding how FTC obtained the 1718 File from LabMD – [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Such testimony would refute a necessary element of FTC’s case that LabMD’s data security practices were inadequate and likely to cause substantial consumer injury or harm.

¹ This document was timely filed on October 1, 2014. After that filing and based on a concern raised by Complaint Counsel, Counsel for the parties agreed to the redaction set forth in footnote 3.

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For these reasons, and as set forth in greater detail below, LabMD respectfully requests that the Court proceed with the process in Rule 3.39(b) and issue the requested order.

Background

As explained in greater detail in LabMD’s Motion for Sanctions (Aug. 14, 2014), recent activity in this case confirms that FTC never questioned or confirmed how Tiversa obtained the 1718 File. The only document produced by the government “proving” that the 1718 File was found somewhere other than a LabMD workstation is CX-19, a one-page document containing nothing but four typed IP addresses created by Mr. Wallace sometime in or about October 2013 – *after* FTC already issued its administrative complaint against LabMD. In fact, Mr. Wallace is expected to testify that [REDACTED]

[REDACTED]

[REDACTED] Mr.

Wallace, though previously presumed to be a FTC witness, is now a government target because his testimony will contradict Tiversa’s story and, in turn, damage FTC’s case against LabMD.

Against this background, on June 12, 2014, Respondent proffered the live testimony of Mr. Wallace. Trial Tr. at 1257-1308 (June 12, 2014).² Upon being called to testify and providing his name (and place/length of employment), Mr. Wallace, upon the advice of counsel, refused to answer any questions based upon his Fifth Amendment right against compelled self-incrimination. *Id.* at 1301-02. Subsequently, this case was recessed while the issue of Mr. Wallace’s testimony (and immunity) proceeded before the House Committee on Oversight and Government Reform (“OGR”), which was believed to impact Mr. Wallace’s testimony (and

² The vast majority of the June 12 session related to Mr. Wallace’s testimony, including an *in camera* discussion with the Court regarding the issue of a grant of immunity. *See id.* at 1290-1298.

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immunity) in this case.³ By Order dated August 22, 2014, and based on briefing by the parties, the Court instructed LabMD to file the instant Rule 3.39 request by October 1 provided OGR did not grant Mr. Wallace's immunity request, which has not yet occurred. *See* Order on Complaint Counsel's Motion for Order Requiring Respondent's Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing (Aug. 22, 2014). Accordingly, LabMD submits this Rule 3.39 request, which Complaint Counsel confirmed on September 30 that it will not oppose.⁴

Argument

In relevant part, Rule 3.39(b) authorizes requests under 18 U.S.C. §§ 6002 and 6004, such as the pending one, upon a showing that the testimony sought "may be necessary to the public interest."⁵ According to the U.S. Attorneys' Manual, some of the factors relevant to a similar inquiry under 18 U.S.C. § 6003 are "the importance of the [case]" and "the value of the

³ Upon information and belief, [REDACTED]

See also Order on Complaint Counsel's Motion for Order Requiring Respondent's Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing, at 2 ("Complaint counsel stated that the government does not intend to oppose such a motion.") (quoting Trial Tr. at 1303 (June 12, 2014)).

⁵ Rule 3.39(b) provides as follows:

Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6002 may be made to the Administrative Law Judge and may be made *ex parte*. When such requests are made, the Administrative Law Judge is authorized to determine:

- (1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and
- (2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against self-incrimination; and, upon making such determinations, to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; . . .

See also 18 U.S.C. § 6004. Rule 3.39 (b)(2) was satisfied when Mr. Wallace invoked his Fifth Amendment rights on June 12, 2014. Trial Tr. at 1301-02 (June 12, 2014).

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person's testimony or information to the [case.]" See U.S. Attorneys' Manual, Title 9, Ch. 9-23.210 (1997). As set forth below, these factors are easily met here.

There is no doubt that this case is important not only to FTC as it seeks to define the scope of FTC's Section 5 authority, but to countless health care providers previously under the impression that the Health Insurance Portability and Accountability Act and Health Information Technology for Economic and Clinical Health Act were the exclusive regulatory frameworks governing data security and Personal Health Information.⁶

As to the value of Mr. Wallace's testimony to the pending case, LabMD's counsel previously explained how Mr. Wallace's testimony "is crucial to our defense" and "will eliminate a core section of the government's evidence." *Id.* at 1285-86.

JUDGE CHAPPELL: Well, based on the evidence I've heard, what can he address other than how the government got the information from Tiversa? And am I correct, that's the issue he's supposed to testify regarding?

MR. SHERMAN: That's correct, how he got the information. And I think he can also address the veracity of that information, whether or not in fact that information is what it purports to be. And without that information and without that piece of evidence, I would submit that the government has a very slim chance of proving that LabMD participated in an unfair practice, that being its data security, and that the state of LabMD's data security was likely to cause substantial consumer injury.

...

⁶ See, e.g., Peter S. Frechette, Note, *FTC v. LabMD: FTC Jurisdiction Over Information Privacy Is "Plausible," But How Far Can It Go?*, 62 Am. U. L. Rev. 1401 (2013); Lei Shen & Evan M. Wooten, Mayer Brown LLP, *The Curious Case of LabMD: New Developments In The "Other" FTC Data-Security Case*, martindale.com (Aug. 13, 2014), available at http://www.martindale.com/litigation-law/article_Mayer-Brown-LLP_2175550.htm (last visited Sept. 30, 2014); Randall W. Edwards, Richard Parker, Maryanne Kane, Katrina Robson, Mimi Vu, O'Melveny & Myers LLP, *Companies Challenging the Federal Trade Commission's "Unfairness" Authority Over Data Security Practices Suffer a Second Setback* (May 19, 2014), available at <http://www.omm.com/companies-challenging-the-federal-trade-commissions-unfairness-authority-over-data-security-practices-suffer-a-second-setback-05-19-2014/> (last visited Sept. 30, 2014).

[REDACTED]

[REDACTED]

[REDACTED]

Id. at 1286, 1293 (emphasis added).

Indeed, this Court previously noted the interest in having Mr. Wallace testify so as to ascertain the truth:

And since the respondent has requested the testimony of Mr. Wallace and also requested that we recess or delay this proceeding so they can elicit that testimony, I have no idea what Mr. Wallace is going to say, but I believe in the interest of justice, respondent has the right to have his testimony presented and *I believe in the interest of the truth, which we're all trying to get to the bottom of here, what is the truth, we need to hear this gentleman's testimony in the event he can get immunity and decides to testify.*

Trial Tr. at 1303-04 (June 12, 2014) (emphasis added). Presumably, this was based, in part, by the proffer made by trial counsel for LabMD as well as the extant circumstances regarding Tiversa's involvement with FTC, Complaint Counsel, and the allegations against LabMD. *See id.* at 1293-97.

Mr. Wallace's testimony decidedly serves the public interest. His anticipated testimony goes to the very heart of LabMD's defenses against FTC's allegations, which, in turn, will impact FTC's invocation of its Section 5 authority in this and future proceedings.

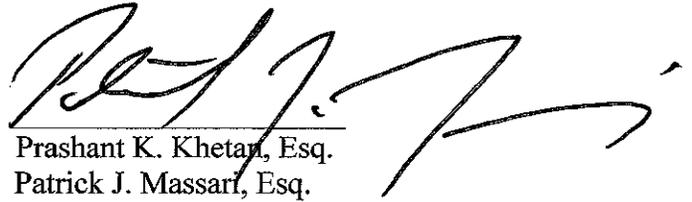
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CONCLUSION

For the reasons discussed above, this Court should grant LabMD's Motion, and enter the attached Order requiring Mr. Wallace to testify in person under a grant of immunity pursuant to Commission Rule 3.39(b).

Dated: October 2, 2014

Respectfully submitted,



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Cause of Action

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Counsel for Respondent

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UNITED STATES OF AMERICA
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OFFICE OF THE ADMINISTRATIVE LAW JUDGES

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LabMD, Inc.,)
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DOCKET NO. 9357

[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.'S REVISED UNOPPOSED MOTION FOR AN ORDER REQUIRING RICHARD WALLACE TO TESTIFY IN PERSON UNDER A GRANT OF IMMUNITY PURSUANT TO COMMISSION RULE 3.39(b)

Upon consideration of Respondent LabMD, Inc.'s Revised Unopposed Motion for an Order Requiring Richard Wallace to Testify In Person Under A Grant of Immunity Pursuant to Commission Rule 3.39(b),

IT IS HEREBY ORDERED that Respondent LabMD, Inc.'s Revised Unopposed Motion for an Order Requiring Richard Wallace to Testify In Person Under A Grant of Immunity Pursuant to Commission Rule 3.39(b) be and the same is hereby GRANTED.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2014, I filed the foregoing document electronically using 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, DC 20580

I also certify that on October 2, 2014, I delivered via electronic mail and caused to be 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, DC 20580

I additionally certify that on October 2, 2014, I delivered via electronic mail a copy of the foregoing document to:

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

CERTIFICATE OF ELECTRONIC FILING

I further 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: October 2, 2014

By: /s/Patrick J. Massari
Patrick J. Massari