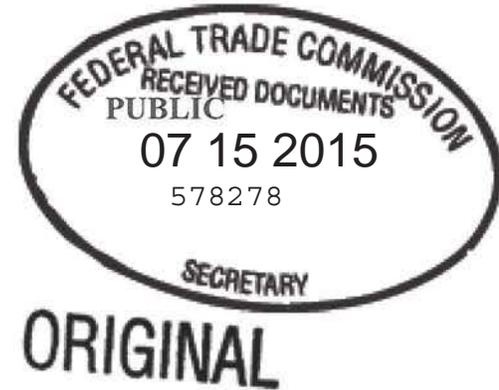


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of)
)
LabMD, Inc.,)
a corporation,)
Respondent.)
_____)

DOCKET NO. 9357

**ORDER ON RESPONDENT'S MOTION
FOR REFERRAL FOR CRIMINAL INVESTIGATION
AND NON-PARTIES' MOTION FOR LEAVE**

I.

On June 19, 2015, Respondent LabMD, Inc. ("Respondent") filed a motion for an order referring non-party witnesses Tiversa, Inc., Tiversa Holding Corp., and its chief executive officer Robert Boback (hereafter collectively "Tiversa" or "Boback"), to the United States Department of Justice and the U.S. Attorney for the District of Columbia for investigation into possible criminal violations in connection with evidence given in this matter, and directing Tiversa and/or Boback to pay Respondent attorneys' fees and costs in defending this case ("Motion"). Respondent asserts, in summary, that Tiversa and/or Boback, in violation of federal criminal laws, knowingly stole from LabMD the evidence referred to in this case as the 1718 File¹; that Tiversa and/or Boback provided false evidence for use in this proceeding (including CX 19 and deposition testimony) that the 1718 File had proliferated across peer-to-peer networks, in an effort to procure Respondent's data breach remediation business; and that Tiversa and/or Boback withheld subpoenaed documents that were contradictory to Tiversa's claims.

Although Respondent filed the Motion as unopposed, Federal Trade Commission ("FTC") Complaint Counsel filed a response to the motion detailing its position on July 1, 2015 ("Response"). Complaint Counsel states that it does not oppose referring Tiversa to an appropriate law enforcement agency for a review of Tiversa's conduct in this proceeding, but does not join in Respondent's legal theories or conclusions as to Tiversa's alleged criminal liability. Complaint Counsel urges that any determination of Tiversa's criminal liability must be left to the appropriate law enforcement agency, and need not be decided herein in order to refer Tiversa for investigation.

¹ The "1718 File" refers to a certain LabMD insurance aging report that was allegedly found by Tiversa on a peer-to-peer network. See Complaint ¶¶ 17-19.

Furthermore, on June 24, 2015, non-parties Tiversa and Boback filed a Motion for Leave to File a Response to Respondent's Motion, along with a proposed response ("Motion for Leave").

As set forth below, Respondent's Motion is DENIED. In addition, the non-parties' Motion for Leave is DENIED AS MOOT.²

II.

As authority for the requested order, Respondent states: "This Court has the authority to entertain all motions that justice requires and to protect the integrity of this proceeding by requesting that the Department of Justice and/or the U.S. Attorney for the District of Columbia investigate whether Tiversa and Boback have violated criminal laws, including those cited herein. *See* 16 CFR § 3.42(c)." Motion at 6.

The only specific authority cited by Respondent in support of its requested relief is Commission Rule of Practice 3.42(c). Rule 3.42, under Subpart E-Hearings, states:

(c) Powers and duties. Administrative Law Judges shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas and orders requiring answers to questions;
- (3) To take depositions or to cause depositions to be taken;
- (4) To compel admissions, upon request of a party or on their own initiative;
- (5) To rule upon offers of proof and receive evidence;
- (6) To regulate the course of the hearings and the conduct of the parties and their counsel therein;
- (7) To hold conferences for settlement, simplification of the issues, or any other proper purpose;
- (8) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;

² Because Respondent's Motion is denied, it is not necessary or appropriate to consider the proposed response of Tiversa and Boback. Accordingly, the assertions and documents included therein will be disregarded and will not be considered for any purpose.

- (9) To make and file initial decisions;
- (10) To certify questions to the Commission for its determination;
- (11) To reject written submissions that fail to comply with rule requirements, or deny *in camera* status without prejudice until a party complies with all relevant rules; and
- (12) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in title 5, U.S.C.

16 C.F.R. § 3.42(c).

III.

Respondent has failed to provide sufficient authority for the relief requested by the Motion. Among other things, Respondent fails to cite any court precedent, statutory authority, or procedural mechanism that addresses a criminal referral of a non-party witness in an administrative agency adjudication. In this regard, compare Respondent's Motion of October 1, 2014, requesting an order under Commission Rule 3.39 granting criminal immunity to another non-party witness, Richard Wallace, and directing Mr. Wallace to testify in this matter. Rule 3.39(b) provided both authority and a set of procedures for obtaining the necessary approval for such immunity by the Attorney General and for issuance of an order to testify under the grant of immunity.³

Moreover, the federal government is already well aware of the allegations and issues raised by Respondent in the Motion. It is a matter of public record that the House of Representatives of the Congress of the United States, Committee on Oversight and Government

³ Rule 3.39 states in pertinent part:

(b) 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:

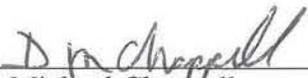
- (1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and
- (2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against 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; and, after the Attorney General (or his or her designee) has granted such approval, to issue such order when the witness or deponent has invoked his or her privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

16 C.F.R. § 3.39(b).

Reform (“OGR”) has conducted an investigation and held hearings into the conduct of Tiversa and Boback, including conduct asserted in the Motion. *See* RX 542, RX 543. In addition, the OGR staff has issued pertinent findings. *See* RX 644.⁴ Under these circumstances, it is not apparent that the requested referral of Tiversa and Boback is necessary.

Accordingly, for the foregoing reasons, the Respondent’s Motion is DENIED and the non-parties’ Motion for Leave is DENIED AS MOOT. This Order is not intended to be, and shall not be interpreted as, a determination on the merits of Respondent’s allegations of criminal activity by Tiversa or Boback.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 15, 2015

⁴ There have been no motions filed seeking *in camera* treatment for RXs 542, 543, and 644. Moreover, there does not appear to be a valid basis for granting *in camera* treatment for these exhibits under FTC Rules. *See* 16 C.F.R. § 3.45(b); Order on Respondent’s Motion to Admit RX 542-RX 548 at 1 n.2